

*Canadian Business Corporations Act*

biage relating to objects and powers in an effort to avoid application of this ultra vires doctrine.

Because objects and powers clauses have become meaningless to protect investors, they tend only to be a trap for the unwary creditor or shareholder, invoked in most cases to permit a corporation to escape an obligation. The bill, therefore, attempts to resolve this root problem instead of attacking symptoms such as limiting broad objects and powers clauses or minimizing prejudice to third parties. To preclude any inference, therefore, that the ultra vires doctrine might apply because the bill is cast as a registration statute, the bill states clearly that a corporation has the capacity and also the rights, powers and privileges of a natural person.

In short, the bill reverts to original common law doctrine and so becomes consistent with the European concept of the corporation. That does not mean, however, that the shareholders of a corporation cannot constrain management by establishing express goals in the corporate constitution. Such restrictions are expressly permitted. But part III makes abundantly clear that even an express restriction cannot prejudice the rights of a third party contracting in good faith. The third party is entitled to presume that the corporation has the capacity to enter into any contract and that its directors and officers have authority to act on behalf of the corporation. Part III, by giving a corporation the capacity of a natural person, rids the corporation law of what has clearly become excess conceptual baggage.

Part V of the bill, concerning corporate finance, deals with more difficult problems. Probably no provisions in the present act are as unclear and unsatisfactory as the sections relating to capital structure, shares, redemption of shares and dividends. Reflecting that the present law developed from several sources and on a piecemeal basis, the financial provisions are scattered throughout the act, rendering difficult the resolution of even simple problems. Some of the provisions relating to registered shares, bearer shares and series of shares are conceptually incomplete and thus engender much confusion. In addition, a number of concepts like partly paid shares and par value shares have simply become archaic, bearing little relation to contemporary market requirement and practices.

● (1430)

Finally, there are several provisions that are altogether absent from the present law, such as rules relating to options and rights, acquisition by a corporation of its own shares, rules relating to accounting practices and uniform insolvency criteria. Part V attempts to clear up this conceptual confusion, to abrogate a number of concepts that no longer serve a useful purpose and to legitimate those institutions that serve a practical purpose and do not prejudice creditor and shareholder interests.

To this end, the bill bars the issue of shares subject to assessment, or the issue of par value shares, prohibits bearer shares, avoids reference to concepts such as paid in surplus or capital surplus, and expressly permits acquisition by a corporation of its own shares subject to strict solvency standards. Similar strict solvency standards apply to determine whether a corporation can pay dividends, make loans or guarantees to its employees, or

[Mr. Cafik.]

reduce its capital. In brief, these provisions tend to permit a great deal of management flexibility within the limits prescribed by the general solvency rules, forcing management to rely on what is good business practice rather than on technical idiosyncrasies that have become part of the traditional corporation law.

Consistent with this philosophy, the bill continues to vest in the directors very broad power to manage the business and affairs of a corporation. Indeed, it is this institutionalization of responsibility in the board of directors for the management of the business and affairs of the corporation that is the hallmark of a contemporary corporation law. But that is not to say that the directors are given a blank cheque, for the bill substantially increases the residual powers of the shareholders to control indirectly the management of the corporation. For example, shareholders have the power to initiate bylaws, to submit general proposals to shareholders' meetings, to remove directors by ordinary resolution, to vote on fundamental changes and even to require the corporation to purchase their shares where they disagree with a proposed fundamental change. It is this internal balancing of interests that raises the most difficult conceptual problems, and it is with respect to this central issue that the bill has been recognized as both imaginative and practical by the business community.

One aspect of this problem, that is, the declaration of a standard of trustee responsibility of duty and duty of care to regulate the conduct of directors and officers, has elicited a great deal of controversy. In general, however, these provisions are only declaratory of what is the common law or is generally acknowledged to be good business practice. For that reason, it is becoming a conventional provision in contemporary corporation laws. To mollify the seemingly high standard of care imposed on corporate management, the bill contains indemnification provisions that are broad in scope and that apply wherever a director or officer has acted in good faith in the interests of the corporation and not in his own interests.

Part IX also introduces the requirement that a majority of the directors of a corporation be resident Canadians. Some of the major initiatives of the government in this area in recent years have been introduction of the foreign investment review bill and the revision of the acts regulating financial intermediaries and some resource corporations in order to restrict foreign ownership and control. It was decided that the corporation law could usefully reinforce these policies by ensuring that the Canadian viewpoint will be expressed in all meetings of directors and committees of directors.

The predecessor bill, Bill C-213, contained two provisions designed to achieve this goal. The first provision, which is already law in Ontario, required each federal corporation to have a majority of Canadian resident directors. The second provision, which is altogether new in Canada, applied only to foreign-controlled corporations, requiring them to have a majority of "outside" Canadian directors, that is, directors who are not employees of the corporation.

The first provision requiring generally a majority of Canadian directors has been widely accepted as expressing a legitimate Canadian concern and as serving a useful