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SIGNIFICANT REFORM OF THE CANADA BUSINESS CORPORATIONS ACT

Linda Stewart LaRue*

I. HISTORICAL BACKGROUND

THE Canadian legal system evolved in large part from the common law of England and from the civil law of France in the province of Quebec.1 The British North America Act of 1867 and its amendments (the BNA) were essentially a “first constitution” and governed the structure of the legal system exclusively until 1982, when Queen Elizabeth II proclaimed the Constitution Act (the Act).2 The Constitution Act severed the power of the British parliament over Canada.3 The Act maintained the constitutional status of the BNA’s provisions and adopted the new Charter of Rights and Freedoms (a unified written version of the documents used as a basis for the “unwritten” British constitution).4 What emerged in final form was the Dominion of Canada, a constitutional monarchy under the auspices of the English sovereign. The practical influence and power of the Queen, of course, is marginal. On the federal level, Parliament is the prevailing government form and is composed of Sovereign, Senate, and House of Commons.5 The Prime Minister is the leading executive, and selects a Governor General who is nominally approved by the Sovereign as her representative in Canada.6 The country is composed of ten provinces and three territories, all with a long history of common and civil law, stare decisis, and a wealth of Canadian, U.K., and Commonwealth precedent.7 These historical antecedents have created a unique blend of federal and provincial government whereby the member provinces enjoy certain exclusive powers, the federal government reserves other powers (including those not delineated), and there is shared jurisdiction in others. In

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2. Id. at 2.
3. Id.
4. Id.
6. Id.
7. Id.
addition to the federal document, each province has its own constitution. The provincial statutes (and the applicable common law) govern trade within a province. In particular, the BNA allocated regulation of international and interprovincial trade and commerce to the federal government. From this framework, surfaces both a provincial chartering program for businesses confining their activity to a single province, and a federal chartering system for businesses trading internationally or between provinces. In certain situations, federally chartered businesses may be required to obtain extraprovincial licenses for the provinces in which they operate or own land.

The Canada Business Corporations Act (CBNA) governs federally chartered entities. The CBNA came into force in December 1975 and was largely unchanged aside from some technical amendments until 1994. The 1994 changes largely dealt with filing matters concerning financial statements, waiver of audit requirements, and short form vertical amalgamations (more commonly called mergers in the United States). Shortly thereafter the Office of Industry Canada began studying, soliciting opinions, and drafting a revised CBCA statute encompassing over 220 changes.

In fact, the Canadian government hopes that federal chartering will become more prevalent. Currently, the vast majority of corporations choose provincial chartering with interprovincial licensing for nationwide business. For instance, during the twelve-month period ending March 27, 1997 only Quebec and the Northwest Territories reported more than 6 percent of their charters awarded under federal law. As a result, forum shopping among the provinces by corporations is prevalent, and the federal jurisprudence on corporate law remains underdeveloped.

Just as Delaware has emerged as the forum of choice for U.S. corporations, the Ontario statutes have been embraced most fully by Canadian corporations, and the resulting jurisprudence has the greatest depth. It is not uncommon for statutes and regulations passed in Ontario to be copied in other jurisdictions, but many lawyers remain uncomfortable with the federal regime for incorporation and subsequent corporate governance.

One of the significant effects of the amended CBCA is that private and closely held companies may now be inclined to incorporate via the fed-

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8. Id. at Can-2.
10. MARTINDALE-HUBBELL, supra note 5.
13. Id.
14. GRAY &. HALLADAY, supra note 12, at n.36.
15. Id. at n .36 noting Wayne D. Gray, Shopping for That Perfect Corporate Statute, in RETURN OF THE SIX-MINUTE CORPORATE LAWYER (Law Society of Upper Canada, Department of Continuing Legal Education, ed., 2002) [hereinafter Gray].
eral charter. Before the amendments federally chartered companies had to prepare audited financial statements and file them with the CBCA director once they reached $10 million in revenues. The complete lack of privacy for financial information was a serious concern to the closely held or private company.

II. GENERAL CANADIAN CORPORATE LAW

While the CBCA applies to most companies operating under a federal charter, the earlier Canada Corporations Act (R.S.C. 1970, c. C-32) governs those companies without share capital, such as those engaged in charitable and other similar activities. The Minister of Industry Canada is responsible for the general supervision and administration of both the Canada Corporations Act and the CBCA. The CBCA is rooted in a “minimum standards/shareholder based model” that views substantial regulation and defined structure as the best measures to regulate corporate behavior. In contrast, the most influential corporate statute in the United States, that of Delaware, is based on an “enabling/board of directors model” that encourages discretion by corporate directors in their business judgment. Several of the modifications of the CBCA ease the statutory requirements and shift the Canadian model towards that of the United States.

The drive to revise the CBCA in a significant way was led by Industry Canada and involved consultations over six years. The initial version of the amended CBCA was released on March 21, 2000 as Bill S-19. The time period for responses was an exceptionally short five weeks, but despite this time constraint the corporate bar filed extensive comments and suggestions. Bill S-19 died, however, when Parliament was dissolved in October 2000. When Parliament reconvened in February 2001, Bill S-11 was introduced as a successor to the previous S-19. While Bill S-11 incorporated some of the technical suggestions made by the corporate bar, it explicitly rejected many of the more substantive suggestions. The new bill passed and, along with a new set of regulations, became law on

17. Id. at 72.
18. Martindale-Hubbell, supra note 5, at Can-2. The general categories of business subject to the Canada Corporations Act instead of the CBCA are national, patriotic, philanthropic, charitable, scientific, artistic, social, professional or sporting in character.
19. Id.
21. Id. at 313.
24. Id.
25. Id.
November 24, 2001. 28

The goals of the amended CBCA are many, but mainly focus on a modernization of the statute to embrace the global nature of business in the 21st century and to increase the competitiveness of national and international Canadian businesses both at home and abroad. Many of the amendments to the CBCA were adopted to take advantage of new technology. 29 Where previously routine filings were the only documents that could be electronically transmitted, the amendments attempt to incorporate electronic communications whenever possible. 30 This change means that meetings of directors and communications with shareholders will be facilitated by electronic means, as long as notice requirements are met.

Specifically, the revised CBCA states its purpose as follows:

The purposes of this Act are to revise and reform the law applicable to business corporations incorporated to carry on business throughout Canada, to advance the cause of uniformity of business corporation law in Canada and to provide a means of allowing an orderly transference of certain federal companies incorporated under various Acts of Parliament to this Act. 31

Modernizing the CBCA means redefining the duties and liabilities of officers and directors to make them similar to the U.S. model. At the same time, shareholder democracy and rights are enhanced as a counterbalance. The resulting mix of corporate statutes is more modern, but remains uniquely Canadian.

The new version of the CBCA allocates issues subject to frequent change (those dealing with prices and the like) to the new regulations to limit the frequency of amendments to the CBCA itself. Applicable regulations are designated the Canada Business Corporations Regulations (CBCR).

Some of the more significant changes to the CBCA are those made to definitions. For instance, in order to draw more business forms under its umbrella, the amended CBCA redefines “entities” so as to encompass all forms of business enterprise. 32 Corporations, partnerships, associations, and even unincorporated forms are all susceptible to regulation under the CBCA. 33

Another significant term redefined under the CBCA is “officer.” 34 A specific list of titles has been added to the definition as well as those enveloping persons appointed by an officer or those acting as if they were

28. Id.
29. Id.
30. Id.
32. Id. § 2(1).
33. Id.
34. Id. § 1(5).
officers. Included in the list of specific titles is “vice president,” “controller,” and “general manager.” The impact of the inclusion of these titles is that entities sometimes name vice-presidents indiscriminately, and small companies may appoint controllers and general managers without intending them to exercise the duties of officers. It will be important for all federally chartered companies to evaluate their job titles to align director/officer liability with their corporate intent to do so.

III. EARLY INCORPORATION ISSUES

Incorporation under the CBCA had been a right, rather than a privilege. This meant that if the articles of incorporation were in correct form, Industry Canada was required to accept them and issue the certificate of incorporation. A new additional section grants the government administrator discretion to refuse to issue a certificate of incorporation if he receives notice that, if incorporated, the new corporation would not be in compliance with the CBCA.

The amended CBCA also broadens personal liability for pre-incorporation contracts. While the previous provisions of the CBCA only attached liability for persons actually entering into a pre-incorporation contract, the new CBCA covers those situations in which a person “purports to enter” into a pre-incorporation contract. This change also corrects case law precedent that created a loophole in pre-formation contract liability. In Westcom Radio Group Ltd. v. MacIsaac, the Ontario Divisional Court held that contracts with yet-to-be-formed business entities are null and void if both parties mistakenly thought the corporation was in existence and neither party intended the promoter to be personally liable. Further, in a pair of opinions, the General Division of the Ontario Court held that a corporation may not enter into pre-formation contracts even if the parties so intend. These cases created important precedent because Ontario corporate jurisprudence is the most developed in the country. Without a statutory amendment, pre-formation liability would disappear. The statutory changes overrule these cases and ease pre-formation uncertainty.

IV. CORPORATE OFFICES AND RECORDS

The earlier versions of the CBCA required a company to record the exact address of its official place of business. CBCA amendments allow

35. Id.
36. Id.
37. Id.
38. MARTINDALE-HUBBELL, supra note 5, at Can-2.
39. CBCA § 8(2).
the corporation to simply name the province within Canada where the registered office will remain.\textsuperscript{43} Further, the corporate records had to remain in Canada. Now, the amendment allows for storage outside of Canada, as long as the records may be accessed from a computer at the registered office or other designated place within Canada.\textsuperscript{44} An affidavit is newly required, however, for anyone wishing to examine the securities register of the company.\textsuperscript{45} The purpose of the affidavit is to record the identity of persons or agents who access the shareholder lists maintained in the securities register. Anonymous access of records is thereby eliminated.

Finally, the new CBCA eliminates the need for the adoption of a corporate seal and allows changes in an already adopted one.\textsuperscript{46} Documents are not rendered invalid simply because the corporate seal is missing.\textsuperscript{47}

\section*{V. CORPORATE FINANCE ISSUES}

Sophisticated corporate finance is a seemingly ever-changing area. The amended CBCA allows federally chartered Canadian companies to use certain transaction forms that had been previously forbidden. For the purposes of corporate finance issues, the new CBCA redefines “property” when used as a form of compensation (instead of money).\textsuperscript{48} The previous definition excluded “a promissory note, or a promise to pay, that is made by a person to whom a share is issued.”\textsuperscript{49} This meant that a company could not issue a share of stock as consideration for the receipt of a promissory note.\textsuperscript{50} The new definition adds an exclusion for “a promise to pay, that is made by a person who does not deal at arm’s length, within the meaning of that expression in the Income Tax Act, with a person to whom a share is issued.”\textsuperscript{51} Therefore, now transactions at arm’s length are allowed.\textsuperscript{52} Because of this amendment, the balance in the stated capital account will be equal to that used for tax purposes.\textsuperscript{53}

Stated capital accounts are the beneficiary of several changes of the CBCA.\textsuperscript{54} Previously, there were only two occasions when a company could issue shares without full and complete consideration. These involved either shares issued in a merger or in exchange for property.\textsuperscript{55} The amended CBCA is flexible in terms of the amount added to the

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\textsuperscript{43} CBCA § 6(1)(b).
\textsuperscript{44} Id. § 20(5.1).
\textsuperscript{45} Id. § 21(1.1).
\textsuperscript{46} Id. § 23(1).
\textsuperscript{47} Id. § 23(2).
\textsuperscript{48} Id. § 25(5).
\textsuperscript{49} Id.
\textsuperscript{50} Gray & Halladay, supra note 12, at 11.
\textsuperscript{51} CBCA § 25(5).
\textsuperscript{52} Gray & Halladay, supra note 12, at 1.
\textsuperscript{53} Id.
\textsuperscript{54} CBCA § 26(3).
\textsuperscript{55} Id. §§ 26(3)(b), 23(3)(a). See Gray & Halladay, supra note 12, at 17.
stated capital account, even when the transaction is at arm's length.\textsuperscript{56} The transactions must receive unanimous approval by several groups: the shareholders of that class of stock, the corporation through its directors, and the party acting as the transferor. The purpose of this limitation is to allow interested parties to veto dilution of stated capital.\textsuperscript{57}

These arm's length transactions will require corporations to issue a separate series of stock to tender in exchange.\textsuperscript{58} The amended CBCA, however, has made issuing a new class of stock much easier.\textsuperscript{59} The previous requirement created a two-step process by which the articles of incorporation were specifically amended to allow issuing a certain named class of stock (or the directors were specifically authorized to issue a class of shares by name), and then the directors actually met and authorized the shares to be issued.\textsuperscript{60} The articles of incorporation may now authorize any class of shares to be issued by the directors, and so eliminate one of the steps. Traditionalists may be uncomfortable with the collapse of the process into a single step for fear of director misconduct, but this is another example of the change in philosophy embodied by the new CBCA; the discretion of directors is now favored over more detailed regulations of their behaviors. The directors have been granted further discretion by the amended CBCA to fix the number of shares available across all classes and to assign the rights, privileges, and conditions.\textsuperscript{61} The previous version of the CBCA required the shares and their designations to be set out in the articles of incorporation.

As a general rule, federally chartered Canadian corporations may not hold their own shares, nor may a subsidiary acquire shares in the parent.\textsuperscript{62} This requirement has impeded transactional flexibility in corporate matters. The amended CBCA has expanded the exceptions to the general rule so that subsidiaries may acquire shares of the parent corporation subject to certain conditions.\textsuperscript{63} This result was achieved by placing fewer restrictions on transnational mergers where shares are traded evenly one for the other.\textsuperscript{64} It follows logically that it should not be easier for companies to do business transnationally than for companies to structure themselves in Canada as they wish.\textsuperscript{65} As long as the transaction enables the company and its subsidiary to meet the solvency tests for cash-flow and net assets as normally required, the transaction will stand.\textsuperscript{66} However, the subsidiary cannot vote the shares.\textsuperscript{67} Instead, the shares are cancelled

\textsuperscript{56} CBCA § 14(1) (replaces CBCA § 26(3)(a) (repealed 2001)).
\textsuperscript{57} GRAY & HALLADAY, supra note 12, at 18.
\textsuperscript{58} Id.
\textsuperscript{59} CBCA §§ 27(1), (4).
\textsuperscript{60} GRAY & HALLADAY, supra note 12, at 18.
\textsuperscript{61} CBCA § 27(1)(b).
\textsuperscript{62} Id. § 30(1)(b).
\textsuperscript{63} Id. §§ 31(3)(a)-(b).
\textsuperscript{64} GRAY & HALLADAY, supra note 12, at 19.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
to protect other shareholders from the subsidiary voting its shares in favor of entrenched management of the parent corporation.\textsuperscript{68} To offset this enlargement of corporate choice, the directors bear liability for the improper exercise of their discretion.\textsuperscript{69} Once again, it is clear that the CBCA amendments are creating a more globally friendly and open corporate environment.

Further changes in the acquisition or redemption of a corporation's own shares are specified in the CBCA amendments. A technical amendment to the CBCA requires that when a federally chartered corporation is evaluating whether acquisition or redemption of its own shares is allowed under any exception, the corporation may not consider the amount of funds already included in the corporation's liabilities in making the calculation.\textsuperscript{70}

The amended CBCA repeals the former section 44 in its entirety.\textsuperscript{71} Section 44 dealt with a prohibition against financial assistance to parties with a relationship to the corporation.\textsuperscript{72} The intent of section 44 was to protect shareholders, but protections already existed under fiduciary statutes.\textsuperscript{73} The result was more complicated financial transactions.\textsuperscript{74} Other existing laws impact the availability of financial assistance, namely those associated with duties of directors.\textsuperscript{75} Directors are still liable as fiduciaries and for duties of care and disclosure.\textsuperscript{76}

VI. DIRECTORS AND OFFICERS

A. THE ROLE OF DIRECTORS

The roles, rights, and duties of corporate directors and officers received tremendous attention in the CBCA amendments. The changes are sweeping and move the Canadian law towards the Delaware enabling model of director conduct, as opposed to the more regulated tradition of earlier Canadian law.\textsuperscript{77} A crucial change in the overall role of directors is seen in the amendment to section 102. The previous CBCA required directors to "manage [the] business and affairs of [the] corporation, . . . subject to any unanimous shareholder agreements."\textsuperscript{78} The amended section 102 allows direc-

\textsuperscript{68} Id.
\textsuperscript{69} CBCA § 118.
\textsuperscript{70} Id. §§ 35(3)(b)(ii), 36(2)(b)(ii).
\textsuperscript{71} Kazanjian & Ahmed, supra note 22, at 5.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} GRAY & HALLADAY, supra note 12, at 2.
\textsuperscript{76} Id.
\textsuperscript{77} GRAY & HALLADAY, supra note 12, at 14. See also Kenneth G. Ottenbreit & John E. Walker, Learning from the Delaware Experience: A Comparison of the Canada Business Corporations Act and the Delaware General Corporation Law, 29 CAN. BUS. L.J. 364 (1998), for a general discussion of the pre-amendment CBCA.
\textsuperscript{78} MARTINDALE-HUBBELL, supra note 5, at Can-4.
tors to "manage, or supervise the management of..." the corporation.79 This change is emblematic of an acceptance of the Delaware model of the role of directors in corporations and other business forms. The impact of this change in philosophy cannot be over-emphasized.

1. Director Residency Requirements

Previous versions of the CBCA required that a majority of the board of directors be resident Canadians.80 While certain businesses of national interest must maintain the majority rule, only 25 percent of the board of other companies must now be composed of resident Canadians.81 The residency requirement for board committees has been removed altogether.82 There is an overall requirement, however, that at least one board member be a resident Canadian.83 So, for small boards with fewer than four members the actual percentage of Canadian residents will be higher.84 It is also important to note that business may not be transacted at a board meeting unless the 25 percent resident Canadian rule is observed.85

In practical terms, the effect of requiring at least one resident Canadian on a board is to ensure that at least one board member would be subject to the jurisdiction of a Canadian court and to the statutory liabilities imposed on directors for misconduct. For foreign-controlled corporations chartered under the CBCA, a unanimous shareholder agreement may be used to relieve the board of directors of their powers, and therefore, make the resident requirement moot.86 Since board committees have no residency requirements, committees can be appointed to exercise all but those powers not allowed to be delegated under section 115(3).87 Non-delegable powers include submitting a matter to the shareholders for their approval, filling a director or auditor vacancy or adding additional directors, and issuing securities except as authorized by the directors.88

2. Director Liability

Under the CBCA, directors continue to be joint and severally liable for breaches of duty.89 The amended CBCA includes the term "solidarily" liable.90 "Solidarily" means the same as joint and several liability and is a

79. CBCA § 102(1).
81. CBCA § 105(3). The other regulated-ownership businesses are uranium or businesses related to books or film distribution. See Kazanjian & Ahmed, supra note 22, at 4.
83. CBCA § 105(3).
84. Id. § 114(3)(a).
85. Id.
86. Gray & Halladay, supra note 12, at 29.
87. Id.
88. CBCA § 115(3)(a)-(c).
89. Id. § 118.
90. Id.
term borrowed from the civil code, used to encompass both the common and civil law traditions of Canada.  

Unfortunately, section 119 was not further amended to bring national uniformity on an important issue. Specifically, section 119(1) specifies joint and several liability to corporate directors for unpaid employee wages. Because solvent companies do not have problems paying their employee wages, the CBCA is an odd place to address these issues. If the liability for wages were created under the federal Bankruptcy and Insolvency Act, all Canadian companies would be under a uniform standard.

Case law limits the scope of the liability. A decision by the Canadian Supreme Court has interpreted the CBCA statute as exempting directors from liability for severance or termination pay. Three factors determine director liability for unpaid employee wages: the articles of incorporation, the provincial law where the employee works, and the status of federal regulation of the particular company's industry. In the case of financial loss stemming from errors, omissions, or misstatements, a modified proportionate liability will apply. A director may be held responsible only for that portion of losses that arise from his degree of responsibility.

The standard for a finding of director liability has also changed. Previously, director liability was imposed based on a finding of good faith reliance. Now, the liability standard is the exercise of powers and discharge of duties with honesty, good faith, and with the care, diligence, and skill of a reasonably prudent person in like circumstances. The effect of expanding the liability standard is to encompass a full due diligence defense. In the event the director relied in good faith upon financial statements made to him by an officer or "person whose profession lends credibility to statements made by . . . [him]," the due diligence defense will be available. In short, the previous CBCA contained only a good faith reliance standard for defense of director wrongdoing, while the new CBCA embraces the full due diligence defense of which good faith is only a part.

Good faith reliance is a part of the exercise of diligence, care, and skill that a reasonably prudent person would use in like circumstances. In contrast it should be noted that the U.S. model is based on a "reasonably prudent director" who will be less risk averse.

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91. Gray & Halladay, supra note 12, at 12.
92. CBCA § 119(1).
96. CBCA §§ 237.1, 237.3.
97. Id. § 237.5(1).
99. CBCA §§ 122(1)(a)-(b), 123(4).
100. Id. §§ 123(5)(a)-(b).
102. Id. at 33.
than a "reasonably prudent person." The more restrictive standard under the CBCA could have detrimental effects on those companies whose directors have served only on boards in the United States and are less familiar with the Canadian standard.

3. Director Disclosure

The amended CBCA expands the definition of self-dealing. The director now also must disclose not just contracts in which he has an interest, but "material transaction[s]."103 However, once the disclosure is made, the director is "not accountable to the corporation or its shareholders for any profit realized from the contract or transaction."104 The amendment means expanded disclosure, but creates a safe harbor once the disclosure is made. The previous CBCA did hold directors and officers accountable to the corporation and its shareholders for the profit from a contract entered into when the director/officer was an interested party.105 Under the amended statute, corporations must give shareholders access to the notices of material transactions.106

4. Director Indemnification

The provisions for director indemnification have been expanded under the amended CBCA.107 The pre-amendment provisions of the CBCA indemnified the director or officer for acts done at the corporation's request once an action settled or to satisfy a judgment stemming from the director's association with the corporation.108 The amendment expands this protection by allowing for the advance of funds in the case of a legal proceeding or investigation.109 The expansion of the definition of "entities" to include all business enterprises significantly broadens director indemnification beyond the traditional corporate form and includes partnerships, trusts, and even unincorporated entities.110 Also, the indemnifying corporations no longer need a financial interest in the entity on whose board the indemnified person occupies a director's position.111

The previous concept of indemnification, as stated in the CBCA, was that the fiduciary duty of the director ran to the best interests of the company providing the indemnification.112 Really, this was an enormous misnomer of a director's fiduciary duty. The director owes a fiduciary duty to the corporation on whose board he sits, not the company providing the indemnification.113 In other words, there could be many cases in which

103. CBCA § 120(1).
104. Id. § 120(7).
106. Id. § 120(6.1).
107. Id. § 51 (replaces previous CBCA § 124 (repealed 2001)).
109. Id. § 124(1)-(2).
110. Id. § 2(1).
111. Id. § 124(1).
112. Id. § 124(1)(a).
113. GRAY & HALLADAY, supra note 12, at 34, 35.
the director would be required to act contrary to the best interest of the
indemnifying company in order to fulfill his duty to the corporation as a
board member.

The right to indemnification as previously provided by the CBCA was
subject to directors meeting their fiduciary duties and then prevailing on
the merits at trial, including a showing that the director reasonably be-
lieved his conduct was lawful. The amended CBCA now permits in-
demnification as long as the director is not found to at fault either by act
or omission. The overall effect is to encourage early settlement of
lawsuits involving director misconduct and to remove the accused direc-
tor's motivation to go to trial for vindication and indemnification.

The previous limit on eligible actions by directors for indemnification
coverage has also been lessened. In its previous form, the CBCA re-
quired the director to have complied with all of his fiduciary duties in
order to be eligible for indemnification. The problem is that not all
breaches of fiduciary duties are deliberate or clear. Now, insurance com-
panies will regulate the scope of coverage available subject to market
forces and not by government regulation.

VII. INSIDER TRADING

A. INSIDER DEFINITION AND REPORTS

The definition of "insider" includes officers and directors of a distribut-
ing corporation, a subsidiary, or any other "body corporate that enters
into a business combination with a distributing corporation." Further,
insider definitions not necessarily including natural persons are found in
section 131 to include corporations, their affiliates, and any employees,
agents, independent contractors, or shareholders with confidential infor-
mation. The definitions create an extremely broad umbrella under
which all holders of confidential information will fall. Those companies
defined as "non-distributing" (private corporations in which shares are
not bought or sold on any public exchange) are also subject to insider
trading restrictions under the definitions created under section 131(1).

Insider trading regulation is not just confined to conventional shares.
The definition of "security" has been expanded to include puts, calls, op-
tions, derivatives, or any other rights or obligations to purchase or sell a
security. The specific provision governing puts and calls has changed
under the amended CBCA. The previous version of the CBCA had re-

114. Id.
115. Id.
116. Id.
117. CBCA § 124(4).
118. Id. § 51.
119. Id. § 126(1).
120. Id. § 131(1).
121. Id.
122. Id. § 131(2)(a), (b).
stricted any insiders from any trading in puts and calls. The overall prohibition has been replaced with one making logical sense: selling calls or buying puts is forbidden because they place the interest of the insider in direct opposition to those of the corporation.

The sections of the CBCA regarding insider reports have been repealed under the amended CBCA. The purpose is to remove federal securities regulations that were applicable jointly with provincial regulations. With no federal regulation of securities, insiders will report solely under the securities regulations in the appropriate provinces. Locating a registered office in a province will trigger extraprovincial corporation license requirements for those companies operating under a federal charter.

New section 131(4) of the CBCA expressly demands privity in all transactions subject to insider regulations. This means the proof in an insider trading dispute will be difficult in cases involving the public security markets because the buys and sells will have to match in order to show the privity statutorily required. Given the volume of trades possible, it will be unclear whether any given buyer was the victim of a sale based on insider information. Liability for insider trades remains as it was under the previous CBCA: insiders will be liable both to the individual damaged by the trade and to the corporation.

B. Civil Liability for Insiders

The previous CBCA used an ambiguous definition for insider activity. The insider was liable if he “made use” of confidential information for his own benefit. The ambiguity has been removed by defining an insider trade as one who “purchases or sells a security of the corporation with knowledge of confidential information.” Thus, tipping is specifically forbidden, but the privity requirement is extended to these situations as well. Tipping had not been addressed in the CBCA prior to the amendments. The new definition establishes civil liability for “any damages” suffered by a seller or purchaser affected by the insider activity. In fact, the liability is inflicted twice: once to the other party to the transaction and once to the corporation. Nonetheless, only direct damage is dealt with by the CBCA under the tipping regime; advising others

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124. CBCA § 130(2); Gray & Halladay, supra note 12, at 4.
126. Martindale-Hubbell, supra note 5, at Can-5.
127. CBCA § 131(4).
129. CBCA §§ 131(4)-(5).
130. Id. § 131 (amended 2001).
131. Id. § 131(4).
132. Id. §§ 131(6), (7).
133. Gray & Halladay, supra note 12, at 40.
134. CBCA § 131(4).
135. Id. §§ 131(4)-(5).
to trade without disclosure of confidential information is not forbidden.\textsuperscript{136}

VIII. RIGHTS OF SHAREHOLDERS

A. MEETINGS AND RECORD DATES

The CBCA had previously provided for shareholder meetings to be held within Canada unless all shareholders agreed otherwise. Now, under the amended CBCA a meeting may be held outside of Canada as long as that place is stipulated in the articles of incorporation.\textsuperscript{137} A modernization amendment also allows for meetings by any telephonic or electronic means.\textsuperscript{138} Smaller companies will benefit from the new provision allowing notice for shareholder meetings of less than twenty-one days as long as the articles of incorporation allow it.\textsuperscript{139}

The timing of annual meetings has been altered by the CBCA amendments. The previous statute allowed for a corporate meeting within eighteen months of inception of the corporation, and within at least fifteen months subsequently. Now, the subsequent meeting must be no later than six months after the end of the corporation’s preceding fiscal year.\textsuperscript{140}

Fixing of the record date to determine shareholder eligibility under the old CBCA was limited to certain purposes. Directors now have the ability to fix the record date for any other purpose in addition to those enumerated in the statute.\textsuperscript{141} If the record date is not fixed, then the record date will be the date before notice of the meeting is given.\textsuperscript{142} Notice had been defined under the previous statute as fifty days prior but is now within a prescribed period yet to be set by the regulations.\textsuperscript{143}

B. SHAREHOLDER PROPOSALS

Unlike the United States, there have been few shareholder proposals offered under Canadian law.\textsuperscript{144} Shareholders, who are registered or beneficial holders of shares, may make proposals for shareholder votes or ask for discussion on matters during the annual meeting.\textsuperscript{145} This is problematic because third parties are holding more shares in the nature of mutual funds, pension plans, or trusts. As a result, registered individuals are holding fewer and fewer shares.

While the previous statute had allowed a “shareholder entitled to vote” to present a proposal or matter for discussion, the Supreme Court of Ca-
Canada had upheld a ruling that disallowed beneficial owners to do so.\textsuperscript{146} The new statute makes the language and intent clear and overrules the holding of the Supreme Court.\textsuperscript{147} When making a proposal an eligible shareholder must submit his name, address, and similar information about his supporters including the number of shares each holds.\textsuperscript{148} Once received, the proposal must be accepted even if it makes statements or proposals primarily for general economic, political, racial, religious, or similar reasons. These types of statements had previously been grounds for dismissal of the proposal by the corporation.\textsuperscript{149} Now the test for acceptance of shareholder proposals is whether it is related significantly to the business of the corporation or its affairs.\textsuperscript{150} The new amendments set an early deadline for shareholder proposals of ninety days prior to an annual meeting and the regulations prescribe a further test of the purpose of the proposal.\textsuperscript{151} The proposal must not attempt to address a personal grievance or claim nor can it be grounded in an attempt for publicity.\textsuperscript{152} The shareholder making the proposal must maintain his ownership of shares up to the time of the annual meeting.\textsuperscript{153} If he does not the company is relieved of its duty to present the proposal to the remaining shareholders.\textsuperscript{154}

This area of reform is a good example of the balance struck by the amended CBCA. The shareholders are granted additional privileges but are shouldered with additional identification requirements. Quantitatively, the shareholders make substantive progress with only procedural restrictions.

Another corporate mechanism, the unanimous shareholder agreement, has been expanded under the amended CBCA.\textsuperscript{155} Non-distributing corporations typically utilize unanimous shareholder agreements to restructure their corporate governance in various ways that may or may not include restrictions on board powers.\textsuperscript{156} Nonetheless, in order to fall under the definition of a unanimous shareholder agreement the agreement \textbf{MUST} restrict the powers of the board of directors.\textsuperscript{157}

Issues regarding the transferability of unanimous shareholder agreements have been settled under the amended CBCA. Notice of the agreement must appear on the face of the shares transferred or purchased, but if complied with, the transferee or purchaser is a party to the unanimous

\begin{itemize}
\item \textsuperscript{147} CBCA § 137(1).
\item \textsuperscript{148} \textit{Id.} § 137(1.2)(a)-(b).
\item \textsuperscript{149} \textit{Id.} § 137(5)(b).
\item \textsuperscript{150} \textit{Id.} § 137(5)(b.1).
\item \textsuperscript{151} \textit{Id.} § 137(5).
\item \textsuperscript{152} \textit{Id.} § 137(5)(b), (e).
\item \textsuperscript{153} \textit{Id.} § 137(5.1).
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} § 146. This section had included previously the statutory regime for pooling agreements in addition to those for unanimous shareholder agreements. Pooling agreements are now dealt with in new section 145.1.
\item \textsuperscript{156} Gray & Halladay, \textit{supra} note 12, at 49-50.
\item \textsuperscript{157} CBCA § 146(1).
\end{itemize}
shareholder agreement by operation of law.\textsuperscript{158} Interestingly, the CBCA does not encompass the conversion of shares situation that the Alberta Business Corporations Act envisions by using the less-limiting term "issued" to cover shares subject to unanimous share agreements.\textsuperscript{159} It was an interesting rejection of terms by the drafting committee given that an Ontario court had already terminated an agreement where the shares had been converted as opposed to transferred or purchased.\textsuperscript{160}

IX. PROXIES

The CBCA refinements regarding proxies are aimed at simplification and recognition of real world situations and difficulties. The new CBCA redefines "solicitation" to exempt certain kinds of communications from a requirement for a proxy circular.\textsuperscript{161} Solicitations of fewer than fifteen shareholders or solicitations by public broadcast, speech, or publication are exempt.\textsuperscript{162} An important effect of this change is that it allows privately held companies with more than fourteen but fewer than fifty-one shareholders the option not to distribute proxies. This fifty-shareholder threshold corresponds to the definition of a "private" company found in provincial securities regulations and unifies the substantive law regarding proxies within private corporations.\textsuperscript{163} For publicly held companies, the end effect of these provisions is to allow for more dissemination of dissident proxies and shareholder communications, particularly for those with widely-held shares that will be able to use the public broadcast provisions.\textsuperscript{164}

X. SQUEEZE-OUT AND GOING-PRIVATE TRANSACTIONS

The amended CBCA expressly permits going-private transactions\textsuperscript{165} and creates new part XVI of the statute entitled "Going-Private Transactions and Squeeze-Out Transactions."\textsuperscript{166} A going-private transaction has been defined as the termination of a shareholder's interest with compensation.\textsuperscript{167}

The CBCA, however, will no longer jointly govern going-private transactions for public companies in conjunction with provincial securities regulations. Instead, provincial securities regulations will regulate the transactions. All language related to a "takeover bid" has been eliminated from the CBCA to give effect to the new exclusive right of the

\textsuperscript{158} See CBCA §§ 49(8), 146(c).
\textsuperscript{160} See Sportscope Television Network Ltd. v. Shaw Communications Ltd., [1999] 46 B.L.R. (2d) 87, 92 O.T.C. 33.
\textsuperscript{161} CBCA § 147(b).
\textsuperscript{162} Id. § 150(1.1), (1.2).
\textsuperscript{163} Gray & Halladay, supra note 12, at 52.
\textsuperscript{164} Id.
\textsuperscript{165} CBCA § 193.
\textsuperscript{166} Id. pt. XVI; Martindale-Hubbell, supra note 5, at Can-9.
\textsuperscript{167} Kazanjian & Ahmed, supra note 22, at 8.
provincial securities regulations to govern such transactions.\textsuperscript{168} The title of part XVII of CBCA is no longer “Take-Over Bids,” but rather “Compulsory and Compelled Acquisitions.”\textsuperscript{169} However, the CBCA director is not a securities expert but rather a regulator of corporate governance. Since securities transactions continue to be complex and numerous, the need for securities expertise is clear. All-share or share-for-share bids, bids for partial control, and the circulars discussing the bids are regulated by the respective provincial regulations.\textsuperscript{170} 100 percent take-over bids and issuer bids are still covered by the CBCA, albeit in a different form. Since these bids involve the dissemination of unhappy minority shareholders, the rights and duties are established in those sections of the CBCA covering shareholder rights.\textsuperscript{171}

The squeeze-out transaction in a private corporation, however, poses a different problem because non-public corporations are not subject to provincial securities law. The CBCA has been amended to provide protection for minority shareholders in these situations. In order to comply with CBCA provisions, a majority of the minority shareholders must approve the transaction.\textsuperscript{172} One concern is that the new squeeze-out rules are not restricted to transactions among related parties and may have unanticipated effects on transactions seeking to eliminate minority shareholder positions.\textsuperscript{173}

**XI. DISSENT AND APPRAISAL RIGHTS**

Squeeze-out and going-private transactions have been specifically added by name to the transactions that give rise to certain statutory dissent and appraisal rights for shareholders.\textsuperscript{174} The power to enter into a squeeze-out transaction only applies to non-distributing corporations.\textsuperscript{175} Nonetheless, by including the going-private and squeeze-out transactions as “arrangements” under section 192, the CBCA specifically invites corporations who are not insolvent to apply for court approval of their “arrangement” (virtually any fundamental change in structure) where it is not practicable to do otherwise.\textsuperscript{176} The goal is to remove any uncertainty about the validity of these particular transactions.

Minority shareholders of corporations should remain wary of their positions. Squeeze-outs have been characterized as a weapon for majority shareholders for converting participating shares into non-participating preferred shares by a simple majority and then approving a squeeze-out based on the votes of each class. A minority of the majority then forces

\begin{itemize}
\item\textsuperscript{168} Martindale -Hubbell, supra note 5, at Can-9.
\item\textsuperscript{169} CBCA pt. XVII; \textit{Id.}
\item\textsuperscript{170} GRAY & HALLADAY, \textit{supra} note 12, at 87.
\item\textsuperscript{171} \textit{Id.}
\item\textsuperscript{172} CBCA § 194.
\item\textsuperscript{173} Kazanjian & Ahmed, \textit{supra} note 22, at 8.
\item\textsuperscript{174} CBCA § 190(1)(f).
\item\textsuperscript{175} GRAY & HALLADAY, \textit{supra} note 12, at 57.
\item\textsuperscript{176} CBCA § 192(3).
\end{itemize}
The former version of the CBCA protected minority shareholders of privately held corporations. Protection was offered under a right of compulsory acquisition when an offeror of a publicly traded company acquired 90 percent of the shares it did not own. The amended legislation continues this provision under a section applying to publicly traded companies, but due to the repeal of all takeover language in the CBCA, there will be no way for shareholders of non-distributing companies to acquire the small share positions that may remain. The remaining minority shareholder(s) may be eligible for a compulsory acquisition of his shares and may initiate the acquisition by the offeror. The remaining shareholder(s) will be bound by the financial terms accepted by the other shareholders and will not be able to seek a premium based on fair market value.

XII. CONCLUSION

The amended CBCA will have far-reaching effects on both public and private companies. While the previous version of the CBCA was less hospitable to private corporations than provincial statutes, the amendments make federal chartering much more attractive. Private companies already in existence and under provincial charter will probably remain so, given the difficulties in changing chartering status. Private companies considering forming business entities may very well consider the federal option.

The advantages of a federal charter include the dominion-wide license of a name, the comparatively smaller Canadian-resident director requirements, and the availability of financial assistance transactions and squeeze-outs. It may be problematic to clear a name through the federal registry and the need for proxies in some situations may complicate some transactions. Finally, lawyers in many provinces may be unfamiliar with the provisions of the CBCA and the applicable case law. This unfamiliarity leads to less comfort when advising a federal charter than a familiar provincial one.

Lawyers assisting their clients on incorporation matters are faced with two choices: the provincial incorporation statutes or the CBCA. There will be occasions when the certain provincial choices are highly advantageous. In the event U.S. investors want to incorporate in Canada but still...
want flow through or branch tax status, Nova Scotia is the only province offering this option.\(^{187}\) The reason the other provinces or the CBCA are not an option is that they forbid the incorporation of unlimited companies.\(^{188}\) Nova Scotia and British Columbia are also the jurisdictions of choice for the typically forbidden transaction of subsidiaries holding shares in their parent corporations.\(^{189}\) Finally, in the event of a foreign corporation doing business in Canada through a subsidiary, it is possible to negate the requirement for resident Canadian directors. New Brunswick and the three Canadian territories have all adopted a corporate governance form modeled on the CBCA without the residency requirement for directors.\(^{190}\) Quebec, Nova Scotia, and the territory of P.E.I. also welcome companies to incorporate without requiring resident Canadian directors, but their statutes are not modeled on the CBCA.\(^{191}\)

The new CBCA requirements for shareholder meetings will likely not impact most private companies in the majority of their transactions. Most private companies operate under a unanimous shareholder agreement that dispenses with the need for shareholder meetings.\(^{192}\) There will be times in many corporate histories when shareholder meetings will be necessary due to dissent among shareholders. In this case, the amended CBCA allows for less notice than previously required.\(^{193}\) Notice may be electronically transmitted where allowed by the corporate bylaws, but financial information pertaining to the business of the meeting must be received no less than twenty-one days prior to the meeting.\(^{194}\)

The unanimous shareholder agreements themselves are subject to notice by purchasers or transferees.\(^{195}\) If notice is not received the remedy is rescission.\(^{196}\) A valid unanimous shareholder agreement does impose certain duties on shareholders not previously seen. When the agreement transfers board powers to shareholders, the shareholders will be held to the same standard of care that the role of fiduciary creates in the board of directors.\(^{197}\)

For public companies, over 50 percent of the largest 500 companies are already governed by the CBCA, whereas the overall percentage of federally-chartered Canadian companies is 12 percent.\(^{198}\) As such, the CBCA is extremely influential in public corporate affairs. The amended CBCA is an instrument of enormous change because it abandons its role as the

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187. Companies Act, R.S., ch. 81, s. 1 (1989) (Can.).
188. Gray & Halladay, supra note 12, at 77.
189. See Gray supra note 15 at 2-20.
190. Gray & Halladay, supra note 12, at 77.
191. Id.
192. Id. at 78.
193. CBCA § 135(1.1).
194. Id. § 159(1).
195. Id. § 146(4).
196. Id.
197. Id. § 146(6).
198. Gray & Halladay, supra note 12, at 77.
primary securities regulation and focuses on corporate governance.\textsuperscript{199}

In particular, the statutory acceptance of electronic technology will be greatly welcomed by the corporate community. The repeal of Canadian residency requirements shows an interest in growing the global stature of companies chartered in Canada. Public companies will find reporting requirements less complicated because the federal system will not receive filings of insider notices.\textsuperscript{200} Financial statements will still be publicly filed as before. As such, compliance with the applicable provincial securities regulations should be less complex as practitioners and corporate officers only focus on a single set of statutes and regulations. Some companies may find the additional shareholder communication and dissident proposal sections onerous, however. In practice, the changes will be most difficult because of the lack of familiarity with the new requirements. With the passage of time most of the innovations will be easily implemented.

Overall, the amended CBCA allows directors to better lead their companies into the 21st century. The CBCA changes the role of directors to supervisors of management not to supervisors of the corporation. This change will lead to more dynamic management based on the American experience.

\textsuperscript{199} Id. at 85.

\textsuperscript{200} CBCA § 127 (repealed 2001).