Second Submission on Bill S-19

Canada Business Corporations Act

[00-18-2]

NATIONAL BUSINESS LAW SECTION
CANADIAN BAR ASSOCIATION

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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.

Second Submission on Bill S-19
Canada Business Corporations Act

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 has prepared 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.

In our appearance before the Senate Committee on Banking, Trade and Commerce on May 10, 2000 we undertook to discuss our comments on the Bill with Industry Canada and Justice Canada officials and to revise our written submission to address separately the matters that raise significant issues of policy and those that are primarily technical. Having discussed our earlier submission with these officials, this second submission attempts to fulfill our undertaking to the Senate Committee. This submission first addresses issues of policy and then issues that are primarily technical. Technical issues are contained in two parts – those with which departmental officials have expressed agreement in principle, and those with which they have not. Within each part the comments follow the order of the Bill. Obviously we consider all of the policy issues important. We are of the view that a substantial number of the technical issues are also important.

The comments in this submission reflect three guiding principles of the Dickerson Committee that underpin the approach of the *CBCA*.[1] First, a corporation act is an enabling act which should provide substantial flexibility to permit corporations to structure and conduct their affairs as their shareholders see fit. Second, to balance the broad discretion of corporate management that such flexibility entails, shareholders should have mechanisms to enable them to communicate with each other and to ensure managerial accountability and adequate remedies to deal with managerial excess or impropriety. Third, as a corporation act is not a regulatory statute, the Director should not have discretionary power to regulate corporate conduct; rather, enforcement of standards should be left to shareholders and the courts. We accept these basic propositions. They are reflected in the comments that follow on policy and technical issues.

The Section continues to be 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 inadequate. We note that the 1975 *CBCA* was introduced after a very lengthy consultation period, yet still required substantial amendment in 1978. Our discussions over the past weeks have confirmed, in our view, the need for time to consider the manner in which policy decisions are implemented in legislation.

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1 See R.W.V. Dickerson *et al.*, *Proposals for a New Business Corporations Law for Canada: Commentary* (vol. 1)(1971) at 1-5.

II. POLICY ISSUES

A. Directors' Residency Requirements: Clause 37

Bill S-19 would amend subsection 105(3) of the *CBCA* by reducing the required minimum percentage of Canadian resident directors of a corporation from a majority to 25 per cent. We believe that the only viable solution, if the *CBCA* is not to be bypassed 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 offshore 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:

1. **The National Business Law Section of the Canadian Bar Association recommends that:**
   - **(a) the minimum percentage of resident Canadian directors be deleted by repealing subsection 105(3);**
   - **(b) 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.**

B. Attendance by Resident Directors: Subclause 43(1)

Subsections 114(3) and (4), to be added by subclause 43(1) of the Bill, would implement the amended resident Canadian director requirements by imposing minimum attendance requirements for directors' meetings. In accordance with our comments on clause 37, these subsections should also be deleted.[2]

RECOMMENDATION:

2. **The National Business Law Section of the Canadian Bar Association recommends that subclause 43(1) be deleted.**

C. Liability for Insider Trading: Clause 54 - Section 131

Bill S-19 would delete insider reporting obligations and retain civil liability for improper trading by insiders, broadly defined. The new civil liability regime is intended to replicate

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[2] See also section IV.I below, which contains a technical comment on these provisions in the event they are retained.

the regime under provincial securities legislation, particularly that in Ontario. As insider trading legislation is aimed at improper communication and use of information, it requires careful and detailed, sometimes subtle attention. Bill S-19 does not harmonize with the provisions of the Ontario *Securities Act*.

Our initial submission raised a number of issues of execution and principle. We understand that some of our earlier suggestions, and some raised subsequently, are acceptable in principle to departmental officials, while others are not. In view of the difficulties of harmonization and differences that inevitably result in an area as complex as this when different drafting styles are imposed, we have concluded that harmonization can best be achieved by repealing the insider liability provisions of the *CBCA* with respect to distributing corporations and adopting the provincial legislation by reference. This can be accomplished by declaring that "persons in a special relationship" with a corporation, as defined in prescribed provincial legislation, must comply with applicable provincial insider trading laws and are subject to the liability imposed under them.

If this is accepted, it is still necessary to address insider liability with respect to non-distributing corporations, as the common law remains unsettled. We recommend that the current provisions be retained but limited to insiders of non-distributing corporations as has been done in the Ontario *Business Corporations Act*, section 138. This can be accomplished by adding a definition of "corporation" to section 131 and defining it as a "non-distributing corporation".

Technical issues concerning the provisions proposed in the Bill are addressed elsewhere in this submission in the event that this recommendation is not accepted; see sections III.I and IV.M, below.

RECOMMENDATION:

3. **The National Business Law Section of the Canadian Bar Association recommends that the provisions relating to section 131 of the *CBCA* in the Bill be deleted and replaced by a new definition of "corporation" in subsection 131(1) to limit the application of the current provisions to non-distributing corporations, as follows:**

   In this section, "corporation" means a corporation that is not a distributing corporation.

D. Shareholder Proposals: Clause 59

Shareholder proposals are the major means under the *CBCA* that enable shareholders to communicate with each other effectively in connection with shareholders meetings. This means was adopted in recognition of the fact that decision-making by shareholders today occurs prior to the meeting through proxies and is based on information contained in the management proxy circular for the meeting. Shareholder proposals must be included in such circulars so that they can propose matters of common concern to other shareholders in a manner that permits realistic consideration by shareholders, at minimal cost to the proposing shareholder - or to the corporation, as the cost of including a shareholder proposal in a circular is small.

In view of the importance of shareholder proposals in achieving shareholder democracy, discussion of section 137 in the Bill is included here in its totality, even though some of the matters raised might otherwise be viewed as technical.

i) Entitlement of beneficial owners

Subsection 137(1) as amended and new subsection 137(1.1) are, we understand, intended to reverse the Supreme Court of Canada's holding in *Verdun v. Toronto-Dominion*

Bank[3] to allow a beneficial owner of shares to submit a proposal. The Bill, however, does not clearly accomplish this result. Subsection 137(1) retains the words "person entitled to vote". Because subsection 51(1) of the *Act* declares that a corporation is entitled to rely on its share register to determine who is a person entitled to vote, the basis of the Supreme Court's *Verdun* decision is arguably retained in the Bill's provision. Subsection 137(1) should refer expressly to a beneficial owner of shares.

RECOMMENDATION:

4. The National Business Law Section of the Canadian Bar Association recommends that subsection 137(1) should be amended by deleting the words "a person entitled to vote at an annual meeting of shareholders may" and substituting:
a registered holder or beneficial owner of shares may in connection with an annual meeting of shareholders

ii) Eligibility requirements

Subsection 137(1.1) provides for eligibility requirements (to be established by regulation)[4] 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*[5] decision in the Québec courts.

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

4 See also our comment on section 261, in section II.I, below.

5 See *Michaud v. Banque Nationale du Canada*, [1997] R.J.Q. 547 (Que. Sup. Ct.), application for stay refused [1997] A.Q. No. 14 (C.A.).

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.

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. Although departmental officials do not agree, it remains our view that the proposed subsection should be deleted.[6]

RECOMMENDATION:

5. The National Business Law Section of the Canadian Bar Association recommends that subsection 137(1.1) be deleted.

iii) Limits on proposals

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

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6 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.

individual proposal. If so, the proposed change may prevent shareholders from submitting a number of related proposals at the same time, although we understand this was not intended. Again, despite the different view of departmental officials, we believe that subsection 137(3) should be retained in its present form.

RECOMMENDATION:

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

iv) Disclosure of deadline

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 and departmental officials were not in a position to address the content of the regulations with us. Unless a commitment is received from the Minister to include such a disclosure obligation in the regulations, we recommend the inclusion of this requirement in the *Act*, by adding "which anniversary date shall be disclosed in the management proxy circular for each annual meeting of shareholders" to proposed paragraph 137(5)(a).

RECOMMENDATION:

7. **The National Business Law Section of the Canadian Bar Association recommends that "*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), unless the Minister agrees to include this requirement in the regulations.**

v) Exclusion of proposals: social issues

At our prior appearance before this Committee, we were asked to address the new qualification in paragraph 137(5)(b.1). This provision is intended to prevent shareholder proposals from being used to turn shareholder meetings into public forums for discussion of social issues which do not affect the corporation or its shareholders, as such. It allows management to refuse to include a proposal, the primary purpose of which is clearly to promote general economic, political, racial, religious, social or similar issues, unless the person submitting the proposal demonstrates that it relates "in a significant way" to the business or affairs of the corporation. We understand that the qualification has raised concern among some investors because it places the burden of demonstrating significance on the person submitting a proposal.

A shareholder's right to submit a proposal should be clear. Ambiguity in a requirement will act as an impediment to the submission of proposals that are legitimate. The standard in paragraph 137(5)(b.1) is, in our view, likely to have this effect, as the meaning of "significant way" is anything but clear and will require a court application in specific cases, if a shareholder wishes a proposal included in the management proxy circular.

As a matter of principle, a shareholder should be entitled to raise any issue that is relevant to the business or affairs of the corporation. The ambiguity in the proposed standard and the concerns of other groups concerning the burden of proof, would be resolved if the

provision were amended to allow a proposal that presents a social issue so long as the issue relates to the corporation's business or affairs. This objective standard will exclude proposals that have no relation to a corporation and allow its shareholders to decide on those that do. We understand that the departmental officials do not disagree with this approach in principle.

RECOMMENDATION:

8. The National Business Law Section of the Canadian Bar Association recommends that paragraph 137(5)(b.1) be amended by substituting the following for the existing "unless" clause:

unless the proposal relates to the business or affairs of the corporation

vi) Proof of eligibility: procedure for refusals

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 management of 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.

We understand that the departmental officials agree with this comment in principle and may wish to address it in the regulations, possibly by extending the time period for refusal. In our view a simpler solution is desirable. It is not necessary to impose a two-stage process concerning proof of beneficial ownership of shares by a person submitting a proposal. Such proof can and should be required when the proposal is initially submitted. Any differences relating to it can then be resolved between management and the proposing shareholder or left to the remedial avenues under section 137.

If this analysis is accepted, subsection 137(1.2)(b) should be amended to require proof of beneficial ownership, if necessary, and subsection (1.4) should be deleted. (The number of shares held may still be relevant if shareholders propose to nominate a director, as to do so they must hold at least five per cent of the shares of a class; *CBCA*, section 137(4).)

RECOMMENDATION:

9. The National Business Law Section of the Canadian Bar Association recommends that subsection 137(1.4) be deleted and subsection 137(1.2)(b) be amended to read as follows (incorporating our earlier recommendation):

the number of shares held or owned by the person and the person's supporters, if applicable, and proof of beneficial ownership if the shares are not registered in their names.

E. Entitlement of Beneficial Owners: Clause 64

Subsection 144(1) gives a shareholder entitled to vote the right to apply to and request a court to order a meeting. Although it is distinguishable, this right is arguably limited by case law to registered shareholders as it uses the same concept of entitlement to vote as section 137.[7] The subsection should be amended to make clear that a beneficial owner of shares also has standing to apply.

RECOMMENDATION:

10. The National Business Law Section of the Canadian Bar Association recommends that subsection 144(1) be amended by deleting "shareholder who is entitled to vote" and substituting "*registered holder or beneficial owner of shares*".

F. Proxy "Solicitation": 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, and thus prohibit, 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

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7 See *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550. See also sections III.L and IV.P, below, which comment on technical changes required in subsection 144(1).

definition, this would 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. The former are exempted in the United States by SEC Rule 14a-2(b)(1) under the *U.S. Securities Exchange Act of 1934*. The latter exemption is necessary to allow shareholders to organize for a formal proxy solicitation. It is also necessary to exempt firms that provide proxy voting advice to their clients, as is done by SEC Rule 14a-2(b)(3). Departmental officials were not able to address these issues with us. Without a commitment to this effect from the Minister, further consideration of the amended definition is necessary.

RECOMMENDATION:

11. The National Business Law Section of the Canadian Bar Association recommends that the definition of "solicitation" be amended in the regulations, or failing a commitment from the Minister, in the *Act* to exclude:

(a) communications among shareholders concerning a management proposal for which no formal proxy is solicited by the communicating shareholders;

(b) communications among shareholders for the purpose of organizing a dissident proxy solicitation; and

(c) the furnishing of proxy voting advice by a person engaged in the business of providing such advice to a client who is a shareholder.

G. Going Private Transactions and Harmonization: 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)."[8] Proposed section 193 authorizes the adoption of such regulations and also authorizes the Director to grant exemptions from any of the prescribed requirements individually or on a class basis.

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 authority to exempt corporations from any of their provisions. This seems unnecessarily cumbersome in view of the fact that such corporations will almost always be subject to the rules and policies of the Ontario Securities Commission and Quebec Securities Commission in any event. The amendments would 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.[9]

In cases where a *CBCA* distributing corporation is not a reporting issuer in Ontario or Quebec an exempting power is arguably necessary. Such cases are likely to be rare. But if they do exist, the amendments to the *CBCA* would not be harmonizing its provisions with provincial securities laws, for such corporations would be subject to no such securities law

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

9 OSC Rule 61-501 and QSC Policy Q-27, respectively.

requirements. Rather, the Bill would impose Ontario's and Quebec's rules on all *CBCA* corporations, even if those rules would not otherwise apply to them. It is questionable whether this should be done, especially as these rules may deprive shareholders of such corporations of rights they might otherwise have under the oppression remedy and would impose additional obligations and requirements on transactions not otherwise subject to them.

Moreover, the Director under the *CBCA* has no experience in administering Ontario's and Quebec's going private requirements and would have no experience concerning exemption applications under them. Indeed, the Director was not intended to exercise such regulatory power under the *CBCA*. If the provisions are retained in their current form and an exempting power is thought necessary, it should be administered by the courts on a case by case basis, as is currently the case with exemptions from the *Act*'s takeover bid provisions; see *CBCA*, section 204.

In view of the nature of the proposed amendments, proposed section 193 should allow no more than adoption by reference of requirements applicable to going private transactions in distributing corporations to which they would otherwise be subject. This is necessary to avoid constitutional issues that may arise in the application of the provincial rules to federal corporations.

RECOMMENDATION:

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

H. Proportionate Liability and Small Investors: Clause 115

Proposed paragraph 237.5(1)(b) provides an exemption for small investors from the Bill's proportionate liability regime, with the exempting level to be established by regulation based on the amount of an investor's total financial interest in the corporation to which an action relates. The Department's proposed regulations (section 89) would set this level at $20,000. Investors with an investment no greater than $20,000 would be entitled to recover against all responsible defendants, who would be jointly and severally liable to them.

This standard and the similar standard in paragraph 237.5(1)(a) governing the courts' discretion do not reflect the approach or concerns in this Committee's earlier two reports on proportionate liability.[10] The exception recommended by this Committee was intended to protect individuals who might suffer unduly from a financial loss because of their personal financial position. The Committee focussed on sophistication as a means of identifying such persons and recommended an exemption for them based on net worth, however defined.

Paragraph 237.5(1)(b) in the Bill does not take this approach. Rather, it bases the exemption on the level of investment in a specific corporation. This standard has no relation to the Committee's goals; an investment of $20,000 in a corporation may or may not be held by an individual who cannot afford the loss incurred. In our view it is wholly arbitrary.

We understand that the reason for this change was a concern that requiring a person to reveal net worth may constitute an invasion of personal privacy and thus create a possibility that the provision will be found not to satisfy the *Canadian Charter of Rights and Freedoms*. In our view any such possibility is at most remote. Financial information has generally been held not to be at the core of the *Charter's* protection of privacy. It is

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10 See *Joint and Several Liability and Professional Defendants* (March, 1998); *Modified Proportionate Liability* (September, 1998).

commonly required of persons who bring an action or are sued. In any event, the Bill would not *require* disclosure by a plaintiff. Only plaintiffs who wish to overcome proportionate liability and who seek joint and several liability would have to disclose their financial position. In other words, only those who need the benefit of the exemption would make disclosure and such disclosure would be at their choice.

RECOMMENDATION:

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

(a) paragraph 237.5(1)(a) be amended by deleting "had a financial interest in the corporation" and substituting "*had a net worth*"; and

(b) paragraph 237.5(1)(b) be amended by deleting "total financial interest in the corporation" and substituting "*net worth*".

I. Notice and Comment Procedure: Clause 125

i) Regulations

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 in the *Canada Gazette* and elsewhere 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*, although not necessarily in the *Canada Gazette*. Subsections 261(2) and (3) should be retained.

RECOMMENDATION:

14. 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.

ii) Rulemaking by the Director

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.[11] Both of these powers are forms of rulemaking. They, too, should be subject to a notice and comment procedure. A section to this effect should be added to the Bill.

RECOMMENDATION:

15. 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 to grant class exemptions (if this is retained) subject to the notice and comment procedure in subsections 261(2) and (3).

J. Unconfined Rulemaking Power: Clause 130

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[11] We recommend elsewhere that the Director not be granted this type of rulemaking power; see section II. G, above and section IV.B, Recommendation 40, below.

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:

16. 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 in the *Act*.

III. TECHNICAL ISSUES ACCEPTABLE IN PRINCIPLE TO INDUSTRY CANADA

A. Financial Assistance: 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. For these reasons we support its repeal.

B. Shareholder Immunity: 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*. These provisions also make shareholders liable to return funds received by them as a result of a corporate default.

RECOMMENDATION:

17. 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).

C. Share Transfers: Subclause 30(4)

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. This is necessary as the preamble to the subsection, as drafted, omits unanimous shareholder agreements.

18. 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.

D. Directors' Consent: Subclause 38(2)

i) Continuing directors

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 and unnecessarily cumbersome.

RECOMMENDATION:

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

(a) subsection 106(10) does not apply to a director who is reelected or reappointed where there is no break in the director's term of office; and

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

ii) Withdrawal of consent

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:

20. The National Business Law Section of the Canadian Bar Association recommends that subsection 106(7) should be amended by adding "*lack of consent*" after "by reason of the" and before "disqualification" where they appear in the subsection.

E. Floating Boards - Filling Vacancies: 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.

RECOMMENDATION:

21. 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 minimum 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.

We further suggest that the words "or minimum number" be reinserted where proposed to be deleted from subsection 111(2) and from the penultimate line of paragraph 111(3)(a) on page 21 of Bill S-19, and that "*or minimum or maximum number*" be inserted in line 36 of paragraph 111(3)(a) after "number" and before "of directors".

RECOMMENDATION:

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

(a) "*or minimum number*" be reinserted where proposed to be deleted from subsection 111(2) and from the penultimate line of paragraph 111(3)(a); and

(b) "*or minimum or maximum number*" be added in line 36 of paragraph 111(3)(a) after "number" and before "of director".

F. Minutes: Clauses 45 and 62

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. These provisions should be deleted.

RECOMMENDATION:

23. The National Business Law Section of the Canadian Bar Association recommends that clauses 45 and 62 of Bill S-19 be deleted.

G. Interested Directors and Officers: Clause 48

The words "by reason only of his or her holding the office of director or officer" in proposed subsection 120(7.1) create confusion. It is not clear whether they refer to all or some of the types of conflict identified in subsection 120(1). In any event they are unnecessary. They should be deleted.

RECOMMENDATION:

24. The National Business Law Section of the Canadian Bar Association recommends that "by reason only of his or her holding the office of director or officer" be deleted from subsection 120(7.1).

H. Indemnification of Directors and Officers: 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)."

RECOMMENDATION:

25. 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).

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 successful" if it is to represent an improvement.

RECOMMENDATION:

26. 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).

I. Trading by Insiders: Clause 54

i) Speculation by insiders

Subsection 130(4) suggests a fine of the greater of $1,000,000 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 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 or three times the profit made.

RECOMMENDATION:

27. 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 or three times the profit made.

ii) Deemed insiders and acquisitions

In view of paragraphs 131(1)(c), (f) and (g), defining "insider", subsection 131(3) is no longer necessary. It should be repealed. (See also the following comment on acquirers.)

RECOMMENDATION:

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

iii) Offerors and other acquirers: subsections 131(1)(g) and 131(3)

More importantly subsection 131(3) highlights a serious omission in the Bill. Under the *CBCA* and provincial securities laws a potential acquirer is entitled to trade in shares of the target corporation prior to the announcement of its bid. This enables it to exploit its own information, namely, its intention to make an acquisition. But insiders of the acquirer are not allowed to buy shares in the intended target corporation for their own profit because of the unfair advantage they have over shareholders of the proposed target corporation.[12]

The Bill treats such acquirers as insiders of the target in subsection 131(1)(g). It should not with respect to their own information, but they should be treated as insiders of a target corporation if they obtain confidential information from it.

Under provincial legislation such acquirers cannot inform another of their intention to make a bid or other acquisition, except in the necessary course of business. Thus, if they are excluded as insiders for trading purposes, they should still be treated as insiders under the provision creating liability for tipping (section 131(6)) - as they are. This makes drafting difficult, given the approach taken to the definition of "insider" in the Bill.

We recommend that paragraph 131(1)(g) be deleted and that the repealed subsection 131(3) be replaced by a provision addressing these issues. A draft provision is contained

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12 See P. Anisman, *Takeover Bid Legislation in Canada: A Comparative Analysis* (1974) at 115-41.

in our recommendation. Discussions with departmental officials lead us to believe they agree in principle with this recommendation.

RECOMMENDATION:

29. The National Business Law Section of the Canadian Bar Association recommends that paragraph 131(1)(g) be deleted and that subsection 131(3) be replaced by the following provision:

(3) For purposes of this section,

(a) an insider, affiliate or associate of a person who proposes to make a take-over bid, as defined in the regulations, for securities of a corporation or of a person who proposes to enter into a business combination with a corporation is an insider of the corporation, and

(b) a person who proposes to make a take-over bid for securities of a corporation or to enter into a business combination with a corporation

(i) is an insider of the corporation with respect to information obtained from the corporation, and

(ii) is an insider of the corporation for purposes of subsection (6).

iv) Scope of liability for trading in a public market

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.[13] The Bill in subsection 131(6) adopts a privity requirement following provincial securities laws. This creates additional confusion. In our earlier submission we said that this question should be directly addressed. We understand that departmental officials would impose a privity requirement in both cases.

v) Accountability to the corporation

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) 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:

30. 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".

J. Varying Notice Periods: 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, shortening the notice period for a meeting of the shareholders of non-distributing corporations should not have to be elevated to the level of articles.

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13 See Anisman, "Insider Trading under the *Canada Business Corporations Act*," in *Meredith Memorial Lectures 1975* (1975) 151 at 234-43.

We understand that departmental officials accept this recommendation with respect to permitting the by-laws for non-distributing corporations to specify a shorter notice period, but not with respect to a unanimous shareholder agreement. As such agreements are invariably intended to supercede the by-laws, we find this refusal unnecessarily formalistic. We reiterate our view that a unanimous shareholder agreement is a corporate constitutional document and should be able to contain any provision that may be contained in a corporation's by-laws with similar effect. This understanding is also reflected in our comments in sections IV.E and IV.P, below.

RECOMMENDATION:

31. The National Business Law Section of the Canadian Bar Association recommends that subsection 135(1.1) should be amended to allow a non-distributing corporation to have a notice period specified in the "*articles or by-laws of the corporation or a unanimous shareholder agreement*."

K. Lending Agreements and Voting Rights: Clause 61

In our view proposed subsection 140(5) in clause 61 is unnecessary. We understand that this section is intended to resolve issues that have arisen when proxies for more than the relevant number of shares have been deposited for a meeting of shareholders, resulting in overvoting of shares. This is an issue that results from the fact that shares are held in depositories and not by their beneficial owners. Such difficulties cannot be resolved by changing a law, especially this law. They must be resolved as matters of practice. Moreover, proposed subsection 140(5) 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 (*CBCA*, section 51(1)) and could cause confusion, possibly

with respect to the validity of resolutions passed at a meeting at which shares were incorrectly voted. We understand that the departmental officials agree in principle and are considering this provision. The provision should be deleted.

RECOMMENDATION:

32. The National Business Law Section of the Canadian Bar Association recommends that proposed clause 61 of Bill S-19 be deleted.

L. Court-Ordered Meetings: Clause 64

Paragraph 144(1)(a) unnecessarily confines the circumstances in which a court may order a meeting of shareholders. A court should be able to order a meeting if it is impracticable "within the time or in the manner in which" the meeting is to be called.

RECOMMENDATION:

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

M. Possible Regulatory Gap: 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 regulatory framework governing such bids, as some aspects of corporate governance may be beyond provincial jurisdiction over federal corporations.[14]

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[14] See 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, 1997) 63 at 68-69.

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:

34. 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.

N. Issuer Bids: Clause 99

Proposed subsection 206(7.1) addresses compulsory acquisitions when a corporation repurchases its own shares by means of a take-over bid. Line 3 of this subsection 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:

35. 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 its shares is...*".

O. Corporate Revival: Clause 102

The amendment to subsection 209(5) declares legal actions after a corporation's dissolution and preceding its revival to be valid and effective, unless they are with an

affiliate of the corporation. There is no need for special provisions for such legal actions, as other provisions of the *Act* deal with conflicts of interest. Such legal actions should not be deemed invalid and ineffective.

RECOMMENDATION:

36. The National Business Law Section of the Canadian Bar Association recommends that subsection 209(5) be amended by deleting "other than those with its affiliates".

P. Signing Notices and Returns: Clause 128

Requiring the notices and returns listed in subsection 262.1(2) to be signed by an "individual who has the relevant knowledge of the corporation" and who has also been "authorized to do so by the directors" effectively destroys the usefulness of allowing such documents to be signed by a knowledgeable individual. This would impose unnecessary formalism on the conduct of corporate affairs and would not further any necessary governmental goal. The requirement for director authorization should be deleted.

RECOMMENDATION:

37. 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.

IV. OTHER TECHNICAL ISSUES

A. Civil Law Concepts: Subclauses 1(3) and 46(1)

The Bill's use of civil law concepts, for example in subclause 1(3) "liquidator of the succession" and subclause 46(1) "solidarily", is confusing and unnecessary. For example, subsection 118(1) in subclause 46(1) first uses the words "or solidarily" along 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). We understand that this approach to drafting has been adopted by the government to reconcile common and civil law concepts. We recommend eliminating repetitious terminology. At a minimum, if this approach is retained, all provisions incorporating civil law concepts should be reviewed to ensure that the meaning is the same in both English and French.

RECOMMENDATION:

38. 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 desirable to ensure that the meaning is the same in both English and French.

B. Distributing Corporations and the Director's Discretion: Subclause 1(7)

i) Appropriate standard

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'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. Securities commissions engage in wide-ranging regulation of corporate issuers and others under broad public interest powers. In our view, this broad public interest standard is a regulatory standard that 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:

39. The National Business Law Section of the Canadian Bar Association recommends that the existing standard in subsection 2(8) of the *CBCA* be retained in proposed subsection 2(6).

ii) Class rulings

Subsection 2(7) would give 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.[15]

RECOMMENDATION:

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15 See also section II.I and Recommendation 15, above.

40. The National Business Law Section of the Canadian Bar Association recommends that proposed subsection 2(7) be deleted.

C. Director's Discretion: Clause 4

Subsection 8(2) authorizes the Director to refuse to issue a certificate of incorporation if a notice indicates that a corporation would not comply with the *CBCA* if it came into existence. 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 broad discretion to refuse incorporation.[16] The Director's discretion under the *Act* is usually specific, for example with respect to corporate names; *CBCA*, section 12. As the notices referred to in this subsection are also quite specific, relating to the location of a registered office and a notice of directors, 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 subsection 19(1) or section 105."

RECOMMENDATION:

41. The National Business Law Section of the Canadian Bar Association recommends that the final words of subsection 8(2) should be amended to read "*would not be in compliance with subsection 19(1) or section 105*."

D. Shareholding by Subsidiary: 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. We understand that Revenue Canada opposes this recommendation. It is our view that

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16 See R.W.V. Dickerson, above note 1, at 18-19.

flexibility for corporate conduct requires this amendment. If tax liability is a goal, it should be dealt with in the *Income Tax Act*.

RECOMMENDATION:

42. The National Business Law Section of the Canadian Bar Association recommends that a new paragraph 31(3)(c) be added to permit a subsidiary to hold shares in its parent where necessary to avoid adverse tax consequences.

E. Lien on Shares: Clause 27

Subsection 45(2) permits a corporation's articles to provide that it has a lien on shares of a registered shareholder who is indebted to the corporation. The subsection should permit the lien on shares to be specified in the by-laws or a unanimous shareholder agreement, as well as in the articles of incorporation.

RECOMMENDATION:

43. The National Business Law Section of the Canadian Bar Association recommends that subsection 45(2) should permit a lien on shares to be specified in a corporation's by-laws or a unanimous shareholder agreement, as well as in its articles of incorporation.

F. Restrictions on Transfer - Distributing Corporations: 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. It is not necessary for classes and series of shares of a distributing corporation that are not publicly distributed.

RECOMMENDATION:

44. The National Business Law Section of the Canadian Bar Association recommends that the prohibition in subsection 49(9) of the *Act* apply only to a class or series of shares which was or is part of a distribution to the public.

G. Distributing Corporations and Corporate Obligations: Clauses 35 and 77

Proposed subsection 102(2), which specifies the minimum number of directors, would limit its requirement to distributing corporations. Despite the Bill's new definition of "distributing corporation", the subsection continues to state that this requirement does not apply to a corporation unless it has outstanding shares held by more than one person. This reference should be deleted in light of the new limitation in the subsection. Every distributing corporation should have at least three directors, at least two of whom will be outside directors. The same comment applies to the requirement to file annual financial statements in subsection 160(1). In other words, all distributing corporations should have the same obligations, until they become non-distributing corporations.

RECOMMENDATION:

45. The National Business Law Section of the Canadian Bar Association recommends that subsections 102(2) and 160(1) be amended to delete "any of the issued securities of which remain outstanding and are held by more than one person".

H. Floating Boards - Fixing Numbers: 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 on 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:

(a) 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

(b) 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:

46. 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) to read 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 a 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.

I. Resident Directors and Board Committees: Subclause 43(1)

If the directors' residency requirements are 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:

47. The National Business Law Section of the Canadian Bar Association recommends that, if they are retained, subsections 114(3) and (4) should apply only to non-delegable decisions of the board.

J. Communications among Directors: Subclause 43(2)

Proposed subsection 114(9) would permit directors to use electronic means of communication, if they are all able "to communicate adequately with each other". What is "adequate communication" for the purposes of this new subsection? 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. This clause should be deleted and the existing subsection left as it now is.

RECOMMENDATION:

48. The National Business Law Section of the Canadian Bar Association recommends that subclause 43(2) be deleted from the Bill.

K. Void Contracts: Clause 48

The amended subsection 120(7) would substitute the word "invalid" for "void or voidable". There is a difference between a contract that is invalid (void) and one that may be declared invalid, but is valid until so declared (voidable). The existing language is clearer, especially in light of the common law,[17] and should be retained. The same comment applies to proposed subsection 120(7.1).

RECOMMENDATION:

49. 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". In addition, in subsection 120(7.1) the words "*void or voidable*" should be substituted for "invalid".

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17 See *Aberdeen Ry. v. Blaikie*, (1854) 2 Eq. 1281 (interested directors' contract void).

L. Reliance on Professional Advice: Clauses 50 and 110

The proposed amendment of paragraph 123(4)(b) would delete the existing list of professionals whose status invariably lends credibility to their advice and substitute a generic category exclusively. We understand the amendment is merely meant as a drafting change. Some members of our subcommittee believe this change may exclude some persons who are currently covered; others think it may remove limitations. In either case it will create uncertainty without any benefit. To avoid a narrow or overly broad reading of "profession", the existing language in subsection 123(4) of the *Act*, which expressly lists lawyers, accountants, appraisers and engineers, should be retained. This comment also applies to the reference to professionals in subsection 222(2)(b) in clause 110.

RECOMMENDATION:

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

M. Insiders: Clause 54

i) Indirect insiders

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. This change reflects the definition of "insider" in provincial securities legislation and was intended for harmonization purposes. But the provincial definition was designed to govern insider reporting. These anti-avoidance words are not needed for a liability provision based on knowledge, which is all that the *CBCA* would retain. These words create uncertainty and should be deleted.

RECOMMENDATION:

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

ii) Undefined insiders

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 far from clear that this regulatory power to expand the scope of insider liability is necessary. In any event, civil liability should not be imposed by regulation. This raises a serious issue of policy, but is discussed here in view of our more basic recommendation in section II.C, above.

RECOMMENDATION:

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

iii) Tippers' liability

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.[18] We understand that departmental officials are reluctant to make this change because it would go beyond current provincial legislation.

RECOMMENDATION:

53. The National Business Law Section of the Canadian Bar Association recommends that subsection 131(6) be amended

(a) by adding after "corporation" and before "is liable" in line 25 on page 35 of the Bill "*or who, when in possession of such information, causes, procures or advises another person to purchase or sell a security of the corporation*", and

(b) by adding after "information" in line 30 on page 35 of the Bill the words "*or that was so caused, procured or advised to purchase or sell*,"

iv) Permissible communication

The communication of confidential information among corporate employees and a corporation's advisers is necessary for the corporation itself to exploit it. Such communications are exempt from the prohibition against tipping in provincial securities legislation if they are made "in the necessary course of business." Paragraphs 131(6)(c) and (d) do not adopt this standard, but provide instead that an insider will not be liable for tipping if information is given to another "in the ordinary course of business." The standard

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[18] 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.

in the Bill is softer than the provincial standard and may permit communications that are not necessary to implement the corporation's plans or otherwise utilize the information. It may also detract from the obligation of corporations to adopt policies to ensure that confidential information is not communicated to employees and others who do not need it, even if they would receive it in the ordinary course of business. Paragraphs 131(6)(c) and (d) should be amended to correspond to the standard in provincial securities legislation.

We believe that the departmental officials would likely agree with this recommendation. It is included in this section because we have not discussed it with them, as we noticed this change only when reviewing the provisions of the Bill again in connection with our preparation of this submission.

RECOMMENDATION:

54. The National Business Law Section of the Canadian Bar Association recommends that paragraphs 131(6)(c) and (d) be amended by deleting "ordinary" and substituting "*necessary*" in both paragraphs.

v) Joint and several accountability

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. This too would go beyond current provincial legislation.

RECOMMENDATION:

55. 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.

N. Presumptions and By-laws: 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 new Part XX.1, particularly proposed paragraph 252.4(a). In our view, further consideration of this provision is necessary.

RECOMMENDATION:

56. The National Business Law Section of the Canadian Bar Association recommends that subsection 132(4) be amended by deleting "if the by-laws so provide" and substituting "*unless the by-laws provide otherwise*", if our concerns about meaningful participation are addressed by the Department.

O. Validity of Shareholder Meetings: 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 be interpreted to 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 *Act*.

RECOMMENDATION:

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

P. Unanimous Shareholder Agreements: Clause 64

We have previously said that a unanimous shareholder agreement invariably operates in the same manner as by-laws and is intended to supercede them.[19] In addition to expressly referring to the manner of calling a meeting required by the by-laws, paragraph 144(1)(b) should refer to a unanimous shareholder agreement so that a court may consider the requirements of such an agreement when determining whether to order a meeting of shareholders.

RECOMMENDATION:

58. The National Business Law Section of the Canadian Bar Association recommends that paragraph 144(1)(b) should be amended to read "*... in the manner required by this Act, the by-laws or a unanimous shareholder agreement*".

Q. Notice of Unanimous Shareholder Agreement: Clause 66

We see no valid 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

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19 See sections III.J and IV.E, above.

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 purpose, except possibly data collection. In our view this provision should be deleted.

RECOMMENDATION:

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

R. Superfluous Additions: Subclauses 94(2) and 96(1)

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

Going private and squeeze out transactions must be accomplished by means of transactions already subject to subsections 190(1) and 192(1), as is clear from the definition of "going private transaction" in OSC Rule 61-501 and QSC Policy Q-27. 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:

60. 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.

S. Definition of "Take-over Bid": 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". A take-over bid should be simply defined to mean an offer "made by a person ...".

RECOMMENDATION:

61. The National Business Law Section of the Canadian Bar Association recommends that the definition of "take-over bid" in subsection 206(1) should be modified to read as follows:

take-over bid means an offer made by a person...

T. Documents in Electronic Form: Clause 121

Clarification should be made in the *CBCA* or the 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 a written consent every time a person sends an electronic document rather than paper. It may be desirable not to require written consent where there is evidence of delivery of an electronic reply to an electronic document or request.

Under the definition of "electronic document" in proposed section 252.1 the status of a faxed proxy is unclear. If a faxed document is an "electronic document", then a proxy that is faxed to tabulators at a corporate meeting may be subject to a number of new requirements. Faxed documents could require consent and verification procedures not presently performed or commercially feasible. Clarification is needed to avoid this potential problem.

Under proposed paragraph 252.5(1)(a) information that is created in an electronic document must be accessible so as to be usable for subsequent reference. It is not clear by whom the document must be accessible. Is it the creator of the document, the addressee or a third party? In contrast, where information is provided in an electronic document under paragraph 252.5(2)(a), the provision specifies the addressee as the party to whom the information in the electronic document must be accessible In short, the accessibility reference in paragraph 252.5(1)(a) requires clarification.

Under proposed section 252.7, a signature or execution requirement can be met by using an electronic technology or process if the factors set out in the section, which generally relate to matters of authenticity and validity, can be "proven". The requirement for "proof" may set an inappropriate and commercially unreasonable standard in the context of corporate meetings where presumptions of validity play a part. This potential difficulty suggests that further consideration or clarification may be necessary.

Instead of "proven", the standard of validity might be that the technology or process permit the specified factors to be "determined" or "reasonably determined". The issue of how high this standard should be will be a major issue for industry players and should be established only after consultation. It would be advisable to leave the means of determining these elements to specification in regulations.

RECOMMENDATION:

62. The National Business Law Section of the Canadian Bar Association recommends that the standards specified in proposed Part XX.1 be left to regulations so that they may be clarified and, particularly, that proposed section 252.7 be amended by deleting the word "proven" and substituting "*determined in accordance with prescribed procedures or standards*".

U. Correction of Filed Documents: Clause 130

i) Request by the Director

Under the proposed amendment to subsection 265(1), the Director may ask directors and shareholders to send to the Director documents necessary to comply with the Act or to take such other steps as the Director may require to correct a document. This provision may cause unnecessary inconvenience as such matters can frequently be satisfactorily resolved by corporate officers or others without a need to convene a meeting of directors or shareholders. The class of persons of whom such requests may be made should be expanded to include officers and a resolution should not always be required. Rather, such persons should only be required to take steps necessary to satisfy a request from the Director.

RECOMMENDATION:

63. The National Business Law Section of the Canadian Bar Association recommends that subsection 265(1) should be amended by inserting before the word "directors" in line 3 of the subsection the word "*officers*," and by deleting the words "pass the resolutions and" and substituting the words "*take the steps necessary to*".

ii) Request by a corporation

Paragraph 265(3)(a) requires a request from a corporation to correct a filed document to be approved by the directors of the corporation, unless the error is "obvious". It should also address the frequent situations where an error 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, for example, an amalgamation that takes effect one day prior to the date the corporation authorized.

Currently, the Director does correct articles in such situations. In our view paragraph 265(3)(a) should not deprive the Director of this authority, as it now would. Allowing such authority would not create a potential for abuse, as the Director has sufficient discretion under paragraph 265(3)(b) to ensure that abuses do not occur.

RECOMMENDATION:

64. The National Business Law Section of the Canadian Bar Association recommends that paragraph 265(3)(a) be amended to read:

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

V. 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 is unnecessary and in principle undesirable.

RECOMMENDATION:

65. The National Business Law Section of the Canadian Bar Association recommends that the adoption of gender neutral language avoid the

confusion of singular and plural by using, where necessary, the pronouns of both genders.

V. CONCLUSION

The National Business Law Section of the Canadian Bar Association hopes that its comments will assist in improving Bill S-19. We are pleased to continue to offer our assistance.

VI. SUMMARY OF RECOMMENDATIONS

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

1. **(a) the minimum percentage of resident Canadian directors be deleted by repealing subsection 105(3);**
   (b) 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;
2. **that subclause 43(1) be deleted;**
3. **the provisions relating to section 131 of the CBCA in the Bill be deleted and replaced by a new definition of "corporation" in subsection 131(1) to limit the application of the current provisions to non-distributing corporations, as follows:**

   In this section, "corporation" means a corporation that is not a distributing corporation;
4. **subsection 137(1) be amended by deleting "a person entitled to vote at an annual meeting of shareholders may" and substituting:**

   a registered holder or beneficial owner of shares may in connection with an annual meeting of shareholders;
5. **subsection 137(1.1) be deleted;**
6. **subsection 137(3) be retained in its present form;**
7. **"*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), unless the Minister agrees to include this requirement in the regulations;**
8. **paragraph 137(5)(b.1) be amended by substituting the following for the existing "unless" clause:**

unless the proposal relates to the business or affairs of the corporation;

9. subsection 137(1.4) be deleted and subsection 137(1.2)(b) be amended to read as follows (incorporating our earlier recommendation):

***the number of shares held or owned by the person and the person's supporters, if applicable, and proof of beneficial ownership if the shares are not registered in their names*;**

10. subsection 144(1) be amended by deleting "share holder who is entitled to vote" and substituting "*registered holder or beneficial owner of shares*";

11. the definition of "solicitation" be amended in the regulations, or failing a commitment from the Minister, in the *Act* to exclude:

(a) communications among shareholders concerning a management proposal for which no formal proxy is solicited by the communicating shareholders;

(b) communications among shareholders for the purpose of organizing a dissident proxy solicitation; and

(c) the furnishing of proxy voting advice by a person engaged in the business of providing such advice to a client who is a shareholder;

12. proposed section 193 should only authorize adoption by reference of requirements otherwise applicable to going private transactions in distributing corporations;

13. (a) paragraph 237.5(1)(a) be amended by deleting "had a financial interest in the corporation" and substituting "*had a net worth*"; and

(b) paragraph 237.5(1)(b) be amended by deleting "total financial interest in the corporation" and substituting "*net worth*";

14. the publication and representation requirements in subsections 261(2) and (3) be retained;

15. **a section should be added to the Bill to make the Director's authority to adopt forms and to grant class exemptions (if this is retained) subject to the notice and comment procedure in subsections 261(2) and (3);**
16. **the circumstances in which the Director may cancel a certificate should be defined in the *Act*;**
17. **that subsections 118(4) and (5) be added to the list of exceptions to shareholder immunity in subsection 45(1);**
18. **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;**
19. **section 106 be amended to provide that:**
    (a) **subsection 106(10) does not apply to a director who is reelected or reappointed where there is no break in the director's term of office; and**
    (b) **if a person elected or appointed consents in writing after the time period mentioned in subsection 106(9), the election or appointment is valid;**
20. **Subsection 106(7) be amended by adding "*lack of consent*" after "by reason of the" and before "disqualification" where they appear in the subsection;**
21. **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 minimum 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*;**
22. (a) **"*or minimum number*" be reinserted where proposed to be deleted from subsection 111(2) and from the penultimate line of paragraph 111(3)(a); and**

(b) "*or minimum or maximum number*" be added in line 36 of paragraph 111(3)(a) on page 21 of Bill S-19 after "number" and before "of director";

23. clauses 45 and 62 of Bill S-19 be deleted;

24. "by reason only of his or her holding the office of director or officer" be deleted from subsection 120(7.1);

25. 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);

26. 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);

27. 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 or three times the profit made;

28. subsection 131(3) of the *CBCA* be repealed;

29. paragraph 131(1)(g) be deleted and that subsection 131(3) be replaced by the following provision:

(3) For purposes of this section,

(a) an insider, affiliate or associate of a person who proposes to make a take-over bid, as defined in the regulations, for securities of a corporation or of a person who proposes to enter into a business combination with a corporation is an insider of the corporation, and

(b) a person who proposes to make a take-over bid for securities of a corporation or to enter into a business combination with a corporation

(i) is an insider of the corporation with respect to information obtained from the corporation, and

(ii) is an insider of the corporation for purposes of subsection (6);

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

31. subsection 135(1.1) should be amended to allow a non-distributing corporation to have a notice period specified in the "*articles or by-laws of the corporation or a unanimous shareholder agreement*.";

32. proposed clause 61 of Bill S-19 be deleted;

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

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

35. the third line of subsection 206(7.1) be amended to read "*...shares of a class of its shares is...*";

36. subsection 209(5) be amended by deleting "other than those with its affiliates";

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

38. 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 desirable to ensure that the meaning is the same in both English and French;

39. the existing standard in subsection 2(8) of the *CBCA* be retained in proposed subsection 2(6);

40. proposed subsection 2(7) be deleted;

41. the final words of subsection 8(2) should be amended to read "*would not be in compliance with subsection 19(1) or section 105*.";

42. a new paragraph 31(3)(c) be added to permit a subsidiary to hold shares in its parent where necessary to avoid adverse tax consequences;

43. subsection 45(2) should permit a lien on shares to be specified in a corporation's by-laws or a unanimous shareholder agreement, as well as in its articles of incorporation;

44. the prohibition in subsection 49(9) of the *Act* apply only to a class or series of shares which was or is part of a distribution to the public;

45. subsections 102(2) and 160(1) be amended to delete "any of the issued securities of which remain outstanding and are held by more than one person";

46. Bill S-19 be revised by enacting new subsections 112(3) and 112(4) and by amending subsection 106(8) to read 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 a 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*;**

47. if they are retained, subsections 114(3) and (4) should apply only to non-delegable decisions of the board;

48. subclause 43(2) be deleted from the Bill;

49. amendments not be made to subsection 120(7) to substitute the word "invalid" for "void or voidable". In addition, in subsection 120(7.1) the words "*void or voidable*" should be substituted for "invalid";

50. the existing language of paragraphs 123(4)(b) and 222(2)(b) of the *CBCA* be retained;

51. "directly or indirectly" be deleted from paragraph 131(1)(d);

52. proposed paragraph 131(1)(j) be deleted from the Bill;

53. subsection 131(6) be amended

(a) by adding after "corporation" and before "is liable" in line 25 on page 35 of the Bill "*or who, when in possession of such information, causes, procures or advises another person to purchase or sell a security of the corporation*", and

(b) by adding after "information" in line 30 on page 35 of the Bill the words "*or that was so caused, procured or advised to purchase or sell*,";

54. paragraphs 131(6)(c) and (d) be amended by deleting "ordinary" and substituting "*necessary*" in both paragraphs;

55. 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;

56. subsection 132(4) be amended by deleting "if the by-laws so provide" and substituting "*unless the by-laws provide otherwise*", if our concerns about meaningful participation are addressed by the Department;

57. section 133 state that meetings are not invalid solely because they are not held within the period prescribed by the *Act*;

58. paragraph 144(1)(b) should be amended to read "*... in the manner required by this Act, the by-laws or a unanimous shareholder agreement*".

59. subsection 146(7) of Bill S-19 be deleted;

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

61. the definition of "take-over bid" in subsection 206(1) should be modified to read as follows:

take-over bid means an offer made by a person...;

62. the standards specified in proposed Part XX.1 be left to regulations so that they may be clarified and, particularly, that proposed section 252.7 be amended by deleting the word "proven" and substituting "*determined in accordance with prescribed procedures or standards*";

63. subsection 265(1) should be amended by inserting before the word "directors" in line 3 of the subsection the word "*officers*," and by deleting the words "pass the resolutions and" and substituting the words "*take the steps necessary to*";

64. paragraph 265(3)(a) be amended to read:

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

65. the adoption of gender neutral language avoid the confusion of singular and plural by using, where necessary, the pronouns of both genders.