CORPORATION LAW

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The most significant event in the general field of corporation and securities law during 1970 was the enactment of the Ontario Business Corporations Act; [1] amendments were also made to the Canada Corporations Act, [2] though these were for the most part of lesser interest. Judicial contributions to the law were few and thoroughly unremarkable. In addition, the Ontario Securities Commission *Merger Report* [3] was published.

I. ONTARIO BUSINESS CORPORATIONS ACT

The new Ontario Business Corporations Act is the product of almost five years' work and reflection that began with the establishment of the Select Committee on Company Law (the Lawrence Committee) in 1965. That Committee published an interim report in 1967, [4] many of the recommendations of which were embodied in Bill 125, introduced in 1968, but allowed to die. [5] That Bill was re-introduced, somewhat amended, in 1970, [6] was passed in June, and proclaimed in force on January 1, 1971.

One may not necessarily share the enthusiasm of former Premier Robarts, who said, on the first reading of Bill 125, that it represented "the dawn of a new era" and was a "shareholders' bill of rights and a directors' code of ethics." [7] One must nevertheless concede that it is an immensely significant piece of legislation, that is likely to have a profound effect upon legislative developments in the field within Canada, and perhaps outside. It deserves far closer attention than the fairly selective and cursory treatment of some of its more important features that will be given to it here.

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[1] Ont. Stat. 1970 c. 25 [hereinafter cited as B.C.A.].

[2] CAN. REV. STAT. c. 53 (1952) *as amended* Can. Stat. 1969-70 c. 70 [hereinafter cited as Canada Corporations Act].

[3] REPORT OF THE COMMITTEE OF THE ONTARIO SECURITIES COMMISSION ON THE PROBLEMS OF DISCLOSURE RAISED FOR INVESTORS BY BUSINESS COMBINATIONS AND PRIVATE PLACEMENTS (1970) [hereinafter cited as MERGER STUDY]. On the assumption that the recommendations of the Committee will eventually find their way into legislation, the Report will not be discussed in this article.

[4] INTERIM REPORT OF THE SELECT COMMITTEE ON COMPANY LAW (Ont. 1967) [hereinafter cited as LAWRENCE REPORT]. *Cf.* Prentice, Book Review, 46 CAN. B. REV. 163 (1968).

[5] Bill 125, The Business Corporations Act, 1968 (Ont.).

[6] Bill 61, (Ont. 1970).

[7] ONT. LEG. ASS. DEB. May 17, 1968, at 3092, 3089.

A. *Incorporation Procedure*

The act effects a major change in incorporation procedure. The old system of discretionary incorporation by letters patent, always an anachronism, [8] is abandoned, following the recommendations of the Lawrence Committee, [9] in favour of a system of incorporation by right. [10] The Ontario system is thus brought into line with those in most other jurisdictions. The position of the incorporating officer becomes analogous to that of the Registrar in the memorandum jurisdictions, [11] and provided that the prescribed documents in proper form are filed, incorporation must follow. [12] Only one incorporator is required, who may be a corporation. [13]

B. *Distinction Between Private and Public Corporations*

The distinction between private and public corporations was first introduced into English legislation early in this century. [14] It was never a workable distinction, and in recent years has been under steady attack. [15] The Lawrence Committee recommended that it be abandoned, [16] and in its place, there has been substituted a distinction between corporations whose shares are being offered to the public, and other corporations. The former class is defined [17] to include any "body corporate" in respect of which a prospectus covering any of its securities has been filed with the Securities Commission, so long as any of the securities are outstanding, and any corporation having shares listed and posted for trading on a recognized stock exchange. The significance of the new distinction, which does not turn, as did the old, upon arbitrary mathematical considerations or technical constitutional provisions, [18] is principally evident in the provisions relating to proxies, [19] insider trading, [20] disclosure [21] and the like. These, of course, are the areas in which one expects some distinction to be drawn, with more onerous obligations being imposed upon public-issue corporations than upon others. The new legislation also distinguishes between the two kinds of corporations in a number of other respects, however, such as in relation to trust indentures, [22] number of directors, [23] and, to some extent, redemption of special shares. [24]

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[8] *Cf.* Currie, *The First Dominion Companies Act*, 28 CAN. J. ECON. & POL. SCI. 387, at 396-401 (1962).

[9] LAWRENCE REPORT 1-4.

[10] B.C.A. §§ 4, 5.

[11] *Cf.* BUCKLEY ON THE COMPANIES ACTS 41 (13th ed. J. Lindon 1957).

[12] B.C.A. § 5.

[13] *Id.* § 4(1). *Cf.* LAWRENCE REPORT 5-7.

[14] Companies (Consolidation) Act, 1908, 8 Edw. 7, c. 69.

[15] *See, e.g.*, BOARD OF TRADE, REPORT OF THE COMPANY LAW COMMITTEE, CMND. 1749, paras. 55-67 (1962) [hereinafter cited as JENKINS REPORT]. *Cf. also*, WEDDERBURN, COMPANY LAW REFORM 5-8 (Fabian Tract 363, 1965).

[16] LAWRENCE REPORT 14-17

[17] B.C.A. § 1(9). *Cf. generally*, MERGER STUDY 37-50, 59-73.

[18] Corporations Act, ONT. REV. STAT. c. 71, § 1(*f*), (*g*) (1960).

[19] B.C.A. §§ 115-21.

[20] *Id.* §§ 148-52.

[21] *Id.* §§ 172-85.

[22] *Id.* §§ 57-62.

[23] *Id.* § 122(2).

[24] *Id.* § 34.

C. *Pre-incorporation Contracts*

Section 20 of the new act seeks to remedy the unsatisfactory state of the common law concerning pre-incorporation contracts and, broadly speaking, follows the recommendations of the Lawrence Committee. [25] The decision in *Kelner v. Baxter* [26] is abrogated, so that a corporation may now adopt a pre-incorporation transaction. [27] If it does, the promoter ceases to be liable; [28] if it does not, he continues to bear the burdens of the transaction, and to enjoy its benefits, though he may recover from the corporation "the value of any benefits" received by it. [29] Whether or not the contract is adopted, the third party may apply to court for an order apportioning liability between promoter and corporation. [30] This provision is designed to prevent evasion of liability by a promoter through procuring the adoption of the transaction by a shell corporation under his control. [31] The new provision leaves unclear the effect of a disclaimer of liability by the promoter, in terms of which it is agreed that he should under no circumstances incur any liability under the contract, and the third party is to look to the corporation exclusively. [32]

D. *Objects and Powers—Ultra vires* [33]

The editor of a recent volume of essays on corporation law in Canada suggested that the ultra vires problem "should long ago have been resolved by properly drafted legislation." [34] Whether the new Ontario provisions meet the prescription is open to some doubt. Indeed, it is possible to argue that the new act has succeeded in obfuscating the problem to an even greater extent than it was formerly. By section 4(2)2, the articles of incorporation (formerly the letters patent), must set out the objects of the corporation. By section 15(2), the corporation enjoys a wide variety of ancillary or incidental powers, any of which may be limited or excluded by the articles. By section 16(1), no transaction is invalid "by reason of the fact that the corporation was without capacity or power" to enter into it. Such lack of capacity or power may, however, be asserted in three situations: (a) in proceedings by or on behalf of the corporation against a present or former director or officer; (b) as a cause for cancellation of the certificate of incorporation, and (c) in an application by a shareholder to restrain the corpora-

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[25] LAWRENCE REPORT 10-13. The Lawrence Committee's proposals are extensively discussed in Getz, *Pre-incorporation Contracts: Some Proposals,* [1967] U.B.C.L. REV. 381.

[26] L.R. 2 C.P. 174, 15 L.T.R. (n.s.) 213 (1866).

[27] B.C.A. § 20(2).

[28] *Id.*

[29] *Id.* § 20(3).

[30] *Id.* § 20(4).

[31] LAWRENCE REPORT 12.

[32] *See, e.g.,* Dairy Supplies Ltd. v. Fuchs, 28 W.W.R. (n.s.) 1, 18 D.L.R.2d 408 (Sask. 1959).

[33] *See generally* Mockler, *The Doctrine of Ultra Vires in Letters Patent Companies,* in STUDIES IN CANADIAN COMPANY LAW 231 (J. Ziegel ed. 1967) [hereinafter cited as STUDIES] for a discussion of aspects of the former law.

[34] Ziegel, *Preface* to STUDIES at vii.

tion from entering into, or performing and transaction on the grounds of lack of power or capacity.

Logically, since the ultra vires doctrine relates to the capacity of a corporation, any attempt to dispose of it should begin with an attempt to dispose of all questions of capacity. This can be quite simply done by declaring that a corporation has the capacity of a natural person of full legal capacity—if this is the solution that is desired. Once that has been said, all further statements about capacity and power become irrelevant. It becomes unnecessary to specify, as has been done in section 15(2), a long list of ancillary or incidental powers, or to deal with problems of lack of capacity. If one wishes to ensure that corporations do not carry on unauthorized business, and that their shareholders or others should be able to stop them from doing so, this is quite easily done without any reference to capacity.

All this, in effect, is what was recommended by the Lawrence Committee, [35] and it is not at all clear why this solution was not adopted. [36] As it is, the problem has been approached in a curiously faint-hearted and circuitous fashion, and ultra vires, far from being dead in Ontario, may well have entered upon a new and more vigorous life.

E. *Corporate Finance*

Every corporation under the new act must have at least one class of shares designated "common," which may not have any restrictions or limitations attached to it, other than a restriction on transfer. [37] The effect of this provision is to preclude a limitation on the voting rights of common shares, and so to prohibit the voteless common share. For other classes of shares the term "special" is used, [38] the description "preference" being reserved for those shares having some preference or right "over the common shares." [39]

Partly-paid shares are prohibited, [40] and shares are only to be treated as fully paid if the entire consideration in cash, property or services has been received by the corporation. [41] The act contains a new provision declaring that only services actually performed qualify as good consideration, and further declaring that "a document evidencing indebtedness" is not to be treated as good consideration. [42] Whether this is intended to exclude promissory notes as good consideration is not clear. If so, it probably represents a change in the law. [43]

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[35] LAWRENCE REPORT 27-28.

[36] It is also a matter of regret that, especially in view of the new method of incorporation, the opportunity was not taken to clarify the applicability of the law concerning constructive notice of the corporation's constituting documents. *See generally* Prentice, *The Indoor Management Rule*, in STUDIES 309, at 310-13.

[37] B.C.A. § 26.

[38] *Id.* §§ 26(3), 27.

[39] *Id.* § 26(4).

[40] *Id.* § 44(4).

[41] *Id.* § 44(5).

[42] *Id.*

[43] See authorities cited in W. FRASER & J. STEWART, COMPANY LAW OF CANADA 210 (5th ed. 1962).

The Lawrence Committee, considering there were good reasons for permitting repurchases of common shares, recommended [44] the abrogation of the decision in *Trevor v. Whitworth.* [45] That recommendation has been implemented by section 39 of the new act which permits a corporation, if authorized by its articles, to repurchase its own common shares out of surplus, provided that the corporation is not, and the transaction does not render it insolvent, that is, presumably, unable to pay its debts as they fall due. In two limited cases—to eliminate fractional shares and to compromise debts —the repurchase may be made out of issued capital. The term "surplus" is nowhere defined, and this may be a matter of some concern to directors, who, by section 135, incur a personal liability in respect of a repurchase made in violation of the provisions of section 39.

The act specifies three alternative procedures for effecting the repurchase, [46] one of which is "by invitation addressed to all shareholders for tenders of shares and pro rata from the shares so tendered." If this is to have the meaning that the shares tendered must be purchased pro rata at whatever price they are offered, the results could be disastrous. Moreover, it is by no means clear why, if the shares are being repurchased for the purpose of compromising debts or eliminating fractional shares, the corporation should be forced to go through an elaborate procedure of soliciting tenders from all shareholders.

To deal with the possibilities of market-rigging, insider trading and manipulation that exist with share-repurchases, section 41 declares the corporation to be an insider in respect of the repurchase transaction, and subject to the reporting and liability provisions governing insiders that are set out in sections 148 to 152. It should also be noticed that by section 98(2), repurchased shares that are not cancelled or re-sold do not carry any voting or other rights.

Section 153 of the new act substantially repeats the provisions of section 61 of the former legislation prohibiting the payment of dividends that would render the corporation insolvent, or would result in its capital being diminished. It is a pity that the opportunity was not taken to clarify the meaning to be given to these two concepts, and especially to the notion of capital diminution. On one view, at least, a corporation's capital is not diminished if dividends are paid out of current profits, notwithstanding that previous losses have wiped out a substantial proportion of its capital. [47] On another view, a corporation's capital is diminished if the effect of paying a dividend is to reduce the value of its assets below the total of its liabilities and share capital. [48] There is a difference between these two tests, and the choice of either could have significant consequences. [49]

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[44] LAWRENCE REPORT 34-38.

[45] 12 App. Cas. 409 (1887).

[46] B.C.A. § 39(5).

[47] Ammonia Soda Co. v. Chamberlain, [1918] 1 Ch. 266. 87 L.J. Ch. (n.s.) 193 (1917).

[48] *Cf.* Massey v. Minister of National Revenue [1940] Sup. Ct. 191, at 198, [1940] 1 D.L.R. 225, at 229 (1939).

[49] *See generally* Bryden, *The Law of Dividends,* in STUDIES.

F. *Share Transfers*

Sections 63 to 97 make a major innovation in the law affecting share transfers. Under the former law, a transfer was not, as a general rule, valid for any purpose, except as between the parties thereto, until registration of the transfer had been affected upon the books of the corporation. [50] As a result, a bona fide purchaser for value from a transferor with a defect in title was liable to have his title to the shares he had bought defeated by the true owner, unless the latter was for some reason estopped from asserting his title. [51] Put simply, the share certificate was not ordinarily treated as a negotiable instrument, delivery of which passed title in the shares, but rather as mere evidence of title enabling the transferee to obtain registration on the books of the corporation. In two cases only was something approximating negotiability accorded to shares. First, by express statutory provision, delivery of a share certificate covering fully paid shares listed on a recognized stock exchange, accompanied by a duly executed transfer form constituted a valid transfer of title to the shares [52] (though the corporation could continue, until registration, to deal only with the registered shareholder). Second, a limited form of negotiability attached to so-called "street certificates" through a combination of brokerage practice and judicial ingenuity. [53]

These rather broad propositions are a partial statement of a complex, confused and difficult branch of law. Many commentators have argued that the registration system for the transfer of title to shares is outdated, unnecessarily complex and, in the light of modern commercial needs, an anachronism. The Lawrence Committee shared this view [54] and recommended replacement of the existing system by the adoption of the provisions of Article 8 of the United States Uniform Commercial Code. [55] Essentially, the purpose of this recommendation was to create "a negotiable instruments law dealing with securities." Article 8 is an attempt "to modernize and simplify the law applicable to investment securities, as defined, first by endowing them with negotiability in its full sense, and then by delineating the rights of holder and issuer economically and logically flowing from and connected with negotiability." [56]

It is impossible to give a comprehensive description of the new provisions here. Briefly, however, they attempt to realize the aim of negotiability in three ways: first, by limiting the defences available to the issuer of securities against a bona fide purchaser for value, to lack of genuineness (that is, though this is not defined, the defence that the security is a forgery); second, by limiting the claims that may be made against a bona fide transferee for value of securities by his predecessors—in other words, to ensure

[50] Corporations Act, ONT. REV. STAT. c. 71 § 49(1) (1960).

[51] *See generally* FRASER & STEWART, *supra* note 43, at 259-62.

[52] ONT. REV. STAT. c. 71, § 49(2) (1960).

[53] LAWRENCE REPORT 41.

[54] *See generally id.* at 40-45.

[55] UNIFORM COMMERCIAL CODE (1966).

[56] Israels, *Investment Securities as Negotiable Paper Article 8 of the Uniform Commercial Code*, 13 BUS. LAWYER 676, at 677 (1958).

that he receives title free of defects; and third, by limiting the duties of inquiry imposed upon the corporation as to the title of the purchaser, before registration.

The new scheme is conceptually simpler than the old, is likely to be more efficient and expeditious, and for these reasons more likely to meet the needs of the securities markets. This said, however, it should be added that, regrettably, the new legislation does not adopt Article 8 in its entirety, but has modified its language, its arrangement and, in some respects, its substance. [57] This is regrettable, not only because in some respects the modifications may well have the effect of obscuring some questions in Ontario that, under Article 8, are clear, but also because it deprives the lawyers and the securities industry of ready access to the body of interpretative commentary and authority on Article 8 that has developed in the United States. All this is especially regrettable in view of the increasingly close integration of the North American securities markets.

G. *Trust Indentures*

Sections 57 to 62 of the new act deal with debenture trust deeds (referred to as trust indentures) and trustees. As with the provisions governing securities transfers, they are new to Canadian law, and are based on United States precedent. In this case, the model is the Trust Indenture Act of 1939. Notwithstanding the vigorous criticism of these provisions as they originally appeared in Bill 125 by Mr. Justice Hughes in his report as Royal Commissioner inquiring into the failure of Atlantic Acceptance Corporation, [58] the Ontario legislature has, wisely it is believed, retained them in the new act, though with some useful modifications.

The two most important provisions are sections 58 and 60. Section 58(1) describes, in fairly conventional language conveying nothing new to an equity lawyer, the fiduciary position of a debenture trustee towards the debenture holders. He is required to display that degree of care, diligence and skill that a reasonably prudent trustee would exercise in comparable circumstances. By section 60, any provision in a trust indenture purporting to relieve the trustee from any liability arising in respect of a breach of the duty defined by section 58(1), is declared "ineffective." This works a fairly considerable change in the law as to the liability of trustees. [59] Equally important is section 58(2), which prohibits the appointment as trustee of any person having a "material conflict of interest" in his role as fiduciary. If such a conflict exists at the time of his appointment, or arises subse-

[57] For example, U.C.C. § 8-317 declares that "[n]o attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy . . . ." This provision is omitted from the new act, thus permitting, in effect, charges to be attached to shares in a manner that is conceptually inconsistent with the provisions that have been adopted. Similarly, many of the terms used in the act are not defined, as they are in article 8, *e.g.*, "conspicuous," "genuine," both of which are concepts of central importance to the new scheme.

[58] REPORT OF THE ROYAL COMMISSION APPOINTED TO INQUIRE INTO THE FAILURE OF ATLANTIC ACCEPTANCE CORPORATION LTD. 1331-1342 (1969).

[59] *Cf.* 3 A. SCOTT, THE LAW OF TRUSTS §§ 222-222.4 (3d ed. 1967).

quently, he must within ninety days either eliminate it or resign. There is no definition of "material conflict of interest," it having been the view of the Lawrence Committee that "[w]hat is or is not, as a matter of fact, a conflict of interest should be clearly discernible in the great majority of cases." [60] In this respect, the new act departs from its American model. Section 58(2), taking account of one of the criticisms made of the provisions of Bill 125 by Mr. Justice Hughes, [61] expressly provides that the existence of a conflict of interest does not impair the underlying security.

H. *Appointment and Removal of Directors*

Pursuant to the Lawrence Committee's recommendation, public issue corporations must have a minimum of three directors, while other corporations need only have one. [62] Provision is retained for optional cumulative voting, [63] though there is no provision precluding the nomination and election of a slate of candidates for the board by a single resolution. [64] Vacancies may be filled by the remainder of the board, if it comprises a quorum, [65] though the act fails to indicate what constitutes a "vacancy." What, for example, are the powers of the remaining directors to make appointments necessitated by an increase in the number of directors, or a failure to elect a full complement in the first place? [66] Section 140 of the new act modifies the former law concerning removal of directors before the expiration of their term, in two important respects. First, it is no longer necessary that the corporate constitution contain authority to remove directors—the right to remove is now given directly by statute; and second, a removal resolution only requires a simple majority, except where directors are elected through a process of cumulative voting. Curiously, the act makes no provision for the directors whose removal is being sought to make written representations to the shareholders. [67] This omission is particularly strange in view of the elaborate provisions governing the removal of auditors, which do permit such representations to be made. [68]

I. *Conduct of Corporate Business*

Section 132 of the new act declares that "[t]he board of directors shall manage or supervise the management of the affairs and business of the corporation." This formula, it will be noted, differs from that in the former legislation, which contained no reference to any obligation of the board to either manage or supervise management. Doubtless the common law rules concerning liability of directors for negligence in conducting the affairs of the corporation implicitly accepted the alternative obligation, so that the new provision probably reflects no substantive difference in directors' obliga-

[60] LAWRENCE REPORT 103.
[61] *Supra* note 58, at 1336-37.
[62] B.C.A. § 122(2). See LAWRENCE REPORT 8.
[63] B.C.A. § 127, *See generally* LAWRENCE REPORT at 71-73.
[64] *Compare* Companies Act, 1948, 11 & 12 Geo. 6 c. 38, § 183(1) (U.K.).
[65] B.C.A. § 128.
[66] *See, e.g.*, Canada Corporations Act § 84.
[67] *Compare e.g.*, Companies Act, 1948, 11 & 12 Geo. 6 c. 38, § 184 (U.K.).
[68] B.C.A. § 168(5).

tions. It is nevertheless interesting as a statutory recognition of the complexity of modern management structures.

The directors must transact their business at a meeting, [69] with a quorum of at least two persons, [70] though a resolution in writing duly signed by all directors is treated as if passed at a properly called meeting. [71] Quite apart from the convenience that this provision offers to large boards, it is necessary to avoid forcing on the sole director of a one-man corporation the necessity for a set of meaningless ritual meetings.

The provisions governing the manner in which directors' powers are to be exercised are among the worst drafted and most confusing in the entire act. The legislation speaks of directors acting both by resolution and by by-law, without making clear the necessity for any such distinction or indicating its nature. By section 21(1), the directors may make by-laws regulating a list of specified matters, and "the conduct in all other particulars of the affairs of the corporation." [71a] By section 22(2) a by-law, to be effective, must be confirmed (though it may be varied or otherwise dealt with) by the shareholders. If confirmed, whether as originally passed or as amended, it is given retroactive effect to the date of its passing by the directors. [72] If rejected, its effectiveness is limited to the interval between the directors' meeting and its rejection by the shareholders. [73]

All this is complicated enough, though it is easy to see the case for shareholder confirmation of directors' acts. The matter is further confounded, however, by section 23, which apparently contemplates that directors may act by resolution rather than by by-law, and especially by section 23(3) which, though referring in the marginal note to an "[a]lternative method of confirming by-laws," speaks in the text of the confirmation of by-laws and resolutions. Can directors act by resolution in all cases, or only in some? If only in some cases, what are they, and how does one identify a resolution and distinguish it from a by-law? Does a resolution require confirmation in all cases, or only in some, and if the latter, in which cases? Indeed, does a resolution ever require confirmation, and if not, can the entire confirmatory procedure for by-laws be avoided by recourse to resolutions? The act, it seems to me, unnecessarily raises these questions, and answers none of them.

The problem is further confused by the use of the terms "special by-law" and "special resolution." The definitions of these terms are identical. [74] Special by-laws and resolutions, as the case may be, are required for various major or fundamental acts. They too are passed in the first instance by the directors, but must be confirmed by a two-thirds majority vote of the share-

[69] *Id.* § 132(2).
[70] *Id.* § 129.
[71] *Id.* § 23(1).
[71a] *Id.* § 21(1)(*g*).
[72] *Id.* § 21(2).
[73] *Id.* § 21(3).

holders. Certain acts require a special by-law.[75] Others require a special resolution.[76] Yet others require a special resolution with a special procedure.[77] There seems no rational distinction between those cases calling for special by-laws, and those calling for special resolutions.

This elaborate structure compels admiration, though it is difficult to avoid a feeling that much of it is pretentious nonsense, and that any legitimate objectives that anyone might have had in mind could have been much more simply achieved. One might have thought, indeed, that in matters so crucial to the routine operations of Ontario corporations, the directors and shareholders should be entitled to less opaque guidance from the legislation.

It is also odd that there is no provision made for shareholders to initiate by-laws or resolutions, except through the rather cumbersome machinery of the requisitioned meeting.[78] Reference should also be made in this context to the quite remarkable provisions of section 101, which work a quiet revolution in the structure of Ontario corporations. This section authorizes the holders of at least 10 per cent of the voting shares to call upon the directors to hold a directors' meeting, "for the purpose of passing any by-law or resolution that may properly be passed at a meeting of the directors."[79] If the directors fail to respond to the demand, the shareholders may themselves hold a meeting to pass the relevant by-law or resolution, which is then treated as if passed by the directors and confirmed by the shareholders.

Where this provision may be invoked, it results in the total overthrow of the long-standing principle of Ontario law that the will of the directors is paramount.[80] The irony of this revolution is that even in those jurisdictions in which the principle of majority rule prevails, the limits of that principle have generally been held to lie along the parameters of the powers of the directors.[81] Now comes Ontario, which not only reverses its own former law in the most radical fashion, but carries the principle in the name of which the revolution is pursued, far further than in its historic home. The effect of the new provision seems to be that the shareholders can at any time act in any matter at all, if they do so under the umbrella of section 101.

This change is the more remarkable since the Lawrence Committee's discussion of requisition rights, so far as relevant at all, is quite inconclusive.[82] The provision seems to have been borrowed from a comparable pro-

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[75] *E.g.*, exercising power to make loans to directors [§ 17(3)], changing number of directors [§ 124(1)].

[76] *E.g.*, amendment of articles [§ 189(2)], sale of undertaking [§ 15(2)17].

[77] *E.g.*, adoption of restriction on transfer of shares [§ 189(2)].

[78] B.C.A. § 109.

[79] *Id.* § 101(1).

[80] *See generally* Beck, *An Analysis of Foss v. Harbottle*, in STUDIES 545, at 548-556.

[81] The leading case is Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame, [1906] 2 Ch. 34, 75 L.J. Ch. (n.s.) 437 (C.A.). *See generally* Slutsky, *The Relationship Between the Board of Directors and the Shareholders in General Meeting*, 3 U.B.C.L. REV. 81, at 93-94 (1969).

[82] LAWRENCE REPORT 77-8. The discussion is almost exclusively concerned with the right to requisition meetings of shareholders, a subject dealt with in section 109 of the new act.

vision in the Manitoba act that has attracted relatively little attention. [83] So far as is known, the Manitoba provision has been little used. It may be that the Ontario provision will be equally little used, and it is possible that it represents the sort of symbolic gesture in favour of "shareholder democracy," that legislators are fond of making from time to time. Its potential is nevertheless considerable and one might have expected some evidence of careful thought having preceded it.

J. *Directors' Duties*

Pursuant to a recommendation of the Lawrence Committee, [84] section 144 of the new act attempts a general statutory formulation of the duties of directors. "Every director and officer . . . shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interests of the corporation, and in connection therewith shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

In respect of the duty of care and skill, section 144 differs from the Lawrence Committee proposal [85] and its reflection in Bill 125, [86] by the substitution for the original "reasonably prudent director" of the phrase "reasonably prudent person." The assumption behind the original version, presumably, was that directors should be considered a class of professionals, and expected to behave accordingly. [87] This view would, it was thought, result in raising the general level of care and skill legally required of directors. [88] Quite apart from any inherent difficulties that may exist in the application of the concept of the reasonably prudent director, [89] the proposal provoked considerable anxiety in the business community and, doubtless for both reasons, was revised. The result is that the new formulation does little to advance the state of the law classically described by Mr. Justice Romer in *In Re City Equitable Fire Insurance Co.* in 1924. [90]

The statement of fiduciary obligations set out in section 144 is largely declaratory. It does not, nor was it apparently intended to work any significant change in the well-known principles operative in this field.

K. *Directors' Contracts*

It has long been established that a contract between a corporation and its directors is voidable at the instance of the corporation in the absence of full disclosure to the corporation and approval by it, of the director's interest. [91] It is equally well established that even remote interests were sufficient

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[83] The Companies Act, MAN. REV. STAT. c. C160, § 184 (1970).

[84] LAWRENCE REPORT 49-54.

[85] *Id.* at 53.

[86] Bill 125, § 131 (Ont. 1968).

[87] *Cf.* LAWRENCE REPORT 53.

[88] *Id.* at 54.

[89] *See generally* Trebilcock, *The Liability of Company Directors for Negligence*, 32 MODERN L. REV. 499 (1969).

[90] [1925] Ch. 407, 94 L.J. Ch. (n.s.) 445 (C.A. 1924).

[91] Aberdeen Ry. v. Blaikie, [1854] 1 Macq. 461, 149 R. Rep. 833.

to bring the equitable rules into play, [92] and that, in the absence of statutory restrictions, the corporation could elect to dispense with the requirements of disclosure and approval to the extent considered appropriate. [93] It is also common knowledge that, until statutory intervention, corporate constitutions frequently eliminated in advance any need to satisfy the disclosure requirements of equity, and that legislative action did occur to limit the extent of the exclusions possible, by requiring as a minimum that directors disclose the fact of their interest to their associates on the board. [94]

The provisions of section 134 of the new act depart in a number of respects from both the former law in Ontario, and from other statutory models on this subject. Every material interest in a material contract or other transaction must be disclosed to the directors at the first meeting at which the contract or transaction is considered, or the next meeting after the interest is acquired. The double test of materiality is, so far as is known, unique and, while it reflects some liberalization of the law on the subject, is likely to prove difficult to apply in practice. The advantage of the former rule requiring disclosure of any interest in a material contract was that it at least simplified the nice problems of judgment involved in a determination of "materiality."

The disclosure requirement is strengthened, however, by the deletion of the common provision permitting general declarations of interest where a director is interested in another firm or corporation having continuing dealings with his corporation. [95] The new provisions also represent an advance on the former legislation in Ontario in requiring disclosure of the "nature and extent" of the interest, rather than merely the fact of being interested.

If disclosure is made to the board in accordance with the section, and the director refrains from voting at the meeting, then, if he was acting honestly and in good faith at the time the contract or transaction was entered into, he is not accountable for profits, and the contract, if it was in the best interests of the corporation, is not voidable by reason only of the interest. [96] This provision introduces two new and, it is thought, desirable qualifications to the normal rules. If they are satisfied, and disclosure is made, the operation of the equitable rules is excluded. The result is, subject to the two new criteria, to give statutory recognition to the combined effect of the former statutory and by-law provisions.

It is possible that the new act goes much further in controlling interested directors' contracts than any previous legislation. This possibility arises from what may well be a drafting inelegance. Section 134(5) provides that "[n]otwithstanding this section" (*i.e.*, section 134) a director is not accountable for profits from a transaction with his corporation in which he is inter-

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[92] *See, e.g.*, Transvaal Lands Co. v. New Belgium (Transvaal) Land & Development Co., [1914] 2 Ch. 488, 84 L.J. Ch. (n.s.) 94 (C.A.).

[93] *Cf.* Costa Rica Ry. v. Forwood, [1901] 1 Ch. 746, 70 L.J. Ch. (n.s.) 385 (C.A.).

[94] Corporations Act, ONT. REV. STAT. c. 71, § 70 (1960).

[95] *Id.* at § 70(3).

[96] B.C.A. § 134(4).

ested, nor is the contract liable to be avoided, if he acted honestly and in good faith and the transaction is in the best interests of the corporation, if he discloses the nature and extent of his interest "in reasonable detail" in an information circular to shareholders, who approve the transaction by at least two-thirds vote at a meeting called for that purpose. If the opening words of section 134(5) are given their plain meaning, it could be that section 134 in fact requires disclosure to the shareholders as well as to the board. This would be an extremely rigorous regime, and doubtless was not intended. Sub-section (5) was presumably designed as a fall-back requirement in cases of non-compliance with the other provisions of the section, but the point should be clarified. [97]

L. *Enforcement of Directors' Duties—Derivative Actions*

It is by now trite to observe that the principal obstacle to effective enforcement of the duties of directors lies in the body of law surrounding the landmark decision in *Foss v. Harbottle*. [98] This is not the place to explore the complexities of that body of law, which is the subject of an already voluminous literature. [99] It is sufficient to say here that an awareness of at least some of the difficulties led the Lawrence Committee to propose [100] the adoption of a statutory form of "derivative" action as a means of enforcing directors' duties.

The Lawrence Committee's proposals have been implemented in section 99 of the new act. This authorizes a shareholder, with the leave of the court, [101] to commence and maintain an action "in a representative capacity for himself and all other shareholders of the corporation suing for and on behalf of the corporation to enforce any right, duty or obligation . . . that could be enforced by the corporation." [102] There are three conditions precedent to the grant of leave. [103] The proposed plaintiff must (a) have been a shareholder at the time of the transaction complained of; [104] (b) he must show that he has made reasonable efforts to persuade the corporation itself to take action; and (c) he must show that he is acting in good faith and it is "prima facie in the interests of the corporation or its shareholders that the action be commenced." [104a] Even if these conditions are met, however, the court retains a discretion to refuse the application.

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[97] *E.g.*, by deleting the words "notwithstanding this section," and substituting "notwithstanding non-compliance with Sub-sections (1)-(4) of this section."

[98] 2 Hare 461, 67 Eng. Rep. 189 (1843).

[99] *See, e.g.*, Beck, *An Analysis of Foss v. Harbottle*, in STUDIES 545, at 548-56; Barak, *A Comparative Look at Protection of the Shareholders' Interest: Variations on the Derivative Suit*, 20 INT'L & COMP. L.Q. 22 (1971).

[100] LAWRENCE REPORT 63.

[101] B.C.A. § 99(2).

[102] *Id.* § 99(1).

[103] *Id.* § 99(3).

[104] This narrows the common-law position. Since the cause of action vests in the corporation and not the derivative plaintiff, it is, as a matter of principle, irrelevant whether the plaintiff was a shareholder at the date of the alleged wrong. *See* Seaton v. Grant, 2 Ch. App. 459 (1867); Bloxam v. Metropolitan Ry., 3 Ch. App. 337 (1868).

[104a] B.C.A. § 99(3)(c).

That the aims of the Lawrence Committee were praiseworthy admits of no doubt. What is open to question, however, is the extent to which those aims are realized in its proposals, or the legislation based on them. It is my view that the legislation fails to grasp the nettle. The nettle, in this case, is that part of the rule in *Foss v. Harbottle* that affirms the principle of majority power, considered together with the decision in *North-west Transportation Co. v. Beatty,* [105] which draws a curtain between the position of directors *qua* directors, and *qua* shareholders, permitting them in most cases to ignore their directorships while acting as shareholders. Put simply, the provisions of section 99 fail to deal effectively with that peculiar amalgam of procedural and substantive considerations that makes the minority's right to sue dependent upon the majority's ability to ratify the alleged breach of duty, thereby curing the substantive wrong giving rise to the cause of action, and depriving the minority shareholder of *locus standi* to sue. [106] To put the point in another way, the legislation fails to ensure that the ultimate decision to institute legal proceedings is transferred from the shareholders' meeting, where it is made by interested persons, to the courtroom, where an objective determination could be made.

The argument may perhaps be briefly illustrated by reference to the facts in *Pavlides v. Jensen.* [107] It was alleged there that the directors had negligently sold the principal asset of a corporation at a gross undervaluation, and it was sought, in a minority shareholder's derivative action, to hold them liable for the alleged breach of duty. The court held that, assuming there was a breach of duty, it was nevertheless not a matter about which a minority stockholder could complain on behalf of the corporation, since it was open to the majority of shareholders to ratify the act which constituted the breach. There is nothing in section 99 to preclude the defendants in such a case from successfully making the same argument on an application for leave to sue. Unless some formula can be found for depriving majority power of its conclusive and preclusive effect, the problem of minority rights in litigation will not be adequately solved. The failure of section 99 lies precisely in its failure to deal with the problem of majority power.

Despite the consternation that section 99 has apparently caused in the business community, there are plausible grounds for thinking that it is a paper tiger. If this conclusion is sound, the Lawrence Committee's rejection of the proposal to adopt some version of section 210 of the United Kingdom act [108] seems misconceived. The Lawrence Committee's reasons for rejecting some analogy to section 210 were never persuasive. The Committee said that it represented "a complete dereliction of the established principle of judicial non-interference" and that its underlying philosophy had "an air of reservation and defeatism about it." [109] The former betrays a

[105] 12 App. Cas. 589 (P.C. 1887).

[106] *Compare e.g.*, Cook v. Deeks, [1916] 1 A.C. 554, 27 D.L.R. 1, *with* Menier v. Hooper's Telegraph Works, 9 Ch. App. 350, 43 L.J. Ch. (n.s.) 330 (1874). And *cf.* Bamford v. Bamford, [1969] 1 All E.R. 969, [1969] 2 W.L.R. 1107, especially per Russell L.J. at 975-76, [1969] 2 W.L.R. at 1114-15.

[107] [1956] Ch. 565, [1956] 2 All E.R. 518.

[108] LAWRENCE REPORT 59-60.

[109] *Id.* at 60.

complete misapprehension of the central issues in this area. The latter betrays a misunderstanding of the purposes and uses of section 210. The Committee's decision is especially regrettable in view of the widespread movement to strengthen the protections offered by section 210 as an addition to other aspects of minority rights, not as an alternative to them. [110]

M. *Indemnification of Directors and Directors' Insurance*

Under the former Ontario law a corporation could, if authorized by its shareholders, indemnify its directors against any liability or expense incurred in actions brought against them for anything done as directors, except where the liability or expense was attributable to "his own wilful neglect or default." [111] The new legislation, adopting a recommendation of the Lawrence Committee, [112] precludes indemnification against liability for any breach of duty, unless the director has achieved complete or substantial success in the legal proceedings. [113] The effect of the change, of course, is greatly to limit the circumstances in which indemnification may now be paid.

Another new provision [114] permits a corporation to take out insurance for the benefit of a director, except insurance covering a liability arising from a breach of the duties of care and skill and loyalty prescribed by section 144. What this appears to mean is that the other statutory liabilities to which directors are subject may be insured against.

N. *Auditors*

The new act makes a number of important changes in the law governing the position of auditors. Section 170(1) prevents the appointment as an auditor of a public-issue corporation of any director, officer or employee of the corporation or any of its affiliates, or any partner, employer, employee or relative of any such director, officer or employee. A similar prohibition applies, subject to certain exceptions, if the auditor or any partner, employer or related person directly or indirectly is the beneficial owner of any securities of the corporation or its parent or subsidiary. [115]

These provisions are designed, of course, to ensure the independence of the auditor of public-issue corporations, and bring the law in this respect into line with what is generally regarded as good professional conduct for auditors. Moreover, the act attempts to strengthen the auditor's independence of management by detailed provisions concerning the procedure to be followed for his removal or replacement. [116] In addition, the auditor is permitted to attend shareholders' meetings and to be heard on any part of the business of the meeting that concerns him as auditor. [117] He may also be

[110] *See, e.g.*, Benade, *A Survey of the Main Report of the Commission of Enquiry into the Companies Act*, 3 COMP. & INT'L L.J. OF S. AFR. 277, at 295-96 (1970).
[111] ONT. REV. STAT. c. 71, § 72 (1960).
[112] LAWRENCE REPORT 68.
[113] B.C.A. § 147(1), (2).
[114] *Id.* § 147(3).
[115] *Id.* § 170(2).
[116] *Id.* §§ 168, 169.
[117] *Id.* § 171(12).

required to attend upon the written request of any shareholder. [118] If he does attend, he must answer inquiries concerning the opinions expressed by him in his report. [119] If the auditor is unable to express the unqualified opinion that the financial statements of the corporation fairly reflects the financial position of the corporation "in accordance with generally accepted accounting principles applied on a basis consistent with that of the preceding period," he must state the reasons for his inability. [120]

Section 182 of the new act embodies the Lawrence Committee's proposal [121] that every public-issue corporation should have an audit committee composed of at least three directors, a majority of whom should not be officers or employees of the corporation or any affiliate. The financial statements must be submitted to the audit committee for review before being submitted to the board of directors. The intention of this group of provisions is to ensure a more comprehensive flow of information about corporate affairs to the directors, it being recognized that the latter are not necessarily the effective managers of the corporate business. [122]

O. *Investigations*

The new act modifies the former provisions on court-ordered investigations in a number of respects. First, an application for the appointment of an inspector may now be made by any shareholder, rather than by the holders of one-tenth of the issued capital. [123] Second, the restrictive effect of the decision in *Re H. Flagal (Holdings) Ltd.*, [124] is avoided by permitting a shareholder in one corporation to obtain an order for the appointment of an inspector into the affairs of any affiliate of that corporation. [125] Third, the restrictive effect of the decision in *Re Automatic Phone Recorder Co.*, [126] is avoided by authorizing an inspection "whether or not there has been disclosure to the shareholders of the corporation of information relating to any matter on the basis of which the order is made." [127] Finally, the inspector is given much wider powers than formerly to examine persons having information relevant to the purposes of the inquiry. [128]

P. *General*

The preceding discussion has sought to focus on only some of the more important provisions of the new legislation. There is no doubt that, taken as a whole, the new act represents a substantial advance in the development

[118] *Id.* § 171(13).
[119] *Id.* § 171(14).
[120] *Id.* § 171(2), (3).
[121] LAWRENCE REPORT 92.
[122] For professional views about these provisions, see Paterson, *Independence and the auditor*, 96 CAN. CHART. ACCOUNTANT 235 (1970); Wallace, *A Look at Audit Committees and the Auditor's Independence*, 95 CAN. CHART. ACCOUNTANT 17 (1969).
[123] B.C.A. § 186(1).
[124] [1966] 1 Ont. 33, 52 D.L.R.2d 385 (High Ct. 1965).
[125] B.C.A. § 186(1).
[126] 15 W.W.R. (n.s.) 666 (B.C. Sup. Ct. 1955).
[127] B.C.A. § 186(2).
[128] *Id.* § 186(3)-(5).

of Canadian corporate law. It is certainly a vast improvement upon any legislation currently in force in Canada or, for that matter, the Commonwealth. Its deficiencies lie, for the most part, not so much in conception or analysis (though there are examples of both in the act), but in execution. The act is not, generally speaking, a model of draftsmanship, leaving far too many points obscure that could and should have been made clear. On balance, however, it is a notable piece of legislation, and one can only hope that it will have the impact elsewhere in Canada that it deserves.

II. CANADA CORPORATIONS ACT

In 1970, the Parliament of Canada enacted a number of amendments to the Canada Corporations Act, [129] apparently as part of a continuing programme of modernization of that statute. Here again, attention will be directed to only some of the more important amendments [130] made.

A. *Constrained-share Companies*

A new section [131] has been added to the act creating a new beast (the word is carefully chosen) known as a "constrained-share company." This is a company that is declared by its letters patent to be a member of the species. A company may so declare itself if, in order to qualify for certain advantages under Canadian law, [132] "any class or description of persons may not have a significant or controlling interest, directly or indirectly, in its shares or any class or classes thereof." This is, in other words, Canadian content legislation designed to maintain Canadian ownership of certain industries regarded as having crucial significance. The company is required to disclose its special status on any share certificates, in prospectuses, proxy forms, and financial statements. [133] There is a detailed schedule to the provision which spells out some of the consequences of the status, but they are too detailed for analysis here.

B. *Insider Trading*

The newly adopted insider trading provisions [134] of the Canada Corporations Act largely duplicate the comparable provisions of the various provincial corporations and securities legislation. There is, however, one respect in which the federal statute goes far further than the provincial legislation. Under provincial legislation, liability in respect of insider trading is imposed only upon insiders, their associates and affiliates. [135] Section 98D(1) of the federal law, however, imposes liability as well upon "every person employed or retained by the company" and the company auditor. In extending the liability thus, the federal act rejects the position taken by the

[129] CAN. REV. STAT. c. 53 (1952).
[130] Can. Stat. 1969-70 c. 70.
[131] § 38A.
[132] § 38A(2).
[133] § 38A(6).
[134] §§ 98 to 98F.
[135] *See, e.g.*, B.C.A. § 150(1).

Kimber Committee that employees should not be brought within the ambit of the legislation, on the ground that "the policing of any such abuse [by employees] can be left to management." [136] The federal legislation also rejects the Kimber Committee's view that the disciplining of professional persons should be left to the corporations retaining them and the professional bodies to which they belong. [137]

C. *Notice of Meetings*

Section 103 of the act has been amended to authorize the directors to fix a date, not more than thirty days before a meeting, upon which a determination will be made as to who is entitled to vote at the meeting. Notice of the fixing of the record date must be given to each shareholder at least fourteen days prior to the date itself, and any shareholder not registered on that date is not entitled to notice of meeting.

D. *Proxies and Proxy Solicitation*

Section 106A to 106I introduce for the first time into the federal legislation elaborate proxy provisions comparable to those introduced into the provincial corporation and securities acts pursuant to the Report of the Kimber Committee. [138] The federal provisions differ from their provincial counterparts in a number of respects. First, the "information circular" required to be sent to shareholders in cases of solicitation, is described as an "explanatory memorandum" where the solicitation is being made otherwise than by management. [139] Second, the new provisions specifically authorize the Minister of Corporate and Consumer Affairs to apply to court for an order of compliance with the proxy provisions, in the event of non-compliance. [140] This is a new departure in proxy regulation in Canada. Under the provincial legislation there is no direct means of securing compliance with the provisions of the law governing proxies. [141] If the Minister is inclined to exercise this power, it could represent a most important new initiative in this field.

Perhaps the most striking innovation to be made by the federal legislation in the field of proxy regulation, however, is the provision of section 106H dealing with "shareholder proposals." Section 106H is inspired by Securities Exchange Commission Rule 14a-8 in the United States. [142] Under it, a shareholder may submit to the corporation any proposal that he wishes to have discussed by a general meeting. If the corporation makes a solicitation to which the statute applies, it must include the proposal in its information circular, if it concerns a "proper subject" for shareholder action. A

[136] REPORT OF THE ONTARIO ATTORNEY GENERAL'S COMMITTEE ON SECURITIES LEGISLATION IN ONTARIO 11 (1965).

[137] *Id.* at 12.

[138] *Id.* at 49-57.

[139] § 106D(1)(*b*).

[140] § 106I.

[141] *Cf.* Getz, *The Alberta Proxy Legislation: Borrowed Variations on an Eighteenth Century Theme*, 8 ALTA. L. REV. 18, at 41-48 (1970).

[142] *See generally* ARANOW & EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 279-98 (2d ed. 1968).

proposal does not concern a proper subject if submitted primarily for the purpose of "enforcing a personal claim or redressing a personal grievance against the company or its director, or primarily for the promotion of general economic, political, racial, religious, social or similar causes," [143] or if it is not a proper subject because the matter in question is assigned by law to the exclusive competence of the directors. [144] The company may also decline to include the proposal where the shareholder submitting it has failed to appear personally to support a proposal submitted by him at either of the previous two meetings of shareholders. [145] If the corporation refuses to include the proposal, the shareholder must be notified of this, together with the reasons for the refusal. [146] If management decides that the proposal is a proper one, but is opposed to it, they must include in the information circular a statement by its supporters, not exceeding two hundred words in length. [147] If the shareholder has within the preceding five years submitted two or more proposals which have not received majority support, he is required to deposit a sum reasonably sufficient to meet the corporation's expenses in submitting the new proposal. [148] If the new proposal is approved, he will receive his money back. If disapproved, the deposit will be applied to defraying the costs of circulating it, and any surplus will be returned to the shareholder.

The facility offered by these provisions must be seen as an alternative to the cumbersome procedure of requisitioning a special meeting to consider the proposal, [149] and as an alternative to requiring the shareholder to make his own proxy solicitation. Both avenues are, in appropriate circumstances, still open to a shareholder under the federal act. The principal value of the new provisions is that they ensure that stockholder proposals can be brought before a general meeting of shareholders, whereas previously the law concerning notice would have prevented the raising of such proposals, or at least made it extremely difficult. [150]

The new federal provisions concerning the form of proxies remedy one deficiency in the provincial legislation. Under the latter, the proxy must be in "two-way" form with respect to all matters other than the election of directors and appointment of auditors. [151] In relation to the latter, this system is satisfactory where the only issue to be voted on at a meeting is the election of directors. A shareholder opposed to a particular group of candidates can simply withhold his proxy if there is no electoral alternative. If, however, there are issues other than elections, and there is only one slate of candidates for election, he is deprived of his vote on everything if he does not wish to vote for those nominated. The new federal provisions deal with this by declaring that the proxy form must provide a means for the share-

[143] § 106H(6)(*a*).
[144] § 106H(6)(*b*)-(*c*).
[145] § 106H(6)(*d*).
[146] § 106H(8).
[147] § 106H(4).
[148] § 106H(10).
[149] Companies Act, CAN. REV. STAT. c. 53, § 101 (1952).
[150] L. GOWER, MODERN COMPANY LAW 479 (3d ed. 1969).
[151] *See, e.g.*, B.C.A. § 120(*b*).

holder to specify that his shares be voted or withheld from voting in an election. [152]

E. *Investigations*

Prior to the most recent round of amendments, section 112 of the Canada Corporations Act empowered the Minister to appoint an inspector to investigate the affairs of a corporation, upon the application of that proportion of the shares as in his opinion warranted the application. Under the new provisions, [153] the application may be made either by at least five shareholders holding at least 10 per cent of the issued shares, or the issued shares of a class, or by the Minister. The application is made to the Restrictive Trade Practices Commission. The Commission may authorize the investigation if satisfied that there are reasonable grounds for believing that the business of the company or any affiliate is being conducted with intent to defraud, or acts have been done unlawfully in the management of the corporation that are prejudicial to the interests of any shareholder, or that the corporation was formed or is to be dissolved for a fraudulent or unlawful purpose, or that those concerned with the formation or management of the corporation or any affiliate have, in connection therewith, been guilty of fraud, misfeasance or other misconduct. [154] Elaborate provisions are made for the conduct of any investigation ordered. [155] These new provisions, which represent a substantial advance upon the former law, are a mixture of precedents found in the various provincial acts, as well as section 165 of the U.K. Companies Act, 1948. [156]

F. *Investigation of Ownership of Securities*

Section 112A of the new act authorizes the Minister, in order to aid the administering of insider trading and takeover bid provisions of the act, to conduct an investigation into the ownership of any securities.

G. *Takeover Bids*

Section 127A to 127L adopt, with minor variations in wording, the provisions commonly found in provincial legislation governing takeover bids.

III. Case Law

As noted at the beginning of this survey, there has been little judicial activity during the period under review, and less that is of more than passing interest. The Saskatchewan Court of Appeal in *Re Remick Lloyd & Co.*, [157] disposed of a fairly routine application of the so-called rule in *Turquand's*

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[152] § 106F(1)(*e*).
[153] §§ 112-112D.
[154] § 112(2).
[155] § 112(3)-(32).
[156] *See generally* L. Gower, *supra* note 150, at 604-13
[157] 74 W.W.R. (n.s.) 732 (Sask. 1970).

case [158] while in *Crawford's Ltd. v. Wanhil Line Construction Co.* [159] the same court held that where an instrument was not required to be under seal, but where the corporate seal had been irregularly fixed by two directors who otherwise had authority to bind the corporation, the seal could be disregarded and the corporation held to its obligations under the instrument. In another case, [160] decided under the provision of the Saskatchewan Co-operative Associations Act providing that "[t]he directors shall direct and supervise the business and property of the association and may . . . exercise all such powers of the association as are not required by this Act or the supplemental by-law to be exercised by the association in general or special meeting," [160a] the members could not overrule or control the actions of the directors in the area of their competence.

The fiduciary duties of directors were considered in two cases in the Ontario High Court. One of these, *Canadian Aero Service Ltd. v. O'Malley* [161] involved an unsuccessful attempt to call former directors to account for breach of fiduciary duty in diverting a corporate opportunity, but no new principle was involved in the decision, nor was any light cast upon the old principles. The case is more interesting, indeed, for its facts, which should fascinate those interested in that murky area of our national life in which politics, finance and diplomacy meet.

Re Dad's Cookie Co. (B.C.), [162] involved an attempt by a minority shareholder in a private company to prevent the compulsory acquisition of his shares pursuant to a takeover bid. [163] The company's articles of association included a provision prohibiting the transfer of shares to non-members until they had been offered to members, who declined to take them. In order to consummate the proposed takeover, it was necessary to secure an alteration of the articles so as to delete this provision. This was done by an overwhelming majority. The minority shareholder sought to object to the alteration on the ground that it was passed for the sole purpose of depriving him of the opportunity to purchase the shares of those willing to accept the takeover offer. The court, however, rejected this argument, holding that there was no evidence to support this imputation of an improper motive. [164] The minority shareholder also argued that he had not been provided with sufficient information to enable him to make a decision whether to sell or hold

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[158] Royal British Bank v. Turquand, 6 E. & B. 327, 106 R. Rep. 623 (1856).

[159] 73 W.W.R. (n.s.) 385, 10 D.L.R.3d 497 (Sask. 1970).

[160] Smythe v. Anderson, 73 W.W.R. (n.s.) 536, 11 D.L.R.3d 503 (Sask. 1970).

[160a] SASK. REV. STAT. c. 246, § 46 (1965).

[161] 61 Can. Pat. R. 1 (Ont. High Ct. 1969). The second case, Munden Acres Ltd. v. Oakes, [1970] 1 Ont. 513, 8 D.L.R.3d 719, is interesting chiefly for the assertion by Pennell, J., that the decision in Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56, 69 L.J. Ch. 428 (C.A.), is explainable not as a case of abuse of directors' powers, but as one of non-disclosure. *Cf.* Wedderburn, *Shareholders' Rights and the Rule in Foss v. Harbottle,* [1958] CAMB. L.J. 93, at 101.

[162] 69 W.W.R. (n.s.) 641, 7 D.L.R.3d 243 (B.C. Sup. Ct. 1969).

[163] Companies Act, B.C. REV. STAT. c. 67, § 181 (1960).

[164] Generally, on the doctrine of a fraud on the minority and alteration of articles of association, *see Re* Rudderham, 9 D.L.R.3d 492 (N.S. Sup. Ct. 1969); *aff'd on other grounds,* 12 D.L.R.3d 83 (1970). *Cf.* Regehr v. Ketzakey Silver Mines Ltd., 10 D.L.R.3d 171 (Alta. 1970).

on to his shares. Mr. Justice Macdonald following an earlier decision in *Re Evertite Locknuts (1938) Ltd.*,[165] held that inadequacy of information was not, per se, a ground for barring the takeover, in the absence of some evidence of unfairness. As to the question of unfairness, the learned judge concluded that since the holders of more than ninety per cent of the shares had accepted the offer, there was no affirmative evidence of inadequacy of the price.[166]

Finally, note should be taken of the decision in *Re Associated Colour Laboratories Ltd.*,[167] in which the Supreme Court of British Columbia decided a narrow but important point concerning the proceedings of directors. The court held that a telephone conversation between two out of three of the directors of a company did not constitute a valid meeting of directors where the articles of association made specific provision for overcoming the difficulty of securing the physical presence of a quorum in one place. The court did not hold, however, that a meeting could not be properly constituted, as a matter of law, by telephone.

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[165] [1945] Ch. 220, [1945] 1 All E.R. 401.

[166] *See also In Re* Grierson, Oldham & Adams Ltd., [1968] 1 Ch. 17, [1966] 1 All E.R. 192 (1966), noted by Leigh, 30 MODERN L. REV. 576 (1967).

[167] 12 D.L.R.3d 338 (B.C. Sup. Ct. 1970).