

purpose. We have, however, received an extraordinary number of heated, even passionate criticisms of the second provision, particularly from Canadian officer-directors who argue that the effects of the rule would be to compel directors to promote Canadian interests above corporate interests in contravention of their legal duty to the corporation, to place greater emphasis on citizenship than demonstrated competence, and to regulate Canadian officers of foreign-controlled corporations to the status of second-class citizens. These were persuasive arguments.

Even more persuasive, however, were the arguments of the more detached professionals, lawyers and accountants, who pointed out the two gross defects of the provision. First, because foreign investors will invoke every possible stratagem to retain control over their capital, they would tend to recruit "straw-men" who would be amenable to their control. Second, it would be relatively easy to set up a formal board of directors and then proceed to control the corporation through a management committee or advisory board. In short, the provision would not be effective. We found these arguments convincing. We therefore recommended that the second provision concerning foreign-controlled corporations be dropped and the government modified the bill accordingly.

As I stated earlier, the bill confers extensive power on the directors to manage the business and affairs of the corporation, but counterbalances that power by conferring on shareholders a number of residual powers to influence or even discourage fundamental changes, to participate more actively and more knowledgeably in the internal affairs of the corporation, and even to remove directors. Most of these provisions which are set out in part XI are not new law. In fact, the bill continues most of the substance of the present act, reorganizing the rules for greater simplicity, redrafting a number of provisions for greater clarity and adding some minor substantive rules relating to the conduct of shareholder meetings and court review of elections of directors.

The only completely new substantive provisions in part XI relate to unanimous shareholder agreements. These provisions, in effect, permit the shareholder of a closely held corporation to assume the duties and liabilities of directors, thus creating what is conceptually a partnership with limited liability. Again, although the provision is new in the statute it only reflects, rather than changes, present practice. It is included in the bill for two specific purposes. First, it legitimates direct control by the shareholders and so obviates many unnecessary formalities in close corporations. Second, it virtually compels an incorporating lawyer to consider more carefully the relationships among his clients when setting up a close corporation.

But this unanimous shareholder agreement provision is the exceptional case. The general policy of part XI is to vest residual power in the shareholders of the usual corporation to enable them to participate directly in the internal affairs and to control indirectly the management of the business of the corporation. This policy is firmly buttressed by the disclosure provisions set out in the proxy rules in part XII and the financial disclosure provisions of part XIII.

Canadian Business Corporations Act

Part XIII of the bill largely continues the substantive disclosure rules of the present Canada Corporations Act but introduces two new concepts, one a matter of form and the other very much a matter of substance. The first major innovation of the bill is to provide that the very lengthy provisions relating to the contents of financial statements be set out in regulations instead of in the statute. Three arguments support this recommendation. First, the changes in future, as in the past, will be made only after discussion with interested parties. Second, it is impossible to amend a corporations act frequently enough to reflect changes in accounting principles and practices. Finally, the regulations will in any case be subject to pre-publication under the bill and will also be subject to scrutiny under the Statutory Instruments Act.

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The second innovation of part XIII is to strengthen the role of the auditor as an appointee of the shareholders, following generally the policy of the Ontario Business Corporations Act. One of the best illustrations of this policy, at least in respect of corporations which distribute their shares to the public, is the requirement of an audit committee which can ensure that the auditor is responsive to the directors as the representatives of the shareholders, and not answerable only to the officers of the corporation.

I turn, now, to the fundamental changes. Reinforcing the residual control of shareholders, part XIV introduces a new legal regime concerning fundamental changes of the constitution or of the business carried on by the corporation. As I said earlier, because the present act was assembled brick by brick with little concern for over all symmetry or even internal consistency, it has become extraordinarily difficult to interpret or to comply with the new law. Nowhere is this more clearly illustrated than with respect to fundamental changes sought to be made under the present discretionary system.

Because of the amount of discretion exercised and the complicated interrelations among the present statute rules, working with the present act has become an arcane art which requires an insider's knowledge of the statute provisions, departmental policies and rules of practice. To resolve this problem, part XIV of the bill recommends two solutions. First, it makes uniform all the formalities relating to basic modifications of the corporation's constitution or business—amendment of articles, amalgamation, continuance under the bill or any other law, and sale or lease of assets of the corporation outside the ordinary course of business.

Under the bill, these modifications may be made as of right, free of any intervention by public administrators. Second, part XIV confers a right to dissent or, as it is more commonly known, an appraisal right on a shareholder who dissents from a proposed fundamental change and demands from the corporation payment of the objectively appraised value of his shares. The purpose of this policy is twofold. It permits management and majority shareholders to effect changes in the business or affairs of the corporation with a maximum of flexibility. At the same time it permits a dissenting shareholder to withdraw his investment from an enterprise which is substantially different from the enterprise in which he originally invested. In short, the rule makes it very difficult for a minority to