Legislative Summary **LS-389E**

BILL S-11: AN ACT TO AMEND THE CANADA BUSINESS CORPORATIONS ACT AND THE CANADA COOPERATIVES ACT AND TO AMEND OTHER ACTS

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LEGISLATIVE HISTORY OF BILL S-11

HOUSE OF COMMONS		SENATE	
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BACKGROUND

Bill S-11, An Act to amend the Canada Business Corporations Act (CBCA) and the Canada Cooperatives Act (CCA) and to amend other Acts, was introduced and read the first time in the Senate on 6 February 2001 by the Honourable Fernand Robichaud, Deputy Leader of the Government in the Senate. The two Acts named regulate federally incorporated companies and cooperatives and the proposed amendments are designed to enhance corporate governance, improve the ability of Canadian corporations to compete in the marketplace and reduce costs for businesses.

Bill S-11 is the result of a process that began as early as 1994 when consultations were held across the country in order to determine what changes should be made to the CBCA. A set of discussion papers was then released in order to obtain comments from stakeholders.(1) Afterwards, more consultations were held to develop a consensus on reform proposals. The Standing Senate Committee on Banking, Trade and Commerce also played a key role with the presentation of its report on corporate governance(2) and its interim and final reports on modified proportionate liability.(3)

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(1) In 1995 and 1996, Industry Canada released nine discussion papers on various issues in relation to the CBCA.

(2) Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Corporate Governance*, August 1996.

(3) Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Modified Proportionate Liability*, September 1998 and *Joint and Several Liability and Professional Defendants*, March 1998.

A bill amending the CBCA and the CCA, Bill S-19, was introduced in the Senate in March 2000, but died on the *Order Paper* when Parliament was dissolved for the November 2000 federal election. At the time of dissolution, the Standing Senate Committee on Banking, Trade and Commerce was examining the bill.

Bill S-11 is largely the same as Bill S-19, although a number of technical and substantive amendments have been made in response to concerns raised during the committee hearings or otherwise identified. **In addition, some amendments were made in committee and at 3rd reading stage in the Senate.**

The CBCA, which has not been substantially amended since 1975, sets out the legal and regulatory framework for corporations in Canada, including the basic rules for corporate governance. The approximately 155,000 companies incorporated under this Act include large as well as small and medium-sized businesses. In Canada, corporations have the option of incorporating at the federal or the provincial level and the CBCA operates in parallel with the corporate laws of the provinces and territories. The main goals of the amendments now proposed are:

- to expand the rights of shareholders to participate in the major decisions of their corporation – for example, by allowing non-registered shareholders to submit proposals and by modifying the grounds for rejecting a shareholder proposal; by allowing increased communication between shareholders; by expanding the means for shareholders to solicit proxies; and by allowing electronic communication between a corporation and shareholders;

- to enhance global competitiveness – for example, by reducing the residency requirements for the board of directors and eliminating the residency requirement for committees of the board; and by establishing a due diligence defence for directors rather than the current "good faith reliance" defence;

- to clarify responsibility – for example, by establishing a regime of modified proportionate liability for those involved in the preparation of financial information required by the Act and by clarifying the rules regarding unanimous shareholder agreements;

- to eliminate duplication and reduce costs – in part by eliminating duplication with provincial securities legislation; and

- to make a series of technical amendments.

The CCA sets out the legal and regulatory framework for the establishment of non-financial cooperatives. The main objective of the proposed amendments to that Act is to harmonize its provisions for corporate governance with the proposed amendments to the CBCA. This would complete the reform process that led to the new CCA, which received Royal Assent in 1998 and came into force on 31 December 1999. Because of its recent passage, the CCA already contains a number of amendments now proposed for the CBCA.(4) Certain issues, however, were set aside pending the results of consultations on the CBCA; these are addressed in the proposed amendments to both the CCA and the CBCA.

The Acts will be supplemented by a set of regulations dealing with a wide range of issues such as minimum ownership and length of ownership requirements with respect to eligibility to make shareholder proposals, the investment threshold defining a small investor for the purpose of the modified proportionate liability regime, and detailed rules for electronic communications between the corporations and shareholders.

Due to the length of this amending legislation and because many of the proposed amendments would make technical changes, this legislative summary will not follow the normal clause-by-clause approach. Certain of the amendments are grouped according to theme, while more general amendments are grouped together.

CBCA

A. Financial Assistance(5)

Section 44 of the CBCA restricts the provision of loans, guarantees and other kinds of financial assistance by a CBCA corporation to directors, officers, employees and shareholders. More specifically, this type of financial assistance is restricted "where the directors have reasonable grounds for believing that, as a result, the corporation either is or would become insolvent or the corporation's assets either are or would be less than all of its liabilities and stated capital."(6) Directors who approve financial assistance contrary to section 44

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(4) This would include a due diligence defence for directors, relaxed proxy solicitation rules, allowing beneficial shareholders to submit proposals, the repeal of insider reporting requirements and enhanced electronic communication.

(5) For a more detailed discussion of the financial assistance provision, see Margaret Smith, PRB 99-41, *Financial Assistance under the Canada Business Corporations Act*, 26 January 2000.

(6) *Ibid*., p. 1.

are personally liable to the corporation for the amount. They can, however, rely on a "good faith reliance" defence.

Clause 26 would repeal the financial assistance provision. The rationale **for this change is that the current wording causes legal and accounting practitioners considerable difficulty in providing clients with unqualified opinions. Despite this repeal**, directors dealing with such transactions are subject to statutory fiduciary duties to act in the best interest of the corporation and can be sued for failing to do so. It is argued that this provides adequate safeguards.

B. Directors' Residency Requirement[7]

The CBCA currently sets out the following residency requirements for corporate directors:

- a majority of the directors must be resident Canadians (section 105(3));
- the directors shall not transact business at a board meeting unless a majority of the directors present are resident Canadians (section 114(3)); and
- a majority of the members of each committee of the board must be resident Canadians (section 115(2)).[8]

An exception to the residency requirements is provided for holding corporations that earn less than 5% of gross revenues in Canada. Only one-third of the directors of such corporations must be resident Canadians (section 105(4)). One of the purposes of the residency requirements was "to specifically promote a Canadian viewpoint at meetings of directors of corporations controlled by non-resident Canadians."[9]

The following amendments are proposed:

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(7) For a more detailed discussion of the residency requirements, see Margaret Smith, PRB 99-31, *Canada Business Corporations Act: Directors' Residency Requirements and Other Residency Issues*, 7 December 1999.

(8) While committees of the board have a residency requirement, there is no requirement that the quorum needed at meetings of committees of the board must be composed of a majority of resident Canadian members or even that any Canadian be present.

(9) Industry Canada, Briefing book, *Clause-by-Clause, Bill S-19, Canada Business Corporations Act*.

- Clause 37 would amend section 105 by reducing the residency requirement to 25% of a board of directors. Where a corporation had fewer than four directors, at least one would have to be a resident Canadian.(10)
- Clause 43 would amend section 114 by reducing to 25% the residency requirement regarding transacting business at a board meeting.(11)
- Clause 44(1) would amend section 115 by entirely eliminating the residency requirement for committees of the board.(12) It is argued that corporations would thereby be given more flexibility to appoint directors on the basis of qualification.

These changes are designed to allow for stronger international representation on boards of directors and to provide corporations with the flexibility to appoint directors to committees based on their qualifications. The stated goal is to provide Canadian corporations with more flexibility as they become global players and perhaps to encourage global corporations to incorporate and locate their headquarters in Canada. It is worth noting that the corporations laws of provinces such as Quebec, Nova Scotia, New Brunswick and Prince Edward Island do not have residency requirements for directors.

C. Directors' Liability(13)

Section 123(4) of the CBCA currently provides a "good faith reliance" defence to certain of the liabilities for which directors are subject under the Act.(14) The director is not liable if he or she relies in good faith on:

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(10) It is worth pointing out that this reduction in the residency requirement would not apply to sectors where federal legislation or policy imposes ownership restrictions. Some of these sectors are to be listed in the Regulations. See section 14 of the draft regulations for a list of prescribed business sectors. In these cases, the current requirement that a majority of directors be resident Canadians would continue to apply and the proposed amendments would clarify that where there were only two directors, only one of the two would have to be a resident Canadian. Once again, an exception would be provided for holding corporations that earned less than 5% of gross revenues in Canada. Only one-third of the directors of these corporations would have to be resident Canadians.

(11) The requirement for a majority of resident Canadians would be kept for certain sectors. See footnote 10 for further details.

(12) This was recommended by the Standing Senate Committee on Banking, Trade and Commerce, *Corporate Governance*, Recommendation 16.

(13) For a more detailed discussion of directors' liability, see Margaret Smith, PRB 99-44, *Directors' Liability*, Parliamentary Research Branch, Library of Parliament, 29 February 2000.

(14) These include improper share issuances or payments (s. 118), unpaid wages (s. 119) or breach of fiduciary duty and the duty of care (s. 122).

(a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial conditions of the corporation; or

(b) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

The scope of this defence is limited: "It allows directors to point to a reliable source of information as justification for their actions, but it does not permit them, in absence of that specific justification, to show that they acted reasonably in the circumstances."(15)

Clause 50 would replace the "good faith reliance" defence with a "due diligence" defence with respect to the liabilities and duties set out in sections 118, 119 and 122(2). It is specified that due diligence would include reliance in good faith on the above-mentioned documents. It is thus clear that such action would continue to be part of what constitutes acting with due diligence. A due diligence defence allows a court to determine that the directors are not liable if they "exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." This test is set out in several other pieces of legislation, including the CCA. The "good faith reliance" defence would still be applicable with respect to the duties set out in section 122(1). The proposed inclusion of a due diligence defence reflects the recommendations of the 1996 report *Corporate Governance* issued by the Standing Senate Committee on Banking, Trade and Commerce.

Clause 110 would amend section 222 to provide a due diligence defence for liquidators rather than the current "good faith reliance" defence. Thus, they would be able to rely on the same defence as is proposed for directors.

Currently, the CBCA is not clear on whether defence costs can be advanced and whether directors or officers should be indemnified for all legal proceedings, including investigations. Clause 51 would amend section 124 to broaden the statutory indemnification rules. For example, a corporation would be expressly allowed to advance defence costs, charges and expenses and the indemnification provision would be applicable to investigations. The indemnification rules would continue not to apply to directors who engage in fraudulent or otherwise illegal activity.

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(15) *Directors' Liability* (2000), p. 4.

D. Insider Trading[16]

Both the CBCA and provincial securities laws require that insiders periodically file trading reports with the respective authorities. "Insider trading has been described as the purchase and sale of securities of a corporation by a person with access to confidential information about the corporation that can materially affect the value of its securities and that is not known by other shareholders or the general public."[17]

The following sets out the general rules regarding insider trading: "Trading by insiders *per se* is not illegal; most laws governing the issue allow insiders to trade in the securities of corporations with which they have a connection, provided they do not possess material confidential information about the corporation. Insider trading is proscribed, however, when the insider possesses material confidential information or uses such information for his or her benefit when trading in the securities of the corporation."[18]

There are three main components to the insider trading provisions: requirement to file reports, speculative trading prohibitions, and civil liability.

1. Requirement to File Reports

The CBCA currently sets out the rules governing when a person must send a report to the Director: within 10 days after the end of the month in which he or she becomes an insider of a distributing corporation, and within 10 days following the end of the month in which there is any change in the person's interest in the securities of a distributing corporation (section 127).

Clause 53 would repeal the insider reporting requirements. Insiders would, however, still be required to report under provincial securities legislation, which contains prohibitions and penal remedies to deal with non-compliance.

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(16) For a more detailed discussion of insider trading, see Margaret Smith, PRB 99-38, *Insider Trading*, Parliamentary Research Branch, Library of Parliament, 22 December 1999.

(17) *Ibid*., p. 1.

(18) *Ibid*.

2. Speculative Trading

The current rules regarding speculative trading are as follows: "The CBCA prohibits insiders from selling shares that they do not own or have a right to own (short selling) and from buying or selling a call option or put option in respect of a share of a distributing corporation of which they are insiders (section 130). Insiders can sell shares they do not own, however, provided they own other shares that are convertible into the shares sold, or they own an option or right to acquire the shares sold."(19)

Clause 54 would replace the word "share" with the word "security" in section 130 to cover more fully types of transactions that could give rise to a conflict of interest (for example, trading in debt obligations issued by the corporations). In addition, insiders would no longer be prohibited from selling a put option or purchasing a call option since they would profit only if the value of the corporation's stock increased, meaning that there would be no direct conflict with the interest of the corporation and its shareholders.(20) The purchase of put options and the sale of call options would still be prohibited, however. Clause 52 would amend the definitions of "insider," "officer," and "business combination" for the purposes of speculative trading provisions.

Clause 54 would increase the fine for a contravention of the speculative trading prohibitions from $5,000 to $1,000,000; or three times the profit made, whichever was greater.

3. Civil Liability

Following are the current rules regarding civil liability for insider trading: "Under subsection 131(4) of the CBCA, insiders (as defined in section 131(1)) who make use of specific confidential information for their own benefit in connection with a transaction in the securities of a corporation (whether distributing or non-distributing) are liable to compensate anyone who suffers a direct loss as a result. They are also accountable to the corporation for any direct benefit or advantage they receive."(21)

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(19) *Ibid*., p. 4.

(20) The civil liability provision would still apply if an insider completed such a transaction with knowledge of material confidential information.

(21) *Insider Trading* (1999), p. 4.

Clause 54 would clarify and expand the scope of civil liability provisions. This would be accomplished in part by expanding the definition of "insider" and "security" for the purpose of the civil liability provisions. Among other things, clause 54 would define an insider as a person who beneficially owns shares carrying more than the "prescribed percentage of voting rights" (set at 10% in the draft regulations). The CBCA at present defines an insider as a person who beneficially owns more than 10% of the shares of a corporation. This amendment would allow the CBCA standard to be changed by regulation when required. In addition, the civil liability provision would be re-worded to expand its scope. For example, the word "specific" would be removed in order to capture confidential information that was general in nature; as well, there would no longer be a requirement that the confidential information be used for the insider's benefit or advantage. The new provision would impose liability where an insider purchases or sells a security with knowledge of confidential information that, if generally known, might reasonably be expected to affect the value of any of the corporation's securities in a material way. The requirement to compensate for loss suffered would be changed to a requirement to compensate for damages suffered. Liability could be avoided if the insider established that he or she had reasonably believed that the information had been generally disclosed, if the information was known, or ought reasonably to have been known, by the person alleged to have suffered damages or if the transaction took place in prescribed circumstances.

Furthermore, an insider would be accountable to the corporation for any benefit or advantage received resulting from the transaction.

A new element in the civil liability provisions would impose civil liability on a person who communicated undisclosed confidential information (the "tipper"); it would also set out applicable defences. This would align the CBCA provisions with provincial securities legislation.

A new provision would also be added to help guide the courts in their assessment of the damages. In the case of distributing corporations, when the plaintiff was a purchaser, the court would have to consider the price paid by the plaintiff less the average market price over the 20 trading days immediately following general disclosure of the information. When the plaintiff was a seller, the court would have to consider the average market price over the 20 trading days immediately following general disclosure of the information, less the price received by the plaintiff.

E. Unanimous Shareholder Agreements[22]

A unanimous shareholder agreement is an agreement by all shareholders in relation to the management of the corporation whereby some or all of the powers of directors are transferred to shareholders. Currently, the CBCA does not expressly state that when the "rights, powers and duties" are transferred, the shareholders also assume the liabilities and associated defences of directors.

Clause 66 would amend section 146 to permit more than one person who was not a shareholder to participate in a unanimous shareholder agreement. In addition, the provision would clarify that parties to a unanimous shareholder agreement who were given the power to manage or supervise the management of the corporation would have all "the rights, powers, duties and liabilities" of a director, whether they arose under the CBCA or otherwise, including any defence available to the directors.

Under a new provision, new shareholders who had not been informed of the existence of a unanimous shareholder agreement at the time of acquisition would be able to cancel the transaction no later than 30 days after they had become aware of such an agreement.

F. Shareholder Communications[23]

The CBCA provides shareholders with the opportunity to participate in major decisions of a corporation in which they have an interest. This is done in part by providing access to corporate information and by granting shareholders the right to vote. Certain of the proposed amendments to the CBCA are intended to facilitate shareholder participation in corporate governance.

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(22) For a more detailed discussion of unanimous shareholder agreements, see Margaret Smith, PRB 99-32, *Canada Business Corporations Act: Unanimous Shareholder Agreements*, Parliamentary Research Branch, Library of Parliament, 20 January 2000.

(23) For a more detailed discussion of shareholder communications, see Margaret Smith, PRB 99-33, *Canada Business Corporations Act: Shareholder Communications*, Parliamentary Research Branch, Library of Parliament, 18 January 2000.

1. Proxy Solicitation Rules

Some are concerned that the current proxy solicitation rules impede communication among shareholders. This is a significant drawback since communications among shareholders can be an important instrument for monitoring and influencing corporate performance.

Section 147 of the CBCA defines proxy solicitation to include:

> (a) a request for a proxy, whether or not accompanied by or included in a form of proxy;
>
> (b) a request to execute or not to execute a form of proxy or to revoke a proxy;
>
> (c) the sending of a form of proxy or other communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy; [emphasis added] and
>
> (d) the sending of a form of proxy to a shareholder under section 149

A Discussion Paper prepared by Industry Canada "points out that, according to this definition, many views expressed by shareholders, including informal discussions or personal letters criticizing management, may be deemed to be solicitation under section 147. Violations of section 147 carry a fine as well as a term of imprisonment."[24] There is no violation when a proxy circular is sent to all shareholders.

The bill would amend the legislation to facilitate communication among shareholders. Clause 67 would amend the definition of "solicit" or "solicitation" in section 147 to exclude: a public announcement, as prescribed, by a shareholder of how he or she intends to vote and the reasons for that decision;[25] a communication for the purpose of obtaining the number of shares required for a shareholder proposal; a communication, other than a solicitation by or on behalf of the management, made to shareholders in any prescribed circumstance. These communications would be exempted from the proxy circular delivery requirements.

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(24) *Ibid*., p. 6.

(25) Under the draft regulations, a public announcement would include a speech in a public forum, a press release, a published or broadcast opinion or a statement or advertising appearing in a broadcast medium or a newspaper, a magazine or other recognized publication dissemination on a regular basis.

In addition, clause 68 would amend section 149 to exempt management of a non-distributing corporation with **50 or fewer** shareholders (rather than the current 15) from having to send a form of proxy to each shareholder entitled to receive notice of a meeting of shareholders.

Clause 69 would add a new provision to allow persons to solicit proxies from no more than 15 shareholders without having to send a dissident's proxy circular. (This exemption would not apply to a solicitation by management.) In addition, a person could commence a solicitation without sending a proxy circular if the solicitation was conveyed by public broadcast, speech or publication in the prescribed circumstances.(26)

Clause 69 of Bill S-11 does not contain the exemption relating to the filing of a preliminary proxy circular found in Bill S-19. This exemption, which would have allowed persons to commence a solicitation provided they had filed a preliminary proxy circular with the corporation and the Director, was based on the premise that the Director would review preliminary proxy circulars and the information would be available to the public. However, because the CBCA does not require preliminary proxy circulars to be filed, such documents would not have been reviewed. Considered unnecessary, this exemption was not included in Bill S-11.

It is hoped that the proposed changes to the proxy solicitation rules would "eliminate unnecessary obstacles to the exchange of views and opinions by shareholders and others concerning management performance and initiatives presented for a vote of shareholders."(27)

2. Shareholder Proposals

Section 137 of the CBCA allows shareholders to add items to the agenda of shareholder meetings by means of shareholder proposals. The shareholder proposal must be included with the management proxy circular if the corporation is required to send one out. The Act sets out five circumstances in which the corporation is not required to circulate the proposal.

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(26) Section 63 of the draft regulations would set out the information that would have to be contained in the communication.

(27) Industry Canada, Backgrounder, *Summary of Amendments to the Canada Business Corporations Act*, p. 2.

Clause 59 would make changes to the eligibility requirements for making shareholder proposals. It would permit beneficial owners of shares to make shareholder proposals, rather than only registered shareholders, as is the case at present. Beneficial owners are persons who have purchased shares and are entitled to dividends and capital gains but are not "registered" on the corporation's records.

In addition, clause 59 would set minimum ownership and length of ownership requirements with respect to eligibility to make shareholder proposals (currently, any shareholder entitled to vote may do so). These new requirements would be set out in the regulations. Under the draft regulations, to be eligible the person would have to be, for at least six months prior to submitting a proposal, the registered owner or beneficial owner of 1% of the total number of outstanding voting shares or of outstanding voting shares whose fair market value was $2,000. The goal is to limit abuse and to "ensure that proposals are founded on a genuine stake and interest in the affairs of the corporation."(28) Shareholders would, however, be permitted to pool their shares to meet the minimum requirements. Thus, a shareholder who had the required support of other shareholders would not have to acquire more shares to be eligible. In certain circumstances, acquiring more shares could have raised an economic barrier to shareholder proposals. Shareholders submitting proposals would be required to provide the corporation with their name, address, number of registered or beneficial shares owned and the date acquired, and would have to continue to hold or own the required number of shares up to and including the day of the meeting.

If requested by the shareholder, the corporation would still have to include a statement by the shareholder supporting the proposal in its management proxy circular. The maximum length of the statement and proposal would be prescribed by regulation. The draft regulations provide that it would not be able to exceed 500 words (currently, the CBCA has a limit of 200 words).

In addition, the proposed amendments aim to limit the scope for a corporation's rejection of shareholder proposals. A corporation would be given more time to give notice of its rejection(29) and would be able to reject a proposal that did not relate in a significant way to the business or affairs of the corporation. However, a corporation would no longer be able to reject

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(28) *Ibid*., p. 3.

(29) Section 47 of the draft regulations would give the corporation 21 days instead of the current 10 days.

a proposal on grounds that its primary purpose was to promote general economic, political, racial, religious, social or similar causes.

Eliminating a corporation's ability to reject a proposal on general economic, political, racial, religious, social or other grounds is a substantive change from Bill S-19, which retained those grounds for rejection and placed the onus on the shareholder making a proposal to demonstrate that the proposal related in a significant way to the business or affairs of the corporation.

When Bill S-19 was being examined by the Standing Senate Committee on Banking, Trade and Commerce, organizations such as the Taskforce on the Churches and Corporate Responsibility, Corporate Responsibility Coalition and the Social Investment Organization strongly argued in favour of eliminating the ability to reject a proposal on general economic, political, racial, religious, social or other grounds.

The bill would also set out rules through the regulations with respect to submitting similar proposals year after year. The time frame for resubmitting a substantially similar proposal would be increased from two years to five years. A proposal that received a prescribed minimum amount of support at the meeting could not, however, be rejected.(30)

3. Electronic Communications

The CBCA does not allow electronic communications between a corporation and its shareholders. Clause 121 would allow corporations to use emerging technologies to communicate with shareholders.(31) This would be permitted only where the shareholder consented and designated an information system for receipt of the electronic documents. Thus, the shareholder would retain the right to insist on paper-based communications. Conversely, the corporation could not be forced to communicate electronically. While the CBCA contains many provisions explicitly requiring that documents be in writing or be provided to the intended recipient in written form, such requirements would be satisfied by the creation or provision of electronic documents, provided the conditions set out in the legislation were satisfied. The proposed amendments also set out other rules with respect to electronic documents which would be supplemented by detailed rules for electronic communications in the regulations.

(30) See section 45 of the draft regulations.

G. Take-over Bids and Going-Private Transactions[32]

Industry Canada describes a take-over bid as "an offer to all or most shareholders to purchase shares of a corporation, where the offeror, if successful, will obtain enough shares to control the target corporation."[33] In the CBCA, it is defined as:

> . . . an offer, other than an exempt offer, made by an offeror to shareholders at approximately the same time to acquire shares that, if combined with shares already beneficially owned or controlled, directly or indirectly, by the offeror or an affiliate or an associate of the offeror on the date of the take-over bid, would exceed ten percent of any class of issued shares of an offeree corporation and includes every offer, other than an exempt offer, by an issuer to repurchase its own shares.[34]

The primary goal of take-over bid provisions is to protect the rights and interests of the various parties involved in a take-over bid — the offeror, shareholders and the target corporation. The CBCA provisions apply to all CBCA corporations whose shares are publicly traded or that have more than 15 shareholders. It is important to point out that provincial securities legislation also contains take-over bid provisions that apply to publicly traded corporations. Clause 98 would repeal the CBCA take-over bid provisions, leaving the area to be regulated by provincial securities laws.

Industry Canada describes "going-private" transactions as a variety of corporate transactions relating to distributing corporations "that result in termination of shareholder interest with compensation but without consent."[35] For non-distributing corporations, a "squeeze-out" is a similar type of transaction.

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(31) Part XX.1, Documents in Electronic or Other Form, would not apply to any information sent to or issued by the CBCA Director.

(32) For a more detailed discussion of take-over bids and going-private transactions, see Margaret Smith, PRB 99-40, *Take-over Bids*, Parliamentary Research Branch, Library of Parliament, 25 January 2000.

(33) Industry Canada, Discussion Paper*, Take-over Bids*, February 1996, p. 2.

(34) *Canada Business Corporations Act*, R.S.C. 1985, s. 194.

(35) Industry Canada, Backgrounder, p. 8.

The CBCA currently sets out rules for one type of going-private transaction (compulsory acquisition). "Under section 206(2) of the CBCA, an offeror who acquires 90% of the outstanding shares of a particular class of shares has the right to acquire the remaining 10%. This compels non-tendering shareholders to sell their shares and permits the majority shareholder to 'take the corporation private'."(36) The CBCA does not, however, address other forms of going-private transactions or whether they are permitted.

Clause 1(5) would add a new definition to the CBCA to provide that the definition of "going-private transactions" (relating to distributing corporations) would be set in the regulations. Clause 97 specifies that going-private transactions would be allowed, subject to **complying with any applicable provincial securities law**.

Clause 1(5) would also define "squeeze out transaction" (relating to non-distributing corporations). Under proposed amendments, the majority of minority shareholders would have to approve such transactions.(37) Thus, the standard of fairness would not be the same for squeeze-out transactions, in recognition of the fact that different circumstances are involved in distributing and non-distributing corporations.

Clause 99 would also make changes to the compulsory acquisition provision. As explained above, an offeror who acquires 90% of the outstanding shares of a particular class of shares has the right to acquire the remaining 10%. Certain aspects of the provision would be clarified and amendments to the definitions would be made to take into account the proposed repeal of the take-over bid provisions. The obligation on the dissenting offeree to elect to transfer shares on the terms of the take-over bid or to demand payment of fair value would be expressly set out, as would be the consequences for the dissenting offeree of not having elected to demand such payment (i.e., the offeree would be deemed to have elected to transfer the shares at the take-over bid price.)

Clause 100 would add a new provision providing a right of compelled acquisition, thereby giving shareholders the right to compel acquisition of their shares by the offeror within a certain time frame, and at the take-over bid price, where a take-over had been accepted by

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(36) Margaret Smith, *Take-over Bids*, p. 6.

(37) The rules relating to squeeze-out transactions can be avoided if all shareholders consent in writing.

90% of shares or shares of a class. The compulsory and compelled acquisition provisions would apply only to distributing corporations.

H. Modified Proportionate Liability

Currently, those who are involved in the preparation of financial information required by the Act are subject to joint and several liability with respect to a financial loss resulting from an error, omission or misstatement. This means that a defendant can be sued and held liable for the entire loss, notwithstanding the defendant's degree of fault, and then has to recover the amounts from the other negligent parties. The Standing Senate Committee on Banking, Trade and Commerce stated that the current regime could have adverse implications for the financial reporting system and capital markets and recommended a regime of modified proportionate liability.(38)

Clause 115 (sections 237.1 to 237.9) would set out a regime of modified proportionate liability in relation to claims for financial loss arising out of an error, omission or misstatement in respect of financial information required by the CBCA. The regime would apply after a court had found more than one defendant or third party responsible for the financial loss. Thus, a defendant or third party would be liable only for the portion of the damages corresponding to their degree of responsibility for the loss. If damages awarded against a defendant or third party proved to be uncollectable (for example, because of a defendant's insolvency), the plaintiff could apply to the court for a reallocation of the uncollectable amount amongst the other responsible defendants or third parties. The reallocated amount would be calculated by multiplying the uncollectable amount by the defendant's or third party's degree of responsibility, with a 50% cap on reallocated liability (the amount would be limited to 50% of the defendant's or third party's original proportionate liability). This procedure could result in cases where the plaintiff was unable to recover full damages.

A defendant or third party would continue to be subject to joint and several liability in case of fraud or dishonesty and this regime would also continue to apply to certain categories of plaintiffs: the Crown, charitable organizations, unsecured trade creditors, as well as

(38) The Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants*, March 1998.

individual plaintiffs and personal bodies corporate whose total financial interest in the corporation was not more than a prescribed threshold.(39) In addition, a court that considered it was just and reasonable to do so would be permitted to apply joint and several liability in the case of individual plaintiffs whose financial interest in the corporation was above the prescribed threshold. A provision would be added to establish how a person's financial interest would be calculated.

Clause 229 would provide that the modified proportionate liability regime would not apply to any proceedings that had been commenced before the coming into force of the section setting out the regime.

I. Other Amendments

Some other proposed amendments are set out below; the parts of the CBCA to which the amendments relate and the relevant section of the CBCA are identified where appropriate.

1. Miscellaneous

- A series of changes would be made to move the requirements for specific time periods (for example, fixing the date for determining which shareholders are entitled to receive a notice of shareholder meetings) and fees from the CBCA to the regulations.
- References in the CBCA to the word "in prescribed form" would be replaced with "in the form that the Director fixes." This would require changes to several sections in the CBCA. The result would be a much less formal process and the removal of the need for the form of documents to be prescribed in regulations. Thus, no notice of changes would have to be given in the *Canada Gazette*, although the regulations would require that the forms be published in a "publication generally available to the public."(40) It is argued that this change would add flexibility to the Act.

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(39) The draft regulations (section 89) prescribe the value of the plaintiff's total financial interest as $20,000.

(40) See section 3 of the draft regulations.

- Certain notices that must be given by the Director would no longer need to be given in the *Canada Gazette* but rather "in a publication generally available to the public."

2. Part 1 – Interpretation and Application

- Clause 1(5) would add the following new definitions to the CBCA: "distributing corporation," "going private transactions," "entity," "officer," "personal representative," and "squeeze out transaction" (section 2).
- Clause 1(5) would provide that, subject to the Director's exemption power, a distributing corporation would be defined in the regulations(41) (section 2).
- Clause 1(7) would broaden the Director's power to exempt a corporation from being a distributing corporation. A new element would also allow the Director to exempt a class of corporations from being distributing corporations. The Director would no longer need to be satisfied that the exemption "would not prejudice any security holder of the corporation" but rather that the exemption "would not be prejudicial to the public interest" (section 2).
- Clause 1(8) would add a definition of "infant" to provide that for the purposes of the CBCA, the word "infant" would be defined according to applicable provincial law, or in the absence of such law, according to the definition of "child" in the United Nations Convention on the Rights of the Child.

3. Part 2 – Incorporation

- Clause 4 would give the Director discretion to refuse to issue a certificate of incorporation where a corporation, if it came into existence, would not be in compliance with the Act (section 8).
- Clause 5 would set out how the articles should refer to the names of corporations in separate or combined forms of English and French (section 10 (3)).
- Clause 7 would clarify that section 14(1) applies to contracts purported to be entered into (and not only those actually entered into) in the name of or on behalf of a corporation prior to its inception. Section 14(1) provides that the person who enters into a written contract prior to incorporation is personally liable under the contract.

(41) See section 2(1) of the draft regulations.

4. Part 4 – Registered Office and Records

- Currently, the place (city or municipality) where the registered office is to be situated must be set out in the articles; an amendment to the articles is required if this place is changed. Clause 9 would permit directors to change the place and address of the registered office as long as these continued to be within the province specified in the articles. Thus, no amendment to the articles would be necessary in such a case (section 19).
- The CBCA requires that certain corporate records be kept in Canada. Clause 10 would permit a corporation to keep specified corporate and accounting records at a place outside Canada if they were available electronically at the registered office or other designated place in Canada. This right would be subject to restrictions imposed by other federal legislation administered by the Minister of National Revenue. If a corporation's accounting records were kept outside of Canada, however, records adequate to allow the directors to determine the financial position of the corporation would have to be kept in Canada. Corporations would be required to provide technical assistance to examine such corporate records, which would have to be available for inspection during regular office hours (section 20).
- Clause 11 would require an affidavit to be sworn before shareholders (and others) were authorized to have access to the securities register of a distributing corporation and would allow a reasonable fee to be charged for extracts from the securities register. The affidavit would have to state that the list of shareholders would not be used other than for the purposes specified in the legislation (section 21).
- Clause 12 would clarify the rules regarding corporate seals (section 23).

5. Part 5 – Corporate Finance

- Clause 14 would add flexibility in the adjustment of the stated capital account (section 26).
- Section 30 of the CBCA provides that, subject to certain exceptions, a corporation cannot hold shares in itself or in its holding corporation. Clauses 17 and 18 would provide an exception whereby a subsidiary corporation could purchase and hold shares in the corporation in the capacity of a legal representative or by way of security. This exception already exists with respect to corporations holding shares in themselves or a holding corporation (section 31). Clause 18 would also permit a subsidiary to acquire shares of its

parent corporation in prescribed circumstances. These circumstances, which are set out in the draft regulations, would essentially allow a foreign subsidiary of a Canadian corporation to acquire shares of its parent corporation to be used for the purpose of facilitating the foreign subsidiary's acquisition of a foreign target.

- Clause 19 would add a new provision to prohibit a corporation from allowing a subsidiary body corporate that held shares in the corporation to vote, or allowing the shares to be voted, unless the subsidiary satisfied the same requirements as are applicable to voting by the corporation of its own shares or shares of a holding corporation (section 33).
- Clause 25 would clarify the rules regarding the priority of holders of redeemable shares where the corporation could not make payment for such shares because it did not meet the solvency tests set out under section 36 (i.e., they would be treated in the same manner as other shareholders who had contracted with the corporation for the purchase of shares). In addition, the rights of shareholders who had contracted with the corporation for the purchase of shares would be subordinated to the rights of creditors and to the rights of shareholders that were in priority to the rights given to the holders of the class of shares being purchased (currently, they are in priority to all other shareholders and are subject only to the rights of creditors) (section 40).

6. Part 10 – Directors and Officers

- Clause 35 would specify that it would be the directors' responsibility to manage, or supervise the management of, the business and affairs of a corporation. This is to take into account the reality that in certain circumstances the directors do not manage the day-to-day affairs of the corporation but rather supervise its management. This would also harmonize the CBCA with the similar provisions found in a number of provincial corporations statutes (section 102).
- Under clause 38, an election or appointment as a director would be valid only if the person consented in writing. Written consent would not be required when the person was present at the meeting at which he or she was elected or appointed and did not refuse to act as a director. If the person were not present at the meeting, the election or appointment would not be valid unless written consent had been given or the person acted as a director

subsequent to the election or appointment. This change has been proposed to avoid the election or appointment of a director without the person's consent or knowledge (section 106).

- Clause 40 would provide that where all of the directors had resigned or been removed without replacement, any person who managed or supervised the management of the business and affairs of the corporation would be deemed to be a director, and would be subject to director's liability. The rationale is that this should encourage the person to ask shareholders to nominate new directors. The deeming provision would not apply to officers acting under the direction or control of a shareholder or other person, professionals who participate in the management of the corporation for the purposes of providing professional services, and receivers (section 109).
- Other changes would be made to the provisions governing the appointment and removal of directors to clarify their application (clauses 38, 39, 41, 42) (sections 106, 107, 111, 113).
- Clause 44(2) and (3) would clarify the limits on the power of the full board of directors to delegate their powers (section 115).
- Clause 45 and 62 would provide that, in the specified circumstances, an entry into the minutes of a corporation of a vote taken or a resolution made would be, in the absence of evidence to the contrary, proof of the outcome of the vote or resolution (section 117) (Part 12 – Shareholders – section 142).
- Under Bill S-19, clause 47 (section 119(1.1)) would have codified the Supreme Court of Canada decision in *Barrette* v. *Heirs of the Late H. Roy Crabtree*[42] and would have specified that a director would not have been liable under the wage liability provision for any amount in respect of statutory or contractual termination of employment or for severance pay. Bill S-11 does not include proposed section 119(1.1). A legal opinion received by Industry Canada states that the wording of S-19 went beyond the *Crabtree* decision, which did not decide the issue of liability for severance pay. Accordingly, the amendment was deemed unnecessary and it will be left to the courts to decide whether severance pay is a debt for services performed for a corporation.

(42) (1993) 1 S.C.R. 1027.

- Clause 48 would make several amendments to the interested director and officer contracts provision. The provision would apply to material transactions (in addition to material contracts as well as proposed material contracts and material transactions); the right of interested directors to vote on a contract or transaction in which they have an interest would be disallowed (they could still attend the meeting at which the conflict was being considered); a director would be required to make an new declaration when there was a material change in the nature of his or her interest; it would be clarified that the director or officer would not be accountable to the corporation for profits made from the contract or transaction if the conditions in the CBCA had been satisfied; a new provision would be added providing for shareholder approval of interested director or officer contracts or transactions where the conditions had not been satisfied; broader grounds would be provided for a court application to set aside an interested director or officer contract or transaction; and, the courts would be given the power to order the director to account to the corporation for any profits or gains (section 120).

7. Part 12 – Shareholders

- Under the CBCA, shareholder meetings must be held within Canada unless all the shareholders entitled to vote at the meeting agree otherwise. Clause 55 would also allow meetings of shareholders to be held at a place outside Canada, if the place was specified in the articles. In addition, a shareholder would be permitted to participate in the meeting by electronic means unless the by-laws provided otherwise. Under Bill S-19, a shareholder would not have been able to participate in a meeting by electronic means unless the by-laws expressly allowed it. However, under Bill S-11, a meeting could only be held entirely by electronic means if authorized by the by-laws (section 132).
- According to clause 56, shareholder meetings would have to be held no later than six months after the end of the financial year[(43)] and a corporation could apply to a court for an order extending the time for calling an annual meeting (section 133).
- Clauses 57 and 58 deal with the record date for determining the shareholders entitled to receive notice of meetings and other record dates, the period within which notice of annual

(43) Section 133 does set out other time limits for holding shareholder meetings.

meetings would have to be sent to shareholders, etc. The clauses would move the identification of specific time periods to the regulations, but in the case of a non-distributing corporation, a notice of a shareholders meeting could be shorter than the prescribed period if the articles or by-laws of the corporation so provided. Clause 57 would also add a record date for determining the shareholders entitled to vote at a meeting of shareholders (sections 134 and 135).

- Clause 60 would amend section 138 of the CBCA to clarify the rules relating to the preparation of lists of shareholders entitled to receive notice of shareholder meetings and lists of shareholders entitled to vote. It would also provide that shareholders whose names appeared on a voting list would be entitled to vote the shares shown on the list. Clause 61 of Bill S-19 would have amended section 140 of the CBCA to provide that a borrower would have been entitled to vote a loaned share unless otherwise specified. This clause was not included in Bill S-11. Stakeholders contended that securities lending should be addressed by the Canadian Securities Administrators rather than in the CBCA.

8. Part 13 – Proxies

- Clause 71 would clarify the rules with respect to when the chairperson of the meeting of shareholders could avoid a ballot (section 152).
- Clause 72 deals with the duties of an intermediary in relation to the voting of shares registered in the intermediary's name and not beneficially owned by the intermediary. Bill S-11 makes a number of changes to the amendments proposed in Bill S-19. Ensuring that intermediaries must have written rather than oral instructions before voting shares on behalf of a beneficial owner and allowing intermediaries to appoint proxyholders are among these changes.

9. Part 14 – Financial Disclosure

- Clause 80 would require the corporation to prepare a statement setting out the reason for replacing an auditor; the new auditor would have to be provided with the opportunity to comment on these reasons (section 168).

- Clause 81 provides that persons who in good faith made an oral or written communication to the auditor of a corporation, as required by the CBCA, would not be liable in any civil proceeding that arose as a result.

10. Part 15 – Fundamental Changes

- Section 190 of the CBCA sets out the circumstances in which a shareholder has the right to dissent from a fundamental change initiated by a corporation. Under clause 94, the right to dissent under section 190 would also be available to shareholders of a corporation carrying out a going-private transaction or a squeeze-out transaction. The proposed amendments would also specify that the right to dissent under section 190(2) would be available even if there was one class of shares (section 190). Section 190(2) provides that a holder of shares of any class or series of shares entitled to vote under section 176 may dissent if the corporation resolves to amend its articles in a manner described in that section.
- Clause 96 would add going-private transactions and squeeze-out transactions to the definition of "arrangement" in section 192; thus, a corporation would be able to make an application to a court for approval of such a transaction where it was not practical for it to do so under any other provision of the CBCA. The court would be able to set the terms and conditions of such an arrangement (section 192).

11. Part 18 – Liquidation and Dissolution

- Clause 101 would make sections 209 and 212 applicable to insolvent or bankrupt corporations. The Director could dissolve such corporations if the conditions set out in section 212 applied and revive them when appropriate (section 208).
- Clause 102 would clarify the revival provision in the CBCA, for example, by making clear that revival would be retroactive and by establishing who would be entitled to apply to revive a corporation. The Director would be able to attach terms and conditions to the revival that he or she considered reasonable (section 209).
- Clause 104 would remove the requirements for a corporation to publish notice of its intention to liquidate or dissolve in a newspaper and in the province where the corporation

has its head office if it does not carry on business there. The corporation would still have to give notice in each province where it was carrying on business (section 211).

- Clause 105 would give the Director the power to dissolve a corporation that did not have any directors and remove the requirement for the Director to wait for one year before dissolving a corporation that fails to pay its incorporation fees (section 212).

12. Part 20 – Remedies, Offences and Punishment

- Clause 119 would clarify the decisions made by the Director that might be appealed, and would add new types of decisions to that list (section 246).
- Clause 120 would clarify that only final court orders are appealable as of right to the court of appeal. An interim order would be appealable only with leave from the court of appeal (section 246).

13. Part 21 – General

- Clause 125 would clarify and broaden the regulations-making power to reflect the other proposed amendments. The regulations would be able to incorporate by reference any material, regardless of its source and either as it existed on a particular date or as amended from time to time (section 261).
- Through a new correction provision in the CBCA (section 265) proposed in clause 130, the Director would be expressly authorized to request changes in any document that contained an error. The Director would have to be satisfied that the correction would not prejudice any of the shareholders or creditors of the corporation. In addition, any corporation or interested person would be permitted to request changes. The Director, the corporation or interested person who believed the correction would prejudice a shareholder or creditor would be entitled to apply to a court for an order directing the Director to make a correction and determining the rights of shareholders and creditors.
- A new cancellation provision (section 265.1) mirroring the correction provision would be added to the CBCA.

- **Bill S-11 was amended at 3rd reading stage in the Senate by adding a new clause 136. This new clause would require a designated committee of either the Senate, the House of Commons or both Houses of Parliament to review the provisions and operations of the CBCA. This review would take place five years after this clause comes into force and every ten years thereafter. Clause 136 would also require the committee(s) to report to Parliament on their review of the CBCA.**

J. Technical Amendments

The bill would also make a series of technical amendments to the CBCA with the intention of clarifying ambiguous language, updating terminology, and eliminating regulatory and paper burdens.

CCA

As stated above, many of the proposed amendments to the CCA are intended to harmonize the legislation with the proposed amendments to the CBCA. Thus, many of the same themes are repeated.

A. Shareholder Proposals

An element added to the CCA in 1998 was the power of cooperatives to issue investment shares and thereby obtain additional sources of capital. The degree of shareholders' power is decided upon by the members of the cooperative, subject to strict upper limits imposed by the CCA. Shareholders do have a role in cooperative decision-making and are allowed to make proposals at annual meetings. The eligibility requirement for persons other than members to submit shareholder proposals in the CCA would be harmonized with the proposed CBCA amendments. Clause 153 would amend section 58 to set minimum share ownership and length of ownership requirements for submitting a proposal. The provisions would also allow for the pooling of shareholdings to meet the minimum requirement. Other elements proposed in the CBCA amendments are repeated here.

Section 58(2) of the CCA provides for no restrictions on members submitting a proposal to amend the articles of the cooperative. No amendments are proposed to the provisions dealing with proposals submitted by members.

Proposed section 58(4.1) would provide that a cooperative would not have to circulate a proposal submitted by a shareholder or a member if at the date of the meeting the shareholder did not own the requisite number of shares or the member had voluntarily withdrawn as a member of the cooperative.

B. Financial Assistance

The CCA restricts the loans, guarantees and other kinds of financial assistance that can be given by a cooperative to members, shareholders, directors, officers or employees where the directors have reasonable grounds for believing that, as a result, the cooperative either would be or would become insolvent or the cooperative's assets either would be or would become less than all of its liabilities and stated capital.

Clause 184 would repeal the provision on financial assistance. The rationale is that directors dealing with such transactions are subject to statutory fiduciary duties to act in the best interest of the cooperative, and they can be sued for failing to do so. It is argued that this provides adequate safeguards.

C. Insider Trading

The proposed amendment would harmonize the CCA provisions with the proposed amendments to the CBCA (clauses 191, 192, 193).

1. Prohibition against Speculative Trading

The proposed amendments would replace the word "share" with the word "security" to cover more fully those transactions that could give rise to a conflict of interest. The proposed amendments would also change the definitions of "insider," "officer," and "business combination" for the purposes of speculative trading provisions.

2. Civil Liability

The proposed amendments would clarify and expand the scope of the civil liability provisions. This would be accomplished in part by expanding the definition of "insider" and "security" for the purpose of such provisions. In addition, the civil liability provision would be re-worded to expand its scope. Liability could be avoided if the insider established that he or she had reasonably believed the information to have been generally disclosed.

A new element to the civil liability provisions would impose civil liability on person who communicated undisclosed confidential information (the tipper) and would set out applicable defences.

Another new provision would guide the courts in their assessment of the damages. In the case of a distributing cooperative, when the plaintiff was a purchaser the court would have to consider the price paid by the plaintiff, less the average market price over the 20 trading days immediately following general disclosure of the information. When the plaintiff was a seller, the court would have to consider the average market price over the 20 trading days immediately following general disclosure of the information, less the price that the plaintiff had received.

D. Modified Proportionate Liability

Clause 218 (proposed sections 337.1 to 337.9) would set out a regime of modified proportionate liability in relation to the preparation of financial information required by the CCA. Currently, those who are involved in the preparation of financial information are subject to joint and several liability. The amendment would harmonize the CCA with the proposed amendments to the CBCA (above) and the same rules would apply.

According to clause 234, the modified proportionate liability regime would not apply to any proceedings commenced before the coming into force of the section setting out this regime.

E. Other Amendments

- Several proposed amendments deal with "unanimous agreements." This term was referenced in certain sections of the CCA, even though a unanimous agreement could not

include a provision dealing with the subject matter of the section. Thus, the reference to "unanimous agreements" would be removed from these sections (miscellaneous).

- Clause 137 would provide that, subject to the Director's exemption power, a distributing cooperative would be defined in the regulations (section 2: Interpretation and Application). It would also change a number of definitions to clarify the language of the CCA and adopt the same wording for the definition of a "minor" as is being proposed for the definition of an "infant" under the CBCA. A reference to section 173 would be added to the definition of security in order to allow members of a cooperative who only hold membership shares to rely on the insider trading civil liability provisions.
- Clause 138 would broaden the Director's power to exempt a cooperative from being a distributing cooperative. A new element would also allow the Director to exempt a class of cooperatives from being distributing cooperatives. The Director would no longer have to be satisfied that the exemption "would not prejudice any security holder of the cooperative" but rather that the exemption "would not be prejudicial to the public interest" (sections 2 and 4: Interpretation and Application).
- Clause 139 would provide that an application to incorporate a cooperative could be made by one or more "cooperative entities." The term "cooperative entity" would replace the word "federation," thereby allowing bodies that fit within the definition of "cooperative entity," which is wider than the definition of "federation," to incorporate a cooperative as a subsidiary.
- Clause 140 would give the Director discretion to refuse to issue a certificate of incorporation where the cooperative, if it came into existence, would not be in compliance with the Act (section 12: Incorporation, Structure and Organization).
- Clause 141 would allow a cooperative's members to be divided into regional groups.
- Clause 144 would set out how the articles should refer to the names of cooperatives in separate or combined forms of French and English (section 20: Incorporation, Structure and Organization).
- Clause 146 would permit a cooperative to keep specified records at a place outside Canada, provided they were available electronically at the registered office or other designated place in Canada. This right would be subject to restrictions imposed by other federal legislation

administered by the Minister of National Revenue. Cooperatives would be required to provide technical assistance to examine such records and they would have to be available for inspection during regular office hours (section 31: Registered Office and Records).

- Clause 149 would clarify the rules allowing a member or shareholder to participate in the meeting by electronic means (section 48: Corporate Governance).
- Clause 150 would allow a cooperative to apply to a court for an order extending the time for calling an annual meeting (Corporate Governance).
- Clause 151 and 152 would move certain specific time periods (for example, fixing a date for determining which members and shareholders were entitled to receive notice of meetings) from the legislation and allow them to be made by regulation. In the case of a non-distributing cooperative, a shorter notice period could be specified in the articles or by-laws. (section 51: Corporate Governance).
- Bill S-19 would have clarified the voting rights in respect to a loaned investment share. Bill S-11 does not make this amendment to the CCA for the same reasons that the same amendment was not made to the CBCA (Corporate Governance).
- Bill S-19 would have repealed sections 69(3)(c) and 70 of the CCA. This would have given members the right to call meetings of investment shareholders and vice versa. It was suggested that the preferred situation would be for investment shareholders only to have the right to call meetings of investment shareholders and for members only to have the right to call members' meetings. As a result, Bill S-11 does not contain the amendment proposed in Bill S-19.
- Clause 156 of Bill S-19 would have provided that, where a cooperative had four directors, at least two would have to have been resident in Canada. This has been replaced by clause 159 of Bill S-11 which provides that at least 25% of the directors of a cooperative must be residents of Canada unless the cooperative has only three directors, in which case one must be a Canadian resident (section 78: Directors and Officers). Clause 163 would impose the same 25% requirement for a quorum at a meeting of directors.
- Clause 170 would specify that a director or officer would not be accountable to the cooperative with respect to an interested director or officer contract or transaction and the contract or transaction would not be invalid, if the director or officer had acted honestly and

in good faith and the other specified conditions were satisfied. These conditions include approval of the contract or transaction by a special resolution of the members, disclosure of the nature of the interest before approval of the contract, and the reasonableness and fairness of the contract to the cooperative when it is approved (section 106: Directors and Officers).

- Clause 171 would modify the provision dealing with powers that might be delegated by directors (section 109: Directors and Officers).
- Clause 174 would clarify the rules regarding unanimous agreements under the CCA (section 115: Directors and Officers).
- Clause 181 would add flexibility in the adjustment of the stated capital account with respect to arm's length transactions (Capital Structure).
- Clause 185 would, among other things, amend the definition of "solicit" or "solicitation" to exclude a communication for the purpose of obtaining the number of shares required for a shareholder proposal (section 163: Proxies).
- Clause 188 would provide that a person could solicit proxies without having to send a dissident's proxy circular if the solicitation was made to 15 or fewer shareholders or if the solicitation was conveyed by public broadcast, speech or publication in the prescribed circumstances.
- Clause 201 would ensure that cooperatives submitted specified documents to the Director in a timely fashion (section 252: Financial Disclosure).
- Clause 209 would make sections 308 and 311 applicable to insolvent or bankrupt cooperatives. The Director could dissolve such cooperatives if the conditions set out in section 311 applied, and could revive them when appropriate (section 307: Liquidation and Dissolution).
- Clause 211 would give the Director the power to dissolve a cooperative that had no directors. In addition, the Director would no longer have to wait for one year before dissolving a cooperative that failed to pay its incorporation fees (section 311: Liquidation and Dissolution).
- Clause 222 would clarify the decisions made by the Director that could be appealed, for example by adding new types of decisions to that list (section 345: Remedies, Offences and Punishment).

- Clause 223 would add new sections 361.1 to 361.7 to the CCA incorporating the same electronic communications regime as is proposed for the CBCA.
- Clause 227 would broaden the regulations-making power to reflect the other proposed amendments. In addition, the proposed amendments would allow the regulations to incorporate by reference any material, regardless of its source and either as it existed on a particular date or as amended from time to time (section 372: General).
- Clause 228 would allow for fees to be set either under the CCA or the *Department of Industry Act* (section 373: General).
- Clause 230 would set out a new correction provision in the CCA. The Director would be expressly authorized to request changes to any document that contained an error. The Director would have to be satisfied that the correction would not prejudice any of the members, shareholders or creditors of the cooperative. In addition, any cooperative or interested person would be permitted to request changes. The Director, the cooperative or the interested person who believed the correction would prejudice a member, shareholder or creditor would be entitled to apply to a court for an order directing the Director to make a correction and determining the rights of shareholders and creditors (General).
- A new cancellation provision mirroring the correction provision would be added to the CCA (General).

F. Technical Amendments

A series of technical amendments are also being proposed to update terminology.

AMENDMENTS TO OTHER ACTS (Ownership Restrictions)

Bill S-11 was amended at committee stage in the Senate by adding several new clauses. Clauses 235 to 238 would amend the *Air Canada Public Participation Act*, the *Canada Development Corporation Reorganization Act*, the *CN Commercialisation Act* and the *Nordion and Theratronics Divestiture Authorization Act* by repealing the definition of "associate" that applied to specific sections of these acts. The term "associate" would

therefore have the same meaning as in the CBCA.(44) The sections in question set out that the articles of continuance or amendment of these corporations shall contain, among other things, ownership restrictions that apply to any one person, together with the associates of that person. Certain relationships between two persons that currently make them associates for the purposes of statutory ownership restrictions would no longer be considered to qualify as "associate relationships." It would appear that this will expand the rights of individuals, corporations, partnerships, and trusts to more freely communicate among themselves and/or act in concert with respect to their interests without running afoul of any statutory ownership restrictions.

The House of Commons Standing Committee on Industry, Science and Technology amended the bill by deleting clauses 235 to 238 added at committee stage in the Senate.

COMING INTO FORCE

The amendments proposed to both the CBCA and the CCA would come into force at a date set by Governor in Council.

COMMENTARY

Most of the amendments proposed in Bill S-11 are unlikely to engender a great deal of debate. The extensive consultation process conducted by the Department of Industry prior to the introduction of the bill was designed to obtain stakeholder input into the amendment process. Despite the consultations, some of the proposals are likely to raise concerns.

The directors' residency requirements may be a controversial issue. The bill would require only 25% of the board of directors of a CBCA corporation to be resident Canadians (rather than a majority, as at present) and would eliminate the residency requirement for committees of the board. Some argue that residency requirements are outmoded and inhibit Canadian corporations from moving into foreign markets and obtaining the best directors. Others contend that they promote Canadian participation in corporate decision-making, foster

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(44) See sections 2(2) of the above-mentioned Acts.

compliance with legal obligations, and allay concerns about the amount of foreign investment in Canada.

The provisions of Bill S-19 with respect to shareholder proposals engendered considerable debate before the Standing Senate Committee on Banking, Trade and Commerce. The provision that continued a corporation's right to reject a shareholder proposal whose primary purpose was to promote general economic, political, racial, religious, social or similar causes was of particular concern to a number of shareholder rights advocates. Bill S-11 would remove these grounds for rejecting a proposal. Under Bill S-11, management could reject a proposal if it did not relate in a significant way to the business or affairs of the corporation. This amendment would appear to address a number of the concerns raised before the Senate Committee.

Bill S-11, however, would continue the minimum share ownership and length of ownership requirements before being able to make shareholder proposal that were proposed in Bill S-19.

Bill S-11 also contains several technical amendments that would address a number of concerns raised about Bill S-19.

The introduction of a modified proportionate liability regime in relation to financial loss for claims arising out of errors, omissions or misstatements in connection with financial information required by the CBCA and the CCA would break new ground. While various forms of modified proportionate liability are common in the United States, the proposals in Bill S-11, if implemented, would be a first for corporations law regimes in Canada.