Submission on S-19

Canada Business Corporations Act

NATIONAL BUSINESS LAW SECTION
CANADIAN BAR ASSOCIATION

May 2002

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Business Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Business Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Business Law Section (the Section) of the Canadian Bar Association is pleased to offer its views on Bill S-19, an *Act* to amend the *Canada Business Corporations Act* (*CBCA*) and the *Canada Cooperatives Act* and to amend other *Acts* in consequence (the Bill). The Corporate Law Subcommittee of the Canadian Bar Association-Ontario took the lead in preparing this submission. The Subcommittee has worked extensively on suggested amendments to the *CBCA* over the past five years and has submitted detailed responses on most of the ten policy papers prepared by Industry Canada prior to the Bill's introduction.

The Section is very concerned about the limited time permitted for consideration of this important proposed legislation. While previous consultation papers addressed underlying broad policy issues, Bill S-19 is the first document that would actually implement policy choices adopted following that process. It represents the first opportunity for interested parties to critique those choices and the manner proposed for implementing them. Given the work of many, including CBA members, and the breadth of the proposed amendments, the period being allowed for consultation and comment is clearly inadequate. We note that the 1975 *CBCA* was introduced after a very lengthy consultation period, yet still required substantial amendment in 1978.

Our comments follow the order of the Bill and not the order of perceived importance. Given the time constraints, no attempt could be made to comprehensively address

technical problems likely from the drafting of the Bill, provide a detailed review of substantive policy issues raised by the Bill, comment upon the *Canada Cooperatives Act* or on its regulations, or comment upon the *CBCA* regulations except to elaborate upon a comment made about the Bill. We focus on those provisions suggested for the *CBCA* which appear to raise important practical or policy concerns.

II. BILL S-19

A. Subclause 1(3)

The Bill's use of civil law concepts, for example in clause 1(3) "*liquidator of the succession*" or subclause 46(1) "*solidarily*", is confusing and unnecessary. For example, subsection 118(1) in clause 46(1) first uses the words "*or solidarily*" with "*jointly and severally*". As solidary liability, that is, liability *in solidum*, has the same meaning as joint and several liability, there is no need to use both terms, as the Bill does in several subsections, including 118(2), 119(1) and 237.5(1).

Moreover, it appears that this use of civil law concepts in the English version is not accurately reflected in the French version, for example, in proposed subsection 237.5(1). While we recommend eliminating repetitious terminology, if that language is retained, all provisions incorporating civil law concepts should be reviewed to ensure that the meaning is identical or at least parallel in both English and French.

RECOMMENDATION:

1. **The National Business Law Section of the Canadian Bar Association recommends that civil law concepts throughout Bill S-19 be reviewed to eliminate repetitious language. If the proposed language is retained, further review of all provisions incorporating civil law concepts is required to ensure that the**

meaning is identical or at least parallel in both English and French.

B. Subclause 1(7)

Subsection 2(6) would authorize the Director to order that a corporation is not a distributing corporation. This exemption is required for the very few cases where a distributing corporation is not a "*reporting issuer*" in any province, as the effect of the new definition is to delegate to provincial securities commissions authority to declare that a corporation is no longer a distributing corporation, according to the Department of Industry's proposed regulations, section 2.

The proposed standard for the Director's discretion to exempt, based on similar provisions in provincial securities laws, is that the determination not prejudice the public interest. In our view, this broad public interest standard is inappropriate for an exercise of discretion by the Director under the *CBCA*. The existing standard in subsection 2(8) of the *CBCA* should instead be retained, so that the Director may make a determination of this nature if satisfied that it would not prejudice any security holder of the corporation.

RECOMMENDATION:

2. The National Business Law Section of the Canadian Bar Association recommends that the existing standard in subsection 2(8) of the *CBCA* be retained, so that the Director may determine that a corporation is not a distributing corporation if satisfied that it would not prejudice any security holder of the corporation.

Subsection 2(7) gives the Director authority to determine that a class of corporations are not distributing corporations on the basis of the same public interest standard. It is unclear why the Director must have authority to make a class order of this nature, and undesirable

in principle to allow this power given the limited oversight activities expected of the Director. In our view, if the Director is permitted to make class exemption orders, the Director should first be required to publish a proposed exemption and request comments from interested parties.

RECOMMENDATION:

3. **The National Business Law Section of the Canadian Bar Association recommends that subsection 2(7) be amended so that the Director does not have authority to determine that a class of corporations are not distributing corporations. Absent this amendment, before making class exemption orders, the Director should be required to publish a proposed exemption and request comments from interested parties.**

C. Clause 4

Subsection 8(2) authorizes the Director to refuse to issue a certificate of incorporation if a notice indicates that the corporation's existence would not comply with the *CBCA*. This would give the Director broad discretion to refuse incorporation based on the Director's interpretation of the *Act*. In our view, this is inconsistent with the theory underlying the *CBCA* that the Director not have discretion to refuse incorporation and similar matters. As the notices referred to in this subsection are quite specific, we suggest that this discretion be confined to circumstances where the corporation would not comply with the specific provisions. The final words of subsection 8(2) should be amended to read "would not be in compliance with these provisions."

RECOMMENDATION:

4. **The National Business Law Section of the Canadian Bar Association recommends that under the notices referred to in clause 4, the Director's discretion to refuse incorporation be**

confined to circumstances where the corporation would not be in compliance with the specific provisions. The final words of subsection 8(2) should be amended to read "would not be in compliance with these provisions."

D. Clause 5

Subsection 10(3) does not specify how to differentiate the combined French and English name from situations where either the French or English name is to be used, as section 22.1 of the *Ontario Business Corporations Act*'s (*OBCA*) general regulations does. The prescribed regulation for combined names is helpful but insufficiently clear as to how a French form and English form should be set out in the articles.

RECOMMENDATION:

5. **The National Business Law Section of the Canadian Bar Association recommends that clause 5 be clarified as to how a French form and English form should be set out in the articles.**

E. Clause 18

We propose that a new paragraph 31(3)(c) be added to permit a subsidiary to hold shares in a parent corporation where adverse tax consequences would otherwise arise.

F. Clause 26

We fully support the repeal of the financial assistance provisions of the *Act*, and consider that repeal a major achievement of Bill S-19. While concerns have been expressed that repeal of these provisions will somehow suggest that previously prohibited transactions are now permitted, we believe the repeal will have the opposite effect.

The fundamental principle should be whether any particular financial assistance is in the best interests of the corporation. This principle is embodied in the fiduciary obligations of directors and officers under section 122 of the *Act*.

Imposing additional requirements to this fundamental test has the undesirable effect of distracting directors and officers from an inquiry into whether they are properly performing their fiduciary duties. Under section 44 of the *Act*, many officers, directors and lawyers mistakenly act as if the corporation can merely satisfy the solvency and realizable assets tests, or determine if the financial assistance is exempt under section 44(2), to comply with all applicable corporate laws. We believe that section 44 of the *Act* has detracted from the fiduciary obligations of directors and officers when they consider whether the corporation should grant financial assistance and therefore support its repeal.

G. Clause 27

We recommend adding subsections 118(4) and (5) to the list of exceptions to shareholder immunity in subsection 45(1), as is done under section 40 of the *OBCA*. In addition, subsection 45(2) should permit the lien on shares to be specified in the by-laws.

RECOMMENDATION:

6. The National Business Law Section of the Canadian Bar Association recommends that subsections 118(4) and (5) be added to the list of exceptions to shareholder immunity in subsection 45(1). In addition, subsection 45(2) should permit the lien on shares to be specified in the by-laws.

H. Subclause 30(4)

Subclause 30(4) would amend subsection 49(9) of the *Act* to prevent a distributing corporation from restricting the transfer or ownership of its shares of "*any class or series*". This prohibition should only apply to a class or series which was or is part of a distribution to the public, not all classes and series of shares of a distributing corporation.

RECOMMENDATION:

7. **The National Business Law Section of the Canadian Bar Association recommends that the prohibition proposed by subclause 30(4) apply only to a class or series which was or is part of a distribution to the public.**

In addition, the opening words of subsection 49(8) should be amended to read: "*Subject to subsection 146(4), no restriction, charge, agreement or endorsement ...*" and the word "*agreement*" should similarly be added later in the subsection.

RECOMMENDATION:

8. **The National Business Law Section of the Canadian Bar Association recommends that subsection 49(8) should begin: "*Subject to subsection 146(4), no restriction, charge, agreement or endorsement ...*" and the word "*agreement*" should similarly be added later in the subsection.**

I. Clause 35

Proposed subsection 102(2) deals with the minimum number of directors for a distributing corporation. Despite the Bill's new definition of "*distributing corporation*", the subsection retains the existing language in the *CBCA* relating to outstanding shares held by more than one person. This reference can be deleted in light of that definition, as every distributing corporation should have at least three Directors, at least two of whom will be outside directors.

RECOMMENDATION:

9. The National Business Law Section of the Canadian Bar Association recommends that the reference to outstanding shares held by more than one person in subsection 102(2) be deleted in light of Bill S-19's new definition of "*distributing corporation*."

J. Clause 37

Bill S-19 would amend subsection 105(3) *CBCA* by reducing the required minimum percentage of Canadian resident directors of a corporation from a majority to 25 percent. We believe that the only viable solution if the *CBCA* is not to be by passed in favour of other jurisdictions, is to remove the *Act*'s residency requirements altogether. Several jurisdictions in Canada have no residency requirement, and jurisdiction shopping is increasingly common. Corporations are continually incorporated in, or continued into, a jurisdiction without residency requirements on behalf of off-shore shareholders.

The new provision represents a political compromise between the original policy goals of the majority requirement and full withdrawal of any Canadian residence requirement. The existing majority requirement was based on nationalist ideals of former governments and the assumption that a majority of Canadian directors would ensure a Canadian perspective for Canadian corporations. Although this assumption was not demonstrable, it was premised on an attempt to ensure dominance of a Canadian perspective in every corporation.

The reduction to 25 per cent loses even this potential. It demonstrates only a reluctance on the part of the current government to discard an ineffective and counterproductive requirement. The provision should be deleted.

Even if the proposed requirement is retained, it is unnecessary to impose a majority requirement for corporations operating in a regulated sector under Canadian ownership requirements. If Canadian director requirements are warranted for sectors thought to be "sensitive", the requirement should be contained in the legislation governing that sector, as with Canadian ownership requirements. Subsections 105(3.1),(3.2)and (3.3)and the amendment to subsection 105(4) should be deleted in any event.

RECOMMENDATION:

10. The National Business Law Section of the Canadian Bar Association recommends that the minimum percentage of resident Canadian directors be deleted by repealing subsection 105(3). Regardless of whether the proposed requirement is repealed, subsections 105(3.1), (3.2) and (3.3) and the amendment to subsection 105(4) should be deleted.

K. Clause 38

The amendment to subsection 106(8) of the *Act* to include a reference to "*additional*" directors, does not address the fact that the *CBCA* contains no provision addressing whether the number of a floating board (that is a board of a corporation having a minimum and maximum number of directors set out in its articles) is to be fixed by the shareholders or the directors. This has been a problem since the *CBCA* was first enacted. We strongly suggest the adoption of the following two amendments:

(i) amend subsections 112(3) and (4) of the *Act* to provide for a method to fix the number of directors of a floating board, and

(ii) amend subsection 106(8) to limit the power of the directors to appoint additional directors when they have been given the power to fix the number of directors by the shareholders.

RECOMMENDATION:

11. The National Business Law Section of the Canadian Bar Association recommends that Bill S-19 be revised by enacting new subsections 112(3) and 112(4) and by amending subsection 106(8) as follows:

112(3) Determining the number of directors

Where a corporation's articles provide for a minimum and maximum number of directors, the number of directors of the corporation and the number of directors to be elected at an annual meeting of the shareholders shall be the number determined from time to time by special resolution or, if a special resolution authorizes the directors to determine the number, by resolution of the directors.

112(4) Idem

Where no resolution has been passed under subsection (3), the number of directors of the corporation shall be the number or minimum number of directors in its articles.

106(8) Appointment of Directors

Where a special resolution passed under subsection 112(3) authorizes the directors of a corporation to determine the number of directors, the directors may not appoint an additional director if, after such appointment, the total number of directors would be greater than one and one-third times the number of directors required to have been elected at the last annual meeting of shareholders.

L. Subclause 38(2)

Subsection 106(10) would require a director elected year after year to consent each and every year, unless present at the meeting at which the election occurred. In our view, this is unduly cumbersome.

RECOMMENDATION:

12. The National Business Law Section of the Canadian Bar Association recommends that section 106 be amended to provide that:

(i) subsection 106(10) does not apply to a director who is re-elected or re-appointed where there is no break in the director's term of office; and

(ii) if a person elected or appointed consents in writing after the time period mentioned in subsection 106(9), the election or appointment is valid.

In addition, subsection 106(7) should be amended to deal with situations that have arisen where a director of a corporation refuses to consent to act as a director after meeting materials have been prepared.

RECOMMENDATION:

13. The National Business Law Section of the Canadian Bar Association recommends that subsection 106(7) should be amended to deal with situations where a director of a corporation refuses to consent to act as a director after meeting materials have been prepared by adding "*lack of consent*", after "*by*

***reason of the*" and before "*disqualification*" where they appear in the subsection.**

M. Clause 41

The proposed amendments to section 111 in clause 41 do not reflect the fact that the *CBCA* uses "*number of directors*" to refer to a corporation with a fixed number of directors and "*minimum number of directors*", "*maximum number of directors*" or "*minimum and maximum number of directors*" to refer to a corporation with a floating board of directors. Some examples are found in paragraph 6(1)(e) which relates to articles of incorporation, and subsection 112(1), which relates to the number of directors. The amendments proposed to section 111 of the *Act* by referring only to "*number of directors*" do not work and should be amended. We further suggest that the words "*or minimum number*" be reinserted where proposed to be deleted from subsection 111(2) and two places within paragraph 111(3)(a).

RECOMMENDATION:

14. The National Business Law Section of the Canadian Bar Association recommends that section 111(1) be amended to read as follows:

Despite subsection 114(3), but subject to subsections (3) and (4) and to subsection 112(3), a quorum of directors may fill a vacancy among the directors, except a vacancy resulting from an increase in the number or maximum number of directors, as the case may be, or from a failure to elect the number or minimum number required to be elected at any meeting of shareholders.

15. The National Business Law Section of the Canadian Bar Association recommends that the words "*or minimum number*"

be reinserted where proposed to be deleted from subsection 111(2) and two places within paragraph 111(3)(a).

N. Subclause 43(1)

These subsections would implement the amended resident Canadian director requirements. In accordance with our comments on clause 37, these subsections should also be deleted. If retained, subsections 114(3) and (4) should apply only to non-delegable decisions of the board as residence requirements do not apply to board committees.

RECOMMENDATION:

16. The National Business Law Section of the Canadian Bar Association recommends that subclause 43(1) be deleted. If retained, subsections 114(3) and (4) should apply only to non-delegable decisions of the board as residence requirements do not apply to board committees.

O. Subclause 43(2)

What is "adequate communication" for the purposes of new subsection 114(9)? The existing subsection requires directors to be able to hear each other. Presumably the change is intended to deal with electronic communications that do not permit oral communication. If so, this should not be allowed for meetings of directors. Directors should be able to talk to each other at meetings.

P. Clause 45

The proposed new subsection 117(3) would make entries in a corporation's minutes proof of the outcome of votes or resolutions, absent evidence to the contrary. It is not clear why this new provision is needed. It is less clear why it refers to a resolution under subsection 117(1). The same comment applies to subsection 142(3) in Clause 62. At a minimum, clarification of the intended purpose is warranted.

Q. Clause 47

In practice, directors' liability for unpaid employee wages arises upon the bankruptcy or insolvency of a corporation. Some provinces do not impose liability for unpaid wages on directors. To a uniform national standard, the provisions of section 119 should be moved from the *CBCA* to *Bankruptcy and Insolvency Act (Canada)*.

RECOMMENDATION:

17. The National Business Law Section of the Canadian Bar Association recommends that directors' liability for unpaid employee wages be moved from the *CBCA* to the *Bankruptcy and Insolvency Act*.

R. Clause 48

The amended subsection 120(7) would substitute the word "*invalid*" for "*void or voidable*". The existing language is clearer, especially in light of the common law, and should be retained. In addition, the proposed words "*by reason only of his or her holding the office of director or officer*" in subsection 120(7.1) create confusion and should be deleted.

RECOMMENDATION:

18. The National Business Law Section of the Canadian Bar Association recommends that amendments not be made to subsection 120(7) to substitute the word "*invalid*" for "*void or voidable*" and that the words "*by reason only of his or her holding the office of director or officer*" be deleted from subsection 120(7.1).

S. Clause 50

To avoid a narrow reading of "*profession*", the existing language in subsection 123(4) of the *Act*, which expressly lists several professionals, including lawyers, accountants, appraisers, engineers, should be retained. This comment also applies to the reference to professionals in subsection 222(2)(b) in clause 110.

RECOMMENDATION:

19. The National Business Law Section of the Canadian Bar Association recommends that the existing language of subsections 123(4) and 222(2)(b) of the *CBCA* be retained.

T. Clause 51

Subsection 124(2) should track the language in subsection 124(1). It should read "*A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).*"

Paragraph 124(5)(a) would amend the qualification for an individual to be indemnified to not having been "*...judged by the court or other competent authority to have*

committed any fault or omitted to do anything that the individual ought to have done...", from the current requirement that an individual be "*...substantially successful on the merits...*". Any amendment to this provision must incorporate a qualification like "*substantially*" if it is to represent an improvement.

RECOMMENDATION:

20. The National Business Law Section of the Canadian Bar Association recommends that subsection 124(2) be amended to read "*...A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3) ...*".

21. The National Business Law Section of the Canadian Bar Association recommends that any proposed amendment to paragraph 124(5)(a) include a concept similar to the "*substantially successful*" qualification that is currently employed in subsection 124(3).

U. Clause 54

Subsection 130(4) suggests a fine of the greater of $1,000,000.00 and three times the profit made or loss avoided for prohibited short selling and speculation by insiders. The fine is derived from the insider trading provisions in the provincial securities acts. The alternative fine based on profit and avoidance of loss does not work for the types of prohibited speculation in section 130, as the prohibited activities are not designed to avoid a loss but to make a profit. In any event, the targeted evil is not the potential profit but the conflict of interest inherent in the prohibited transactions.

A fine of $1,000,000.00 alone would be sufficient. If an alternative maximum is thought necessary, the reference to "*loss avoided*" should be deleted. The maximum fine would then be $1,000,000.00 or three times the profit made.

RECOMMENDATION:

22. The National Business Law Section of the Canadian Bar Association recommends that the maximum fine in subsection 130(4) be $1,000,000. If reference to profit is thought necessary, the maximum fine should be $1,000,000.00 or three times the profit made.

Paragraph 131(1)(d) bases insider status on beneficial ownership of shares. The definition would add the words "*directly or indirectly*," presumably to catch forms of ownership designed to avoid the provision. These words create uncertainty and should be deleted.

RECOMMENDATION:

23. The National Business Law Section of the Canadian Bar Association recommends that the words "*directly or indirectly*" be deleted from paragraph 131(1)(d).

Paragraph 131(1)(g) refers to a takeover bid for shares of a corporation. The word "*shares*" should be changed to "*securities*".

RECOMMENDATION:

24. The National Business Law Section of the Canadian Bar Association recommends that the word "*shares*" be changed to "*securities*" in paragraph 131(1)(g).

Paragraph 131(1)(j) would add to the definition of "*insider*" authority to extend liability by creating additional categories of insiders by regulation. It is not clear that this regulatory power to expand the scope of insider liability is necessary. In any event, civil liability should not be imposed in this manner.

RECOMMENDATION:

25. The National Business Law Section of the Canadian Bar Association recommends that proposed paragraph 131(1)(j) be deleted from the Bill.

In view of paragraphs 131(1)(c), (f) and (g), defining "*insider*", subsection 131(3) is no longer necessary. It should be repealed.

RECOMMENDATION:

26. The National Business Law Section of the Canadian Bar Association recommends that subsection 131(3) of the *CBCA* be repealed.

Subsection 131(4) does not expressly address the question of market liability. Most people have interpreted the existing provision in the *CBCA* to include a privity requirement as a prerequisite for liability. In an article in 1975, Philip Anisman, then Director of Corporate Research in the Department of Consumer and Corporate Affairs (Canada), interpreted it as allowing market liability.[1] This question should be directly addressed.

Subsection 131(5) makes an insider accountable to the corporation for any benefit or advantage received as a result of improper insider trading but it uses the verb "*compensate*". This is technically incorrect. The wording of existing paragraph 131(4)(b)

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[1] See P. Anisman, "*Insider Trading under the Canada Business Corporations Act*," in *Meredith Memorial Lectures 1975* (Toronto: de Boo, 1975) 151 at 234-43.

is the correct one. The provision should read: "*the insider is accountable to the corporation for any benefit or advantage....*" This comment also applies to the use of "*compensate*" in subsection 131(7).

RECOMMENDATION:

27. The National Business Law Section of the Canadian Bar Association recommends that subsections 131(5) and 131(7) substitute "*accountable to*" for "*liable to compensate*".

Subsection 131(6) would create liability for tipping, but it deals with only one aspect of tipping, that is disclosing information to another. To be effective, the provision should address causing, procuring and advising others to trade, as well as disclosing confidential information.[2]

Subsection 131(7) makes an insider who tips accountable to the corporation only for a benefit or advantage received or receivable by the insider as a result of the tipping. It should also make the insider accountable, jointly and severally as in proposed subsection 131(9), for any benefit or advantage received or receivable by the tippee and any subtippees.

RECOMMENDATION:

28. The National Business Law Section of the Canadian Bar Association recommends that subsection 131(7) make an insider who tips accountable, jointly and severally, for any benefit or advantage received or receivable by the insider, the tippee and any subtippees.

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2 See the discussion and draft legislation in P. Anisman, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives* (Australian G.P.S., 1986) 61-63, 138-41 and 145-48.

V. Clause 55

While we favour increased shareholder participation in meetings, we are concerned about the feasibility of meaningful participation if shareholder meetings are conducted electronically. Provided this concern can be addressed, rather than forcing corporations to revise their by-laws, the presumption should be that unless the by-laws provide otherwise, shareholders can participate by telephonic or electronic means at shareholder meetings. The presumption as currently suggested in subsection 132(4) conflicts with Part XX.1. In our view, further consideration of this provision is necessary.

W. Clause 56

Subsection 133(3) of the *Act* allowing a corporation to apply to the court for an order extending the time for calling an annual meeting may suggest that a meeting held after the expiration of the applicable time period is invalid. This would be unfortunate, especially for a non-distributing corporation. It should be made explicit that meetings are not invalid simply because they are not held within the period prescribed by the statute.

RECOMMENDATION:

29. The National Business Law Section of the Canadian Bar Association recommends that section 133 explicitly state that meetings are not invalid solely because they are not held within the period prescribed by the statute.

X. Clause 58

The reference to the articles proposed in subsection 135(1.1) should be replaced by a reference to the "*articles or by-laws of the corporation or a unanimous shareholder*

agreement." In our view, the notice period for a meeting of the shareholders of non-distributing corporations should not have to be elevated to the level of articles.

RECOMMENDATION:

30. The National Business Law Section of the Canadian Bar Association recommends that subsection 135(1.1) should refer to the "*articles or by-laws of the corporation or a unanimous shareholder agreement.*"

Y. Clause 59

Subsection 137(1.1) provides for eligibility requirements (to be established by regulation[3]) based on a minimum period and amount of shareholding before a shareholder may submit a shareholder proposal. Although they are derived from the SEC's current rules, such requirements reflect a fear that the shareholder proposal mechanism will be abused. However, there is no evidence that this has occurred in Canada under the existing provisions, although shareholder proposals have recently increased in frequency, in part as a result of the *Michaud* decision in the Québec courts.

A holder of a single share purchased prior to the record date is entitled to attend a meeting of shareholders, speak at it and move resolutions. The shareholder proposal mechanism is intended to make this right meaningful by enabling shareholders to have their resolutions placed before other shareholders in the management proxy circular for consideration when filling out proxies. If a shareholder is entitled to speak at a meeting, the shareholder should be entitled to submit a proposal, subject to the exclusionary standards in subsection 137(5) which addresses potential abuse of shareholder proposals.

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3 See also our comment on section 261, clause 125, at page 32.

As a matter of principle, the only eligibility requirement should be that the person submitting a proposal be a registered or beneficial owner of at least one voting share of the corporation. The proposed subsection should be deleted.[4]

RECOMMENDATION:

31. The National Business Law Section of the Canadian Bar Association recommends that subsection 137(1.1) be deleted. The only eligibility requirement for a shareholder proposal should be that the person submitting a proposal be a registered or beneficial owner of at least one voting share of the corporation.

Subsection 137(3) of the *CBCA* currently imposes a 200 word limit on a supporting statement accompanying a shareholder proposal, but no limit on the proposal itself. Bill S-19 would amend subsection 137(3) to impose a maximum number of words on a supporting statement and proposal, taken together, with the Department's proposed regulations suggesting a 500 word maximum. This may limit the number of proposals that an individual shareholder may submit. If the word limit applies to proposals, it might be interpreted to apply to all proposals submitted by the same shareholder, rather than each individual proposal. If so, the proposed change may prevent shareholders from submitting a number of related proposals at the same time, although it does not appear that this was intended. Subsection 137(3) should be retained in its present form.

RECOMMENDATION:

32. The National Business law Section of the Canadian Bar Association recommends that subsection 137(3) be retained in its present form.

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[4] In candour, it must be said that this comment does not represent the unanimous view of the Subcommittee. Some members felt that the proposed regulations should impose stricter requirements.

Paragraph 137(5)(a) would change the latest date for submitting shareholder proposals from 90 days prior to the anniversary of the preceding annual meeting to 90 days prior to the anniversary of the notice of that meeting. The effect would be to require shareholder proposals to be submitted at least 111 to 125 days prior to the anniversary of the preceding annual meeting. While the additional 21 to 35 days would not itself make a significant difference, any lack of clarity or ease in determining the deadline may make it more difficult for a shareholder to submit a proposal on time.

However the date is determined, a corporation's management proxy circular for an annual meeting of shareholders should disclose the final date for submission of shareholder proposals for the next annual meeting. The Department's proposed regulations do not require disclosure of this information. We recommend the inclusion of this requirement in the Bill itself, by adding the words "*which anniversary date shall be disclosed in the management proxy circular for each annual meeting of shareholders*" to proposed paragraph 137(5)(a).

RECOMMENDATION:

33. The National Business Law Section of the Canadian Bar Association recommends that the words "*which anniversary date shall be disclosed in the management proxy circular for each annual meeting of shareholders*" be added to proposed paragraph 137(5)(a).

Under proposed subsection 137(7), a corporation must notify a shareholder of its refusal to include a proposal in its management proxy circular within a prescribed period after receiving the proposal. The Department's proposed regulations would prescribe 21 days. However, subsection 137(1.4) would authorize a corporation to require a shareholder to provide proof of eligibility within a prescribed period after receiving a shareholder's proposal, following which the shareholder would have another prescribed period to reply.

The Department's proposed regulations would prescribe terms of 14 and 21 days, respectively, totalling 35 days from the date the corporation received the proposal. Nevertheless, the regulations proposed under subsection 137(7) would require the corporation to decide whether to include the proposal within 21 days, as much as 14 days before receiving proof of ownership. As a result, a corporation that does not accept the proof submitted could find that its refusal is out of time. These time periods require clarification.

RECOMMENDATION:

34. The National Business Law Section of the Canadian Bar Association recommends that the time periods under subsections 137(7) and 137(1.4) be clarified to ensure that they work together.

We note also that subsection 137(8) refers to a person as "*that*", rather than "*who*".

Z. Clause 61

In our view, proposed subsection 140(5) in clause 61 is unnecessary. It is inconsistent with the current understanding that the registered shareholder, the lender, retains voting rights unless otherwise agreed. The change is also inconsistent with provisions of the *Act* basing voting rights on a corporation's share register and could cause confusion. The provision should be deleted.

RECOMMENDATION:

35. The National Business Law Section of the Canadian Bar Association recommends the deletion of proposed clause 61 of Bill S-19.

AA. Clause 64

Subsection 144(1) gives a shareholder entitled to vote the right to apply to and request a court to order a meeting. This right is arguably limited by case law to registered shareholders.[5] The subsection should be amended to make clear that a beneficial owner of shares also has standing to apply.

In paragraph 144(1)(a) it seems that the court should be able to order a meeting if impracticable "*within the time or in the manner in which those meetings are to called*", rather than using the word "*and*".

In addition to expressly referring to the by-laws, paragraph 144(1)(b) should refer to a unanimous shareholder agreement.

RECOMMENDATION:

36. The National Business Law Section of the Canadian Bar Association recommends that subsection 144(1) be amended to make clear that a beneficial owner of shares has standing to apply to and request a court to order a meeting.

37. The National Business Law Section of the Canadian Bar Association recommends that the word "and" be replaced by "or" in paragraph 144(1)(a) so that a court is able to order a meeting if impracticable "*within the time or in the manner in which those meetings are to called*".

38. The National Business Law Section of the Canadian Bar Association recommends that paragraph 144(1)(b) should refer to a unanimous shareholder agreement, in addition to expressly referring to the by-laws.

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5 See, *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550.

BB. Clause 66

We see no reason for the proposed new subsection 146(7), which requires notice of the initial execution or termination of a unanimous shareholder agreement to be sent to the Director. A unanimous shareholder agreement is a private arrangement among the shareholders similar to the by-laws. In addition, the required notice would serve no useful purpose. We recommend this provision be deleted.

RECOMMENDATION:

39. The National Business Law Section of the Canadian Bar Association recommends that subsection 146(7) of Bill S-19 be deleted.

CC. Subclause 67(2)

The expanded definition of "*solicitation*" in section 147 has the effect of treating any communication between or among shareholders about a meeting as a solicitation of proxies, unless it is exempted. It would therefore catch discussions among shareholders with a view to opposing management by preparing a dissident proxy circular or even discussions of corporate policy, unless those discussions are expressly exempted.

Subparagraph (b)(vii) of the definition exempts communications by non-management persons made to shareholders in prescribed circumstances. For the purposes of this paragraph, section 62 of the Department's proposed regulations would exempt communications made to fewer than 16 shareholders. In view of the breadth of the new definition, this may be unnecessarily restrictive as it would limit discussions among shareholders unless those discussions are made public.

Additional exemptions should be added to the regulations for this subparagraph. The regulations should permit all discussions among shareholders of management proposals and all communications with a view to soliciting proxies through a dissident proxy circular. Without a commitment to this effect from the Minister, further consideration of the amended definition is necessary.

DD. Clause 77

Subsection 160(1) retains the existing language to qualify the obligations of distributing corporations to send copies of annual financial statements to the Director. As stated with respect to subsection 102(2), above, the existing language is unnecessary in view of the new definition of "*distributing corporation*". Every distributing corporation should be required to send annual financial statements to the Director until it is declared not to be a distributing corporation.

RECOMMENDATION:

40. The National Business Law Section of the Canadian Bar Association recommends that the words "*any of the issued securities of which remain outstanding and are held by more than one person*" be deleted from subsection 160(1).

EE. Subclauses 94(1) and 96(1)

Bill S-19 would add definitions of "*going-private transaction*" and "*squeeze-out transaction*" to the *CBCA*. Paragraphs 190(1)(f) and 192(1)(f.1) would include such transactions as transactions entitling dissenting shareholders to exercise the appraisal remedy and would add such transactions to the definition of "*arrangement*" in section 192.

Going-private and squeeze-out transactions must be accomplished by means of transactions already subject to subsections 190(1) and 192(1). Adding them to these provisions is unnecessary and suggests that they have an independent quality apart from their expropriative purpose and effect. As the means of squeezing out minority shareholders are already contained in sections 190 and 192, these new subsections should be deleted.

RECOMMENDATION:

41. The National Business Law Section of the Canadian Bar Association recommends that paragraphs 190(1)(f) and 192(1)(f.1) should be deleted from Bill S-19.

FF. Clause 97

Proposed section 193 deals with going-private transactions. Although the Bill would add a definition of "*going-private transaction*" to the *CBCA*, that definition only authorizes the promulgation of a regulation to define the term. The Department's proposed regulations do not contain a definition, but in publications announcing the Bill's introduction, it was stated that the regulations would require going-private transactions to comply with "prescribed fairness criteria set out in the applicable rules or policy statements issued by the Ontario and Quebec Securities Commissions (which would be incorporated by reference in the regulations)."[6] Proposed section 193 authorizes the adoption of such regulations and also authorizes the Director to grant exemptions from any of the prescribed requirements.

The effect of this proposed regime would be to adopt policies or rules relating to going-private transactions by regulation under the *CBCA*, and then grant the Director

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6 See, the summary of amendments contained in Bill S-19 (the "*Backgrounder*") attached to the Minister's News Release of March 21, 2000.

authority to exempt corporations from any of their provisions. This seems unnecessarily cumbersome in view of the fact that such corporations will be subject to the rules and policies of the Ontario Securities Commission and Quebec Securities Commission in any event. The amendments would merely add an unnecessary layer of requirements through the *CBCA*, and would authorize the Director to second guess the OSC and QSC on the application of their own policies.[7] There is no reason to do this.

The major purpose of this new provision appears to be to legitimate going-private transactions by majority shareholders of *CBCA* corporations. This is unnecessary in view of existing jurisprudence and practice. Indeed, in light of current case law, the amendments may limit the availability of relief for minority shareholders under the oppression remedy.

In view of the nature of the proposed amendments and the fact that they are unnecessary to accomplish their intended goals, proposed section 193 should allow no more than adoption by reference of requirements applicable to going-private transactions in distributing corporations. This is necessary to avoid constitutional issues that may arise in the application of the policies to federal corporations.

RECOMMENDATION:

42. The National Business Law Section of the Canadian Bar Association recommends that proposed section 193 should only authorize adoption by reference of requirements applicable to going-private transactions in distributing corporations.

GG. Clause 98

The Bill would repeal the provisions regulating take-over bids for *CBCA* corporations and abandon this field to securities legislation. This blanket repeal may create a gap in the

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7 OSC Policy 9.1 and QSC Policy Q-27, respectively.

regulatory framework governing such bids, as some aspects of corporate governance may be beyond jurisdiction over federal corporations.[8]

A complete withdrawal from regulating take-over bids should be carefully designed to ensure that no regulatory gap is created. This is particularly true of the requirement contained in securities laws that directors of an offeree corporation prepare a directors' circular and send it to their shareholders, as this regulates the internal affairs of federal corporations. While it is not clear how the courts would treat this issue today, if it were raised, it is preferable to avoid creating a possible regulatory gap by requiring *CBCA* corporations to comply with securities laws applicable to offeree corporations.

RECOMMENDATION:

43. The National Business Law Section of the Canadian Bar Association recommends that a provision be added to the Bill to require *CBCA* corporations to comply with securities laws applicable to offeree corporations.

HH. Clause 99

The definition of "*take-over bid*" in subsection 206(1) is circular. It is defined to mean an offer "*made by an offeror*" to shareholders of a distributing corporation. "*Offeror*" is defined as a person "*who makes a take-over bid*". If this definition is retained, a take-over bid should be simply defined to mean an offer "*made by a person ...*"

Proposed paragraph 131(1)(g) relies on the regulations to define "*take-over bid*". The Department's proposed regulations contain a schedule defining "*take-over bid*" in this context as it is defined in specified provincial securities acts. It may be preferable to rely

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8 See P. Anisman, "*Regulation of Public Corporations: The Boundaries of Corporate and Securities Law*" in *The Future of Corporation Law: Issues and Perspectives* (Queen's Annual Business Law Symposium: Carswell, 1997) 63 at 68-69.

on the same definition for purposes of section 206 by adding an act-wide definition of "*take-over bid*" to subsection 2(1) of the *CBCA*, referring to the regulations, as is done in paragraph 131(1)(g).

RECOMMENDATION:

44. The National Business Law Section of the Canadian Bar Association recommends that if an act-wide definition of "*take-over bid*" is adopted, the definition in subsection 206(1) should be modified as follows:

"take-over bid" means a bid to acquire all of the shares of a class of issued shares of a distributing corporation and includes an offer by a distributing corporation to repurchase all of the shares of a class of its shares."

While proposed amendments to section 206 appear intended to move the requirements currently contained in paragraphs 206(3)(c) and (d) from subsection (3) to subsections (5) and (5.1), the Bill does not do so. It fails to delete paragraph 206(3)(c) and contains an amended version of paragraph 206(3)(d) that is substantially identical to new subsection 206(5.1).

RECOMMENDATION:

45. The National Business Law Section of the Canadian Bar Association recommends that the Bill should be amended to repeal subparagraphs 206(3)(c) and (d).

Line 3 of proposed subsection 206(7.1) should refer to "*the corporation*" rather than "*a corporation*". We suggest that it would be better still if the line is amended to read "*...shares of a class of its shares is...*".

RECOMMENDATION:

46. The National Business Law Section of the Canadian Bar Association recommends that the third line of subsection 206(7.1) be amended to read "*...shares of a class of <u>its</u> shares is...*" Alternatively, the second reference to a corporation should be changed to *the* corporation, rather than *a* corporation.

II. Clause 102

The amendment to subsection 209(5) appears to deem legal actions between a revived corporation and its affiliates taken between the time of dissolution and revival as invalid and ineffective. Whether there should be any special provisions for such legal actions is questionable. They should not, however, simply be deemed invalid and ineffective.

JJ. Clause 121

Clarification should be made in the *CBCA* or its regulations regarding how consents will work, how they can be revoked and other related matters. For example, instructions from beneficial owners to intermediaries under subsection 153(1) must now be obtained in writing but it will not be commercially feasible to obtain consent every time a person sends an electronic document rather than paper. It may be desirable not to require consent where there is evidence of delivery of a reply to an electronic document.

KK. Clause 125

Section 261 of the *CBCA* now authorizes the making of regulations. The Bill would replace this section entirely and remove the existing notice and comment requirements by omitting subsections 261(2) and (3), which obligate the Minister to publish proposed regulations and provide a reasonable opportunity for interested persons to comment upon them. This is a retrogressive measure.

The *CBCA* confers wide authority on the Governor in Council to promulgate regulations. As is noted above, the Bill would continue this practice by authorizing regulations to define terms in the *Act* and criteria of eligibility to exercise shareholder rights and prescribe classes of interests for purposes of civil liability. Persons affected by such measures should be entitled to an opportunity to address such regulations before they are adopted. Publication and an opportunity to make representations on proposed regulations should continue to be mandatory, as they are currently under the *CBCA*. Subsections 261(2) and (3) should be retained.

RECOMMENDATION:

47. The National Business Law Section of the Canadian Bar Association recommends that the publication and representation requirements in subsections 261(2) and (3) be retained.

The Bill would systematically amend the *CBCA* to authorize the Director to adopt all forms, without approval of the Governor in Council. It would also authorize the Director to grant exemptions from the *Act* to classes of persons. Both of these powers are forms of rule-making. They, too, should be subject to a notice and comment procedure. A section to this effect should be added to the Bill.

RECOMMENDATION:

48. The National Business Law Section of the Canadian Bar Association recommends that a section should be added to the Bill to make the Director's authority to adopt forms and grant class exemptions subject to the notice and comment procedure in subsections 261(2) and (3).

LL. Clause 128

Allowing the notices and returns listed in subsection 262.1(2) to be signed by *"any individual who has the relevant knowledge of the corporation*" only when "*authorized to do so by the directors*" effectively destroys the usefulness of allowing such documents to be signed by any knowledgeable individual. The amendment's requirement for director authorization should be deleted.

RECOMMENDATION:

49. The National Business Law Section of the Canadian Bar Association recommends that the requirement for director authorization under subsection 262.1(2) of Bill S-19 should be deleted.

MM. Clause 130

For clarification, the words "*filed with the Director*" should be added after the first reference to the word "*document*" in the opening part of subsection 265(1), dealing with the Director's request for corrections. With respect to correcting articles under the amendment to subsection 265(1), the Director may only ask directors and shareholders to send to the Director the documents necessary to comply with the *Act* or to take such other steps as the Director may require. The class of persons of whom such requests may be made should be expanded to include "*officers*" and "*any other person acceptable to the Director*". A consequential amendment to subsection 265(1) would be the addition of the words "*if any*," after the word "*resolutions*" in the fifth line of this subsection.

More importantly, clause 265(3)(a) should be expanded to address the frequently occurring situations where the error in question is not made by directors or shareholders. For example, a solicitor may mistakenly submit articles that either effect a change not approved by the corporation or effect a change but not in the manner contemplated (e.g., an amalgamation that takes effect one day prior to the date the corporation authorized).

Currently, the Director is able to correct articles in such situations. We believe the Director should be given specific authority to do so by amending paragraph 265(3)(a).

RECOMMENDATION:

50. The National Business Law Section of the Canadian Bar Association recommends that the Director should be given specific authority to correct articles by amending paragraph 265(3)(a) to read:

"(a) ***the correction is approved by the directors of the corporation, unless the error was made by the Director or the error is either obvious on its face or is explained to the Director to the satisfaction of the Director; and...*****".**

In our view, the Director has sufficient discretion in paragraph 265(3)(b) to ensure that clause (a), if expanded as suggested above, is not abused in any manner.

Finally, for the sake of consistency and policy, paragraph 265.1(3)(a) should be amended.

RECOMMENDATION:

51. The National Business Law Section of the Canadian Bar Association recommends that paragraph 265.1(3)(a) should be amended to read:

"(a) ***the cancellation is approved by the directors of the corporation or by any other interested person...*****".**

and the prescribed regulation, being Regulation 90, should be amended so that:

(i) Regulation 90(1)(a) reads:

"(a) *if the error is obvious on its face or is explained to the Director to the satisfaction of the Director...*", and

(ii) Regulation 90(2)(a) reads:

"(a) *if the Director is satisfied that there is no dispute among the directors or shareholders regarding the request for cancellation; or...*".

Proposed section 265.1 would authorize the Director to cancel articles of incorporation and the related certificate of incorporation in prescribed circumstances. The Bill does not indicate what those circumstances are likely to be and the Department's proposed regulations do not address this matter. Authority of this nature should only be granted to the Director within defined limits. The circumstances in which the Director may cancel a certificate should, at a minimum, be conceptually defined in the *Act,* and not left entirely to regulations.

RECOMMENDATION:

52. The National Business Law Section of the Canadian Bar Association recommends that the circumstances in which the Director may cancel a certificate should be defined. At a minimum, they should be conceptually defined in the *Act,* and not left entirely to regulations.

III. GENDER NEUTRAL LANGUAGE

We appreciate that Bill S-19 attempts to be gender neutral. However, some of the amendments it contains, in its attempt for gender neutrality, are grammatically incorrect. Several provisions refer to a person in the singular and subsequently refer to that person using a plural pronoun. For example, subsection 223(4) states that *"a liquidator shall give notice of their intention..."*. Similar examples are found in subsections 18(2), 130(3), 138(3.1) and 153(1). This confusion of singular and plural may undermine the clarity of the legislation.

IV. CONCLUSION

The National Business Law Section of the Canadian Bar Association trusts that its comments will assist to advance the shared goal of the Association and our elected representatives in government of improving Bill S-19. While the Section was limited in our scrutiny of this very important and very lengthy Bill as a result of the time permitted, we are pleased to continue to offer our assistance in any manner required in the future.

V. SUMMARY OF RECOMMENDATIONS

The National Business Law Section of the Canadian Bar Association recommends:

1. **that civil law concepts throughout Bill S-19 be reviewed to eliminate repetitious language. If the proposed language is retained, further review of all provisions incorporating civil law concepts is required to ensure that the meaning is identical or at least parallel in both English and French.**

2. **that the existing standard in subsection 2(8) of the *CBCA* be retained, so that the Director may determine that a corporation is not a distributing corporation if satisfied that it would not prejudice any security holder of the corporation.**

3. **that subsection 2(7) be amended so that the Director does not have authority to determine that a class of corporations are not distributing corporations. Absent this amendment, before making class exemption orders, the Director should be required to publish a proposed exemption and request comments from interested parties.**

4. **that under the notices referred to in clause 4, the Director's discretion to refuse incorporation be confined to circumstances where the corporation would not be in compliance with the specific provisions. The final words of subsection 8(2) should be amended to read "would not be in compliance with these provisions."**

5. **that clause 5 be clarified as to how a French form and English form should be set out in the articles.**

6. **that subsections 118(4) and (5) be added to the list of exceptions to shareholder immunity in subsection 45(1). In addition, subsection 45(2) should permit the lien on shares to be specified in the by-laws.**

7. **that the prohibition proposed by subclause 30(4) apply only to a class or series which was or is part of a distribution to the public.**

8. **that subsection 49(8) should begin: "*Subject to subsection 146(4), no restriction, charge, agreement or endorsement ...*" and the word "*agreement*" should similarly be added later in the subsection.**

9. **that the reference to outstanding shares held by more than one person in subsection 102(2) be deleted in light of Bill S-19's new definition of "*distributing corporation*."**

10. **that the minimum percentage of resident Canadian directors be deleted by repealing subsection 105(3). Regardless of whether the proposed requirement is repealed, subsections 105(3.1), (3.2) and (3.3) and the amendment to subsection 105(4) should be deleted.**

11. **that Bill S-19 be revised by enacting new subsections 112(3) and 112(4) and by amending subsection 106(8) as follows:**

112(3) Determining the number of directors
Where a corporation's articles provide for a minimum and maximum number of directors, the number of directors of the corporation and the number of directors to be elected at an annual meeting of the shareholders shall be the number determined from time to time by special resolution or,

if a special resolution authorizes the directors to determine the number, by resolution of the directors.

112(4) Idem
Where no resolution has been passed under subsection (3), the number of directors of the corporation shall be the number or minimum number of directors in its articles.

106(8) Appointment of Directors
Where a special resolution passed under subsection 112(3) authorizes the directors of a corporation to determine the number of directors, the directors may not appoint an additional director if, after such appointment, the total number of directors would be greater than one and one-third times the number of directors required to have been elected at the last annual meeting of shareholders.

12. that section 106 be amended to provide that:

(i) subsection 106(10) does not apply to a director who is re-elected or re-appointed where there is no break in the director's term of office; and

(ii) if a person elected or appointed consents in writing after the time period mentioned in subsection 106(9), the election or appointment is valid.

13. that subsection 106(7) should be amended to deal with situations where a director of a corporation refuses to consent to act as a director after meeting materials have been prepared by adding "*lack of consent*", after

"*by reason of the*" and before "*disqualification*" where they appear in the subsection.

14. that section 111(1) be amended to read as follows:

Despite subsection 114(3), but subject to subsections (3) and (4) and to subsection 112(3), a quorum of directors may fill a vacancy among the directors, except a vacancy resulting from an increase in the number or maximum number of directors, as the case may be, or from a failure to elect the number or minimum number required to be elected at any meeting of shareholders.

15. that the words "*or minimum number*" be reinserted where proposed to be deleted from subsection 111(2) and two places within paragraph 111(3)(a).

16. that subclause 43(1) be deleted. If retained, subsections 114(3) and (4) should apply only to non-delegable decisions of the board as residence requirements do not apply to board committees.

17. that directors' liability for unpaid employee wages be moved from the *CBCA* to the *Bankruptcy and Insolvency Act*.

18. that amendments not be made to subsection 120(7) to substitute the word "*invalid*" for "*void or voidable*" and that the words "*by reason only of his or her holding the office of director or officer*" be deleted from subsection 120(7.1).

19. that the existing language of subsections 123(4) and 222(2)(b) of the *CBCA* be retained.

20. that subsection 124(2) be amended to read "*...A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3) ...*".

21. that any proposed amendment to paragraph 124(5)(a) include a concept similar to the "*substantially successful*" qualification that is currently employed in subsection 124(3).

22. that the maximum fine in subsection 130(4) be $1,000,000. If reference to profit is thought necessary, the maximum fine should be $1,000,000.00 or three times the profit made.

23. that the words "*directly or indirectly*" be deleted from paragraph 131(1)(d).

24. that the word "*shares*" be changed to "*securities*" in paragraph 131(1)(g).

25. that proposed paragraph 131(1)(j) be deleted from the Bill.

26. that subsection 131(3) of the *CBCA* be repealed.

27. that subsections 131(5) and 131(7) substitute "*accountable to*" for "*liable to compensate*".

28. that subsection 131(7) make an insider who tips accountable, jointly and severally, for any benefit or advantage received or receivable by the insider, the tippee and any subtippees.

29. that section 133 explicitly state that meetings are not invalid solely because they are not held within the period prescribed by the statute.

30. that subsection 135(1.1) should refer to the "*articles or by-laws of the corporation or a unanimous shareholder agreement*."

31. that subsection 137(1.1) be deleted. The only eligibility requirement for a shareholder proposal should be that the person submitting a proposal be a registered or beneficial owner of at least one voting share of the corporation.

32. that subsection 137(3) be retained in its present form.

33. that the words "*which anniversary date shall be disclosed in the management proxy circular for each annual meeting of shareholders*" be added to proposed paragraph 137(5)(a).

34. that the time periods under subsections 137(7) and 137(1.4) be clarified to ensure that they work together.

35. the deletion of proposed clause 61 of Bill S-19.

36. that subsection 144(1) be amended to make clear that a beneficial owner of shares has standing to apply to and request a court to order a meeting.

37. the word "and" be replaced by "or" in paragraph 144(1)(a) so that a court is able to order a meeting if impracticable "*within the time or in the manner in which those meetings are to called*".

38. that paragraph 144(1)(b) should refer to a unanimous shareholder agreement, in addition to expressly referring to the by-laws.

39. that subsection 146(7) of Bill S-19 be deleted.

40. that the words "*any of the issued securities of which remain outstanding and are held by more than one person*" be deleted from subsection 160(1).

41. that paragraphs 190(1)(f) and 192(1)(f.1) should be deleted from Bill S-19.

42. that proposed section 193 should only authorize adoption by reference of requirements applicable to going-private transactions in distributing corporations.

43. that a provision be added to the Bill to require *CBCA* corporations to comply with securities laws applicable to offeree corporations.

44. that if an act-wide definition of "*take-over bid*" is adopted, the definition in subsection 206(1) should be modified as follows:

"take-over bid" means a bid to acquire all of the shares of a class of issued shares of a distributing corporation and includes an offer by a distributing corporation to repurchase all of the shares of a class of its shares."

45. that the Bill should be amended to repeal subparagraphs 206(3)(c) and (d).

46. that the third line of subsection 206(7.1) be amended to read "...*shares of a class of <u>its</u> shares is...*" Alternatively, the second reference to a

corporation should be changed to *the* corporation, rather than *a* corporation.

47. that the publication and representation requirements in subsections 261(2) and (3) be retained.

48. that a section should be added to the Bill to make the Director's authority to adopt forms and grant class exemptions subject to the notice and comment procedure in subsections 261(2) and (3).

49. that the requirement for director authorization under subsection 262.1(2) of Bill S-19 should be deleted.

50. that the Director should be given specific authority to correct articles by amending paragraph 265(3)(a) to read:

> **"(a) *the correction is approved by the directors of the corporation, unless the error was made by the Director or the error is either obvious on its face or is explained to the Director to the satisfaction of the Director; and...*".**

51. that paragraph 265.1(3)(a) should be amended to read:

> **"(a) *the cancellation is approved by the directors of the corporation or by any other interested person...*".**

and the prescribed regulation, being Regulation 90, should be amended so that:

(i) Regulation 90(1)(a) reads:

"(a) ***if the error is obvious on its face or is explained to the Director to the satisfaction of the Director...*****", and**

(ii) Regulation 90(2)(a) reads:

"(a) ***if the Director is satisfied that there is no dispute among the directors or shareholders regarding the request for cancellation; or...*****".**

52. that the circumstances in which the Director may cancel a certificate should be defined. At a minimum, they should be conceptually defined in the *Act,* and not left entirely to regulations.