The Business Corporations Act of New Brunswick: Observations From A Management Perspective

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New Brunswick has followed the lead of other Canadian jurisdictions by adopting a business corporations statute that simplifies the routine administration of corporate affairs while enlarging management accountability to shareholders and creditors. The author examines the new Business Corporations Act *concentrating on the impact of the new provisions on directors, officers and controlling shareholders and highlighting the factors to be considered in the transition period during which letters patent companies may choose between remaining under the old legislation and continuing under the new.*

Se conformant à la direction de certaines juridictions canadiennes, le Nouveau-Brunswick a adopté une loi portant sur les corporations commerciales. La nouvelle Loi sur les corporations commerciales *simplifie les affaires courantes des corporations tout en augmentant la responsabilitié de la gérance envers les actionnaires et les créanciers.*

L'auteur étudit l'effet de ces nouvelles dispositions vis-à-vis les administrateurs, les dirigeants et les actionnaires majoritaires, en soulignant les éléments à considerés durant le période de transition. Pendant cette periode, les corporations formées en vertu des lettres patentes peuvent choisir de demeurer sous l'ancienne loi ou de suivre la nouvelle loi.

Starting in January, 1982, a new regime for business corporations takes effect in New Brunswick. The provisions of the new *Business Corporations Act* ("New Act")[1] are to be introduced in stages over five years. After December 31, 1981 no letters patent incorporating a company may be issued[2] under the *Companies Act*[3] ("Old Act"); new trading corporations must be incorporated under the New Act. However, there is a two year delay during which the charters of existing letters patent companies may be amended by supplementary letters patent.[4] During this period, companies incorporated prior to January 1, 1982 may be "continued" under the New Act.[5] On January 1, 1987, all companies

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[1]S.N.B. 1981, c. B-9.1. (New Act).

[2]*Ibid.*, s. 192 (6); S.N.B. 1981, c. 12, s. 1.2(1)

[3]R.S.N.B. 1973, c. C-13.

[4]S.N.B. 1981, c. 12, s. 1.2 (2).

[5]*Supra*, footnote 1, at s. 192.

incorporated in New Brunswick with share capital (with the exception of certain co-operatives, credit unions and savings and loans societies) will be deemed to have been continued under the New Act.[6]

The New Act follows the model of the *Canada Business Corporations Act* ("CBCA")[7] but, in several important respects, departs from that model. Some of these departures stem from the Province's desire to attract extra-provincial investment and business initiatives, others result from the size of the jurisdiction. A preponderance of closely-held companies and somewhat limited government resources militate against the more complex securities provisions found in other business corporations' statutes. In addition, however, the New Act introduces several novel concepts[8] that are hard to trace to administrative expediency and, far from attracting foreign investment, appear to discourage it. The following discussion is intended to highlight the impact of the more salient features of the New Act from the point of view of the management of companies proposing to incorporate or continue under the New Act and to provide some practical suggestions to assist in making the decision whether to continue.

Election of Directors

The New Act, like that of other jurisdictions following the CBCA model, has made "one-man companies" possible. No company governed by the New Act need have more than one director[9], nor does that director have to hold a qualifying share.[10] This is merely an acknowledgement that in many closely-held companies two of the minimum of three directors (required under the Old Act) added nothing but inconvenience and expense to the administration of the company. Because New Brunswick's New Act does not generally distinguish between public and private companies, even a publicly-traded New Brunswick company could conceivably have but a single director. The number of directors may be a fixed number or a minimum and maximum number.[11]

The precise size of the board of directors takes on more significance in New Brunswick than under the CBCA because of the mandatory cumulative voting prescribed by section 65 of the New Act. Under the

[6] *Ibid.*, at s. 2(1) (*c*).

[7] S.C., 1974-75, c. 33.

[8] The main feature of the New Act that would be seen as a deterrent to foreign investment made through corporations governed by the New Act is s. 83 which deals with insider trading. See *Infra* under the title "Insider Trading".

[9] *Supra*, footnote 1, at ss. 60(1) & 72 (7).

[10] *Ibid.*, at s. 63(2).

[11] *Ibid.*, at s. 4 (1) (*e*).

Old Act, section 92 contained a form of cumulative voting for directors that could be invoked by a shareholder or a group of shareholders acting as a unit. Any shareholder wishing to take advantage of this provision was required, prior to the election of a full board of directors, to deposit a declaration indicating his intention to invoke the right to elect one director.

The provisions of section 92 of the Old Act were defective in at least one respect in that if the elections of directors were staggered, it could not be said that a full board of directors was to be elected at any particular meeting. In the absence of the meeting held to elect a full board, one of the pre-requisites of section 92 would not be met and the cumulative voting provisions would not apply. The maximum period for which a director could be elected was two years so that staggering was possible. Under the New Act the staggering of elections of directors is not prohibited but since the maximum term for which a director may be elected is 15 months[12], it would be necessary to have one or more elections of directors between annual meetings in order to stagger the terms.

The New Act affords to shareholders cumulative voting rights each time directors are to be elected by the shareholders whether or not a full board is to be elected. Thus, a holder of 20% of the voting shares is entitled to elect two directors on a board of ten and at least one director on a board of more than four and less than nine.[13] The cumulative voting rights are reinforced by limitations on removal of directors by the shareholders[14] and on the reduction of the board.[15]

The cumulative voting provisions of the New Act cannot be directly excluded by the articles nor does there appear to be a convenient way to assure to a majority shareholder the power to select a percentage of the board greater than the percentage he would be entitled to under the cumulative voting provisions. If it is necessary to eliminate cumulative voting, consideration might be given to creating two classes of shares differing only with respect to rights to elect directors.[16] Conceivably the same result could be achieved by creating in the articles a separate class of redeemable qualifying shares, stipulating that each director must hold

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[12] *Ibid.*, at s. 65(5).

[13] Section 65 (1) operates so that the number of votes required to assure the election of one director on a board of two is ⅓ of the total votes plus one; for one director out of three, ¼ of the votes plus one are required; for one director out of four, ⅕ of the votes plus one are required. Similarly, for two directors out of five, ⅓ of the votes plus one are required. However, if the extra vote is missing the result may be a tie and the mathematical rule will not hold unless the Chairman casts a deciding vote in favour of the majority shareholder's nominees to break the tie.

[14] *Ibid.*, at s. 65 (6).

[15] *Ibid.*, at s. 70 (2).

[16] *Ibid.*, at s. 67 (2).

a qualifying share[17], and by restricting the transfer[18] and issue[19] of qualifying shares so that the majority shareholder can, in effect, prevent the minority shareholder's nominees from continuing to hold or from acquiring the necessary qualification.

Qualifications of Directors

In prescribing the qualifications of directors the New Act[20] is both more and less restrictive than the CBCA.[21] The age requirement is nineteen years under the New Act compared to eighteen years under the CBCA. More important, the New Act does not impose any residence or citizenship qualifications whereas the CBCA[22] calls for a majority of the directors to be "resident Canadians" (defined so as to exclude some residents who are not Canadian citizens). The New Act imposes an extra requirement not found in the CBCA: no person may be a director who has been recently convicted of an offence under the Criminal Code involving fraud or in connection with the promotion, formation or management of a corporation to which the New Act applies and for which he has not been pardoned.[23] Somewhat anomalously, a person convicted under the laws of a non-Canadian jurisdiction for an offence such as securities' fraud involving a New Brunswick corporation would appear to qualify as a director in New Brunswick whereas a conviction for the same offence under the Criminal Code would disqualify him. The disqualification does not appear to extend to a person convicted of a securities' offence in respect of corporations to which the New Act does not apply unless the offence involved fraud.[24]

While the share qualification has been removed unless the articles otherwise provide, a director is not a director unless he was present at the meeting at which he was elected or appointed and did not refuse to act as a director or, if he was not present at the meeting, he consents in writing to act as a director within ten days after his election or appointment or he acts as a director pursuant to his election or appointment. Since a first director is not elected or appointed, but named by the incorporators of the company[25] there is no requirement that he consent

[17] *Ibid.*, at s. 63 (2).

[18] *Ibid.*, at s. 50 (1).

[19] *Ibid.*, at s. 23 (1).

[20] *Ibid.*, at s. 63.

[21] S.C., 1974-75, c. 33, s. 100.

[22] *Ibid.*, at ss. 100 (3) & 2 (1).

[23] *Supra*, footnote 1, at s. 63 (1) (e).

[24] *Ibid.*, at s. 1 (1) (definition of "corporation").

[25] *Ibid.*, at ss. 64 (2) & 64 (3).

to act as a director; he holds office from the issue of the certificate of incorporation until the first meeting of shareholders.

Meetings of the Board

All meetings of directors may be held outside the Province if the by-laws so permit. Under the Old Act this permission had to be included in the letters patent.[26] Unless the by-laws otherwise provide, the minimum notice required for a meeting of the board of directors is seven days.[27] A quorum for a directors' meeting may be any number from one upwards; however, unless the articles or by-laws specify otherwise, a majority constitutes the quorum.[28] Telephone meetings are permitted.[29] There was some doubt under the Old Act whether such meetings constituted proper meetings. The question was canvassed in a British Columbia case, *re Bankruptcy of Associated Color Laboratories Ltd.*[29a] After reviewing the authorities, Mr. Justice MacDonald held in that case that because the articles of association of the company in question did not specifically contemplate meetings of directors by telephone, resolutions purportedly adopted during telephone conversations between the directors were not valid. Under the New Act the meeting by telephone is valid if all those participating can hear each other and either the by-laws permit telephone meetings or, where not prohibited by the by-laws, if all the directors of the corporation consent. It seems prudent therefore to include a provision in the by-laws, permitting such meetings so that those not participating need only waive notice of the meeting, and no separate consent is necessary for each such meeting.[30]

Signed Resolutions

Directors may pass resolutions by means of signed instruments in writing. The directors need not all sign the same instrument—signed counter-parts are permissible.[31] However, all directors in office, not just a majority or a quorum of the board, must sign the resolution. The same procedure is permitted by the CBCA for both directors and shareholders but without reference to counter-parts.[32] The New Act unfortunately is

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[26]*Supra*, footnote 3, at s. 43 (*c*).

[27]*Supra*, footnote 1, at s. 72 (4).

[28]*Ibid.*, at s. 72(3).

[29]*Ibid.*, at s. 72(8).

[29a] (1970), 73 W.W. R. (N.S.) 556.

[30]*cf. CBCA supra*, footnote 7, s. 109(9), which requires the consent of all directors to the holding of telephone meetings (this consent is often included in the waiver of notice of the meeting).

[31]*Supra*, footnote 1, at s. 75(1). The corresponding provision for shareholders' meetings is contained in section 95(1) of the New Act.

[32]*Supra*, footnote 7, ss. 112 (directors) 136 (shareholders).

unclear on the effect of such resolutions. The procedure is prescribed for first directors[33], directors generally,[34] and for shareholders[35]. But only with respect to a resolution signed by the first directors is the resolution deemed to be as valid as if it had been passed at a meeting duly convened and held. Under *The Business Corporations Act* of Ontario both shareholders' and directors' signed resolutions are stated to be "as valid and effective as if passed at a meeting . . . duly called, constituted and held . . ."[36]. Because of the omission of these words from the New Act with respect to resolutions of permanent directors and of shareholders the validity of signed resolutions will be questionable in circumstances where there are special notice requirements. In the usual case, where the article and by-laws do not address the issue of what is to be contained in the notice, the contents of the notice of a directors' meeting will not be of great importance but for shareholders' meetings the contents of the notice is often significant.[37] Section 95 (2), which concerns only shareholders' meetings, may not be adequate to resolve the question of validity of signed resolutions as a substitute for meetings in respect of which notice would normally be given or waived. It states:

> "A resolution in writing dealing with all matters required by this Act to be dealt with at a meeting of shareholders, and signed by all the shareholders entitled to vote at that meeting, satisfies all the requirements of this Act relating to meetings of shareholders."

Even if by signing the shareholders' resolution a shareholder waives notice of any special business to be transacted it is unlikely that the signatures of all shareholders was intended to constitute waiver on the part of a director or the auditor, each of whom is entitled to notice of shareholders' meetings in certain circumstances.[38] Section 95 (2) may be concerned only with the business at the meeting rather than the notice calling it. The most cautious approach in cases where there are special requirements as to the contents of a notice or as to those entitled to receive notice is to hold a meeting in the usual way rather than act by signed resolution. Nevertheless, if the resolution itself gives all the information required to be contained in the notice it is difficult to see how the written resolution procedure could be impugned as long as all those

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[33]*Supra*, footnote 1, at s. 62(6).

[34]*Ibid.*, at s. 75(1).

[35]*Ibid.*, at ss. 95(1) & 95(2).

[36]R.S.O. 1980, c.54, ss. 22(1) & 22(2).

[37]For shareholders' meetings the New Act imposes special requirements as to the notice calling the meeting where a shareholder proposal is to be made (s. 89(2)), or if special business is to be transacted (s. 87(5)) such as where a director's interest is to be declared (s. 77(9)), or amendments to the articles are proposed (s. 114(2)), or an amalgamation is to be considered (s. 122(2)).

[38]Each director is entitled to notice and to be heard at shareholders' meetings: *supra*, footnote 1, at s. 68. The auditor is entitled to notice of and to attend the annual meeting of shareholders: *ibid.* at s. 109(1).

entitled to notice of (and not just those entitled to vote at) the meeting signed the resolution and waived notice of the business to be transacted.

Conflict of Interest

Like the CBCA[39], a director or officer who is a party or who is himself not a party but has a material interest in a person, firm or corporation that is a party to material contracts involving the corporation is required to disclose the nature and extent of his interest.[40] The disclosure is, generally-speaking, to be made at the earliest opportunity. An interested director is not counted in the quorum and may not be present or vote on any resolution approving the contract except where the contract is for directors' indemnity or insurance, for his remuneration, for security for the company's obligations, or a contract with an affiliate. A general notice by the director or officer with respect to all contracts made or to be made with the corporation by a particular person, firm or corporation is sufficient. Giving a general notice does not however enable the director to vote or to be counted in the quorum at the meeting at which the contract is to be considered.

A failure to disclose to the directors will make the interested director or officer liable to account for any profit made on the contract unless the contract is confirmed or approved by a majority of the votes cast by disinterested shareholders at a general meeting duly called for that purpose and, in the case of a director, if the nature and extent of the director's interest are disclosed in reasonable detail in the notice calling the meeting.[41] The New Act appears to distinguish in sub-section 77 (9) between directors and officers, in that a director but not an officer, is required by that sub-section to disclose the nature and extent of his interest in the notice calling the meeting. Since sub-section 87 (5) of the New Act requires that the notice of a meeting of shareholders at which special business is to be transacted state the nature of the business in sufficient detail to permit the shareholder to form a reasoned judgment thereon, it is arguable that even an officer must disclose the nature and extent of his interest in the notice calling the meeting if only to enable the shareholders to make a reasoned judgment on the contract in issue.

Once the officer or director has made the appropriate disclosure to the directors he still has to put the contract to the disinterested shareholders unless the officer or director establishes that the contract was reasonable and fair to the corporation at the time it was approved.[42]

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[39]*Supra*, footnote 7, at s. 115.

[40]*Supra*, footnote 1, at s. 77.

[41]*Ibid.*, at s. 77(9).

[42]*Ibid.*, at s. 77(7).

While accountability by the director is removed by such shareholder ratification, the Court may nevertheless set aside the contract if disclosure was not made to the directors as required by section 77.[43] The practical result is that where a majority shareholder with control of the board of directors is interested in the contract and the minority shareholders object to the contract, the director will be liable to account unless he can establish the reasonableness and fairness of the contract. One circumstance often overlooked but which probably gives rise to the application of section 77 is the issue by the corporation of shares to the majority shareholder. Even if the articles of incorporation remove the statutory pre-emptive rights set out in section 27 of the New Act, a subscription and allotment of shares is a contract[44] in respect of which the director could be accountable. The CBCA, like the Old Act, does not deal with accountability, so for federally incorporated companies it may be necessary to obtain shareholder ratification to avoid accountability.

The New Act saves the interested director or officer from accountability if a majority of the votes cast by disinterested shareholders are in favour of approving the contract.[45] However, in a one-man company or a family-owned company, the interested director may be unable to avoid liability to account because of the absence of any disinterested shareholders. The Bird Report[46] recommended that this difficulty for one-man companies be handled by permitting the interested director who was also the beneficial owner of all the outstanding shares in the corporation to be counted in the quorum and to vote at the directors' meeting that considered the contract. The director would still not be relieved from the onus of establishing that the contract was reasonable and fair to the corporation because there would be no quorum of disinterested shareholders to ratify the contract. The provisions of the New Act do not even go this far; they leave a trap for the vendor of shares of one-man companies or family companies unless appropriate indemnities are obtained.

The other consequence of non-disclosure of interest by a director or officer is that the contract may be set aside. Like the CBCA[47], the New Act provides that the Court may set aside the contract upon application of a shareholder or the corporation but the circumstances in which the

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[43]*Ibid.*, at s. 77(8).

[44]F.W. Wegenast, *The Law of Canadian Companies*, (Toronto: *The Carswell Company Limited, 1979*) *at 295.*

[45]See s. 77(9) of the New Act. Under *The Business Corporations Act*, R.S.O. 1980, c. 54, s. 134(5), accountability can be avoided by a two-thirds vote of the shareholders (counting the interested shareholders) as long as the director was acting honestly and in good faith.

[46]Richard W. Bird, *Report on Company Law*, February 1975, prepared for Company Law Project. Law Reform Division, Department of Justice, Province of New Brunswick, (hereinafter referred to as the "Bird Report"), 195.

[47]*Supra*, footnote 7, at s. 115(8).

court may intervene are ambiguously stated.[48] Under the CBCA the precondition to court intervention is that the director or officer fail to disclose his interest in accordance with the section but the New Act gives the court jurisdiction if the director or officer "fails to comply" with the section. This may put a heavier onus on the New Brunswick director or officer as compliance with section 77 goes beyond mere disclosure; if the director or officer wants to avoid accountability he must either obtain confirmation or approval from a majority of disinterested shareholders or establish that the contract was reasonable and fair to the corporation at the time it was approved by the directors. Does failure to comply with the steps necessary to establish that the contract was reasonable and fair to the corporation constitute a failure to comply with "this section" notwithstanding that shareholder ratification has been given and the director or officer is not accountable?[49]

It should be noted that section 77 of the New Act is so drawn that the only sure way for the director to enjoy what limits of liability there are is to proceed by means of a meeting rather than by a signed resolution.[50]

Insider Trading

The draftsmen of the New Act have attempted to fill all the gaps perceived in the kind of insider trading rules set out in the CBCA in one deceptively simple paragraph. While there are no insider disclosure requirements under the New Act other than those relating to contracts with the corporation, the civil liability imposed by section 83 is far more extensive, on its face, than that set forth in sub-section 125 (5) of the CBCA. The principal difference between the two provisions is that the New Act removes any requirement that the insider "make use" of confidential information.

Section 83 of the New Act is derived from the wording used in an Ontario Bill, predecessor to *The Securities Act, 1980* of Ontario[51], which was designed to extend the civil liability to "tippees", or persons who took advantage of "tips" received from insiders, as well as those traditionally thought of as insiders.

In the Bird Report the test now contained in section 83 of the New Act was favoured because it was thought to avoid "the problem of trying to define insiders and 'tippees', yet it seems to have sufficient clarity and

[48]*Supra*, footnote 1, at s. 77(8).

[49]Section 77 of the New Act deals with the duty of disclosure, the circumstances in which accountability may be avoided, and the jurisdiction of the Court to set aside the contract.

[50]See section "Signed Resolution," *supra*.

[51]R.S.O., 1980, c. 466. The predecessor bill was Bill 75 (4th Sess. 29th Legis. June 1974).

certainty, coupled with a degree of flexibility, to be an effective means of dealing with the problem of inside trading".[52] The Bird Report adopted the provision as one that meets the criteria established by the U.S. Securities and Exchange Commission in the *Cady, Roberts* case[53]:

> "Analytically, the obligation [of insiders to disclose inside information before trading with outsiders or to refrain from trading] rests on two principal elelments; first; the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing . . . Thus our task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs, and thereby suffer correlative duties in trading in its securities. Intimacy demands restraint lest the uninformed be exploited."

It is doubtful whether section 83 of the New Act adequately describes the relationship that makes a person an insider or that liability is restricted to those who take advantage of the insider information knowing it is unavailable to the outsider.

The relevant provisions of the CBCA[54] and the New Act may be summarized as follows:

	CBCA	New Act
Insider[55]	the corporation, its directors, officers, employees, affiliates, 10% shareholders and professional advisers, "tippees", directors and officers of a company in which the corporation is an insider or of a company that is an insider of the corporation	a person who buys or sells shares or debt obligations of the corporation with knowledge of a material fact or change not known to the vendor or purchaser ("outsider") acquired directly or indirectly by virtue of a relationship to the corporation
Transaction	in connection with any transaction in the shares or debt obligations of the corporation or its affiliates	sale or purchase of shares or debt obligations of the corporation

[52]*Supra*, footnote 46, at 187.

[53]*In the Matter of Cady, Roberts & Co.*, Jennings & Marsh, Securities Regulation (1968), 869, per Cary, Chairman.

[54]*Supra*, footnote 7, at s. 125 as amended by S.C. 1978-79, c. 9, s. 38.

[55]There is also a subsection of section 125 of the *CBCA* that extends the definition of "insider" to include directors and officers of corporations that enter into business combinations with the principal corporation.

Information or Knowledge	specific confidential information that if generally known might reasonably be expected to affect materially the value of the security	knowledge of a material fact or change with respect to the corporation acquired by virtue of a relationship to the corporation that was not known to the purchaser or vendor
Wrongful Act	makes use of the information (described above) for his own benefit or advantage in connection with the transaction	sells or purchases while having the knowledge (described above)
Liability	a) to compensate any person for any direct loss suffered by that person as a result of the transaction and b) to account to the corporation for any direct benefit or advantage received or receivable by the insider as a result of the transaction	to compensate the vendor or purchaser of such securities for any loss suffered as a result of such trade
Exception	with respect to (a) above, no liability if the information was known or in the exercise of reasonable diligence should have been known to the person who suffered the loss	no liability if the "insider" has reasonable grounds to believe that the person who suffered the loss did have knowledge of the material fact or change or if such person did in fact have such knowledge
Limitation	two years after discovery of the facts that gave rise to the cause of action	no limitation period specified in the New Act

It has been argued that "non-disclosure of the material fact by an insider to an outsider with whom he trades will prejudice the outsider whether or not the insider can be said to make use of the information"[56] and that "if it is material, one may assume that the outsider would not have traded on the same terms had he known the information"[57].

This argument is made in support of insider liability in cases where no clear evidence exists of an intention on the part of the insider to take advantage of his inside information or confidential relationship. But the premise that trading without full disclosure of all material facts amounts to exploitation of the uninformed[58] does not hold where the outsider

[56]Buckley, "How to Do Things with Inside Information," (1977-78) 2 *C.B.L.J.* 343 at 359.

[57]*Ibid.*

[58]*Supra*, footnote 46, at 187.

has means at his disposal to assess the value of the security he is acquiring from or selling to the insider.

In the common purchase and sale transaction involving all or a large block of shares of a closely-held company, the purchaser traditionally bargains with the vendor as to the extent of the vendor's ultimate liability for undisclosed inside information. The amount of the purchase price may, in some cases, be affected by the nature and scope of representations and warranties the vendor is willing to make about the business and affairs of the company and, in many such transactions, the timing of payment of the purchase price will be affected by the time the purchaser anticipates he will need to assure himself of the accuracy of the representations.

Rarely in a private share purchase transaction between parties with equal bargaining power would a vendor agree to assume the open-ended liability described in section 83 of the New Act. In such a case the purchaser is expected to be diligent in reviewing the financial and corporate books and records and other information of the company whose shares he is purchasing; beyond that, he himself determines what is material and seeks representations or warranties from the vendor concerning those matters.

Unlike the market for publicly-traded securities the market for shares of a private company is very much a matter of negotiation. The price and the other terms of the purchase agreement will vary with the extent of the vendor's continuing liability to the purchaser for breach of representations and warranties. Section 83, in effect, adds a statutory warranty to purchase agreements involving the shares or debt of a company governed by the New Act which are to be sold by an insider. In contractual terms it might be stated as follows:

> "The vendor represents and warrants to the purchaser (such representation and warranty to survive closing) that he has no knowledge of any material fact or change with respect to the corporation that has not been disclosed to the purchaser."[59]

While such a clause might be acceptable to a vendor in some circumstances, it will be a source of surprise and annoyance to vendors who are accustomed to negotiating the terms of the warranties they give. Solicitors for vendors (of either shares or debt) will be well advised to consider stipulating in purchase agreements for a waiver by the purchaser of his rights under section 83 and an acknowledgment that the purchaser is relying solely on the representations and warranties in the agreement and on his own purchase investigation.

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[59] *cf. Canadian Corporation Precedents*, Vol. 2, R.A. Davies, Editor (2nd edition—1975) 8-30, clause 4.41, which is a standard form representation for share purchase agreements, sometimes called a "hunter clause". This kind of clause rarely survives the negotiations intact.

The exception from liability contained in section 83 differs from the exception in the CBCA in that the insider may be liable even if the outsider, in the exercise of reasonable diligence, ought to have known of the material fact because, under section 83, the insider must have reasonable grounds to believe that the person who suffered the loss actually did have knowledge of the material fact or change. Disclosure is therefore essential on the part of the insider but, especially in respect of closely-held companies, what must be disclosed will depend on the meaning of the words "material fact or change". There is no definition of "material" in the New Act and an interpretation based on market price or market value would be inappropriate in many cases because of the narrow market for the securities of closely-held companies. To say that a fact is material because, if generally known, it might reasonably be expected to affect materially the market value of the securities[60] is to apply a public company test in a jurisdiction where there frequently will be no market other than the special purchaser.

In order to decide whether to make the disclosure, abandon the transaction or stipulate for a waiver of section 83, the insider will require a definition of materiality that can be applied to special purchasers. At least some assessment of his position could be made if the material fact were taken to be one that the insider reasonably expected would materially affect the price or terms on which the outsider (or outsiders in his position) would be willing to complete the transaction.

The knowledge necessary to found liability under section 83 of the New Act must be acquired by virtue of a relationship to the corporation. "Relationship" is a word virtually empty of meaning by itself. A purposive construction of section 83 would suggest that the relationship referred to is one other than the relationship of competitor, supplier, minority shareholder or other person not in a position to acquire information of a confidential sort intended only for the purposes of the corporation, albeit a person in a "relationship" to the corporation. It is odd that the draftsmen of the New Act should go to such extremes in sub-section 25(15) to define the word "related" where a simple cross-reference to the *Income Tax Act* would have sufficed for the purpose of that section[61], while in section 83 no assistance whatever is provided.

Assuming all the other pre-requisites are met, the insider is obliged to compensate the outsider for any loss suffered by the outsider as a result of the trade. The comparable provision of the CBCA confines the liability to direct loss. Unlike the New Act, the CBCA requires, in addition, that the insider account to the corporation for benefits received.

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[60] *cf. CBCA, supra,* footnote 7, at s. 125(5).

[61] The purpose of the definition in section 25(15) of the New Act is to explain what persons are deemed not to deal at arm's length with the corporation which is, in turn, necessary for the determination of stated capital under s. 25(4). cf. *CBCA, supra,* footnote 7, at s. 25(1.2), and see the *Income Tax Act,* R.S.C. 1952, c. 148, as amended, s. 251(2).

According to the Bird Report[62], the original rationale for thus making the insider accountable to the corporation and imposing double liability was to ensure that even if the outsider did not know of his rights or could not afford to sue the insider, the corporation could prevent the insider from keeping the fruits of his abuse of confidential information. The Bird Report recommended against requiring the insider to account, suggesting that in closely-held companies, as opposed to public companies, the outsider would be more likely to pursue his remedy on his own.

There is no specific limitation period for bringing actions under the New Act so, presumably, the general six-year period for claims will apply.[63] The CBCA fixes a two-year limitation period for actions by outsiders against insiders under section 125.

In short, traders in securities of New Brunswick corporations must henceforth be extremely cautious. As consumer protection legislation, section 83 of the New Act is a half-measure; its application will be arbitrary[64] because it covers only bodies corporate incorporated or continued under the New Act and not, for instance, companies incorporated under CBCA or the laws of other provinces.[65] It is to be hoped that the courts will interpret section 83 in such a way that it does not frustrate transactions negotiated at arms length between purchasers and vendors of equal bargaining power.

Directors' Liabilities

Section 79(1) of the New Act restates what has come to be accepted as the directors' two-pronged duty—a duty to be honest and a duty to be reasonably diligent and skilful. Section 117 of the CBCA is virtually

[62]Bird Report, *supra*, footnote 46, at 189.

[63]*Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, s.9. The six years run from the date the cause of action arose.

[64]S.N.B. 1981, c. B-9.1, s. 1(1) (definition of "corporation"). If section 83 were extended to apply to federally incorporated companies there is some doubt whether the legislation would be constitutionally valid in respect of such companies. In *Multiple Access Limited v. McCutcheon et al.* 11 O.R. (2d) 249 (High Ct.); 16 O.R. (2d) 593 (Div. Ct.); 19 O.R. (2d) 516 note (C.A.); 24 N.R. 358 (S.C.C.) leave to appeal granted, the Ontario Court of Appeal dismissed an appeal from the decision of the Divisional Court holding that the insider trading liability provisions of Ontario legislation were rendered inoperative with respect to federally incorporated companies by virtue of the existence of identical provisions of the *Canadian Corporations Act*. The decision was based on the paramountcy doctrine (see *Home Ins. Co. of New York v. Lindal and Beattie* [1934] S.C.R. 33; cf. *Robinson v. Countrywide Factors Ltd.* (1977) 72 D.L.R. 500 (S.C.C.)). But the court placed considerable weight on the fact the federal and provincial statutory provisions were identical (see 16 O.R. (2d) 593 at 598) which is not the case with section 83 of the New Act and the provisions of the CBCA. Moreover, on appeal to the Supreme Court of Canada in the *McCutcheon* case, *supra*, (heard on November 25, 1981; judgment reserved) the Ontario Securities Commission which had in the lower courts conceded the constitutional validity of the provisional legislation argued that the federal provisions in issue were *ultra vires* the Parliament of Canada (see *John Deere Plow Company v. Wharton* [1915] A.C. 330).

[65]*Ibid.*

identical. The duty is imposed by both the New Act and the CBCA on officers as well as directors. In addition, the directors are required by sub-section 79(2) to comply with the Act, the regulations, the articles, by-laws and any unanimous shareholder agreement. This duty can be enforced by the court on the application of a shareholder, a creditor, an officer, a director or even the owner of a share in an affiliate of the corporation.[66] The derivative action, brought by a shareholder or other complaintant on behalf of the corporation, provides an alternative remedy.[67]

A director who votes for or consents to certain improper or prohibited payments or transactions is liable to compensate the corporation or to restore the payment and make good the shortfall. The prohibited transactions are set out in section 76 of the New Act and may be summarized as follows:

- issue of a share for less than the fair equivalent of a money consideration;
- purchase, redemption or acquisition of the corporation's own shares when the corporation is insolvent (as defined in the Act);
- payment of an unreasonable commission to procure the purchase of the corporation's shares;
- payment of a dividend when the corporation is insolvent (as defined in the Act);
- granting financial assistance to shareholders, directors or employees or their associates when the corporation is insolvent or to anyone in connection with the purchase of the corporation's shares (with specified exceptions);
- payment of an indemnity to a director or officer except as permitted by section 81;
- payment to a dissenting shareholder or to a shareholder who has invoked the oppression remedy (section 166) when the corporation is insolvent.

A director is not liable for the issue of a share at less than its fair equivalent of money consideration if he proves he did not know and could not reasonably have known that the share was issued for a consideration less than such fair equivalent.[68] In all the cases listed above, the director's liability cannot be enforced by action commenced more than two years after the date of the resolution approving the prohibited transaction.[69]

As in sub-section 118(4) of the CBCA, a director (but not an officer) is relieved from liability under the New Act for breach of his duties to act with care, diligence and skill in the best interests of the corporation

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[66] *Ibid.*, at ss. 172, 163 and *infra*, footnote 106.

[67] *Ibid.*, at s. 164.

[68] *Ibid.*, at s. 76(6).

[69] *Ibid.*, at s. 76(7).

and his duties not to consent to the prohibited transactions referred to above, if he relied in good faith on financial statements of the corporation (if they were represented to him by an officer or in a written report of the auditor as fairly reflecting the financial condition of the corporation) or on the report of a professional adviser where the adviser's profession lends credibility to a statement made.[70] It should be noted that a shareholder can assume the duties of a director and to that extent relieve the director from liability in cases where there is a unanimous shareholder agreement.[71]

The corporation may indemnify its directors and officers against costs and charges incurred in most lawsuits against them resulting from acts done in their official capacities as long as they acted honestly and in good faith with a view to the best interests of the corporation.[72] In the case of legal proceedings involving a fine, the director or officer must, in addition, have had reasonable grounds for believing his conduct was lawful.[73] The director or officer is *entitled* to indemnity if he satisfied these requirements and was substantially successful on the merits of his defence and was fairly and reasonably entitled to indemnity. Insurance against the liabilities of the director or officer for which he may be indemnified by the corporation may be purchased by the corporation.

Information for Shareholders

Under section 100 of the New Act the directors are required to place before the shareholders at each annual meeting comparative financial statements together with the report of the auditor thereon if an auditor has been appointed and, not less than twenty-one days before the annual meeting, the corporation must send the financial statements to each shareholder of the corporation unless the shareholder has informed the corporation in writing that he does not want a copy of the financial statements.[74] Shareholders and their agents and legal representatives are entitled to inspect the annual financial statements of the corporation and its subsidiaries upon request and make extracts free of charge provided the corporation has not after receiving the request obtained a court order barring such inspection on the ground that the examination would be detrimental to the corporation or a subsidiary.[75] That is the extent of the financial disclosure required by the New Act.

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[70] *Ibid.*, at s. 80(3).

[71] *Ibid.*, at s. 99(5).

[72] *Ibid.*, at s. 81(1).

[73] *Ibid.*, at s. 81(1) (*b*).

[74] *Ibid.*, at s. 103(1).

[75] *Ibid.*, at ss. 101(2) & 101(3).

Sub-section 87(5) requires that the notice of a meeting of shareholders at which special business is to be transacted include the text of any special resolution to be submitted to the meeting and state the nature of the business in sufficient detail to permit the shareholder to form a reasoned judgment thereon. This is probably no more onerous than the common law rule referred to by Mr. Justice Spence in *Garvie* v. *Axmith*[76] to the effect that the notice must provide sufficient information for the shareholder to come to an intelligent conclusion as to whether he should support or oppose the resolution.

Shareholders are entitled to inspect the articles, by-laws, unanimous shareholder agreement, minutes of shareholders' meetings, the shareholders' and directors' registers[77] and the shareholders' list.[78] These records are generally the same as those required to be kept under the Old Act. Furthermore, as under the Old Act, a company that is authorized to do so by its articles may, in effect, remove the names of all the shareholders from its share register by issuing bearer share warrants entitling the bearers to the shares specified in the warrants.[79]

The New Act imposes no proxy solicitation requirements nor is a management proxy circular required in connection with the solicitation of proxies for meetings of shareholders.[80] However, the corporation must send a shareholder "proposal" and any accompanying statement of the shareholder with the notice of an annual meeting provided the conditions set forth in sub-section 89(5) are met. Similarly, where an auditor resigns or action is taken to remove him he is entitled to submit a statement explaining his resignation or opposing his removal which must be sent by the corporation to shareholders.[81]

Banking and Borrowing

The requirement of a by-law authorizing the directors to borrow that was contained in section 81 of the Old Act is absent from the New Act.

Under the Old Act there was always some doubt about the validity of "up-stream" guarantees because the list of incidental powers conferred on companies incorporated under the Old Act appeared to prevent a subsidiary from guaranteeing the obligations of its parent unless there

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[76](1962) O.R. 65.

[77]*Supra*, footnote 1, at 5.19(1).

[78]*Ibid.*, at s. 90(4).

[79]*Ibid.*, at s. 51(5).

[80]*cf.* Part xii of the *CBCA*, *supra*,, footnote 7, at s.144(1) (*d*)

[81]*Supra*, footnote 1, at ss. 109(5), 109(6).

were "business relations" between them.[82] It was common to specifically authorize a subsidiary to guarantee its parent's obligations in the letters patent of incorporation. The New Act enables directors of the corporation, without the authorization of the shareholders, to give a guarantee on behalf of the corporation to secure performance of an obligation of any person[83] and to delegate those powers to a director or officer.[84]

The New Act retains and modifies in some respects the rules prohibiting a corporation from borrowing or giving guarantees or financial assistance in connection with the purchase of its own shares. It was a corollary of the common law rule[85] prohibiting a company from trafficking in its own shares that it could not make loans or give financial assistance to facilitate the purchase of its shares. This principal was given statutory sanction in section 38 of the Old Act and appears in section 42 of the CBCA and section 43 of the New Act. These provisions are a serious hurdle to takeovers. Often the only means a suitor has of financing the takeover of a target company is by using the assets of the target company to secure the purchase price.[86]

The CBCA permits the target company to give financial assistance if the realizable value of the target-company's assets (excluding the assets used to give the assistance), after giving the financial assistance, would equal or exceed the liabilities and capital of the target company. It is also permissible, without satisfying a solvency test, for a corporation to give financial assistance in connection with the purchase of its own shares if the assistance is given to a parent company of which the target company is a "wholly-owned subsidiary".[87] However, it is arguable that a target company is not a wholly-owned subsidiary if the parent company becomes the holding body corporate as a result of the very transaction for which the financial assistance is given.

The New Act is more restrictive than the CBCA in that even if the target company would be "solvent" after the assistance was given, financial assistance in connection with the purchase of its own shares is prohibited[88] unless one of the exceptions applies. As with the CBCA the

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[82]*Supra*, footnote 3, at s. 14(1)(*g*).

[83]*Supra*, footnote 1, at s. 61(6) (c).

[84]*Ibid.*, at s. 61(7).

[85]*Trevor* v. *Whitworth* (1887), 12 App. Cas. 409 (H.L.); *Common* v. *McArthur* (1898), 29 S.C.R. 239; *Zwicker* v. *Stanbury*, (1954) 1 D.L.R. 257(S.C.C.).

[86]For a recent example of an unsuccessful attempt to finance an acquisition in this way see *Central and Eastern Trust Company* v. *Irving Oil Limited and Stonehouse Motel and Restaurant Limited (1980) 31 N.R. 593 (S.C.C.).*

[87]*Supra*, footnote 7, at s. 42(2) (*c*).

[88]*Supra*, footnote 1, at s. 43(2)(b).

meaning of "wholly-owned subsidiary" is not clear. Does it include a company all of whose shares are owned by two companies that are in turn wholly-owned by one ultimate parent company?

The Old Act prohibited loans to shareholders or directors except in certain narrowly defined circumstances.[89] The New Act abandons that position by permitting such loans subject to a solvency test. Moreover, even this restraint can be removed with an appropriate provision in the articles.[90]

The Decision to Continue Under the New Act

During the period between January 1, 1982 and January 1, 1987[91], the officers, directors and shareholders of companies incorporated under the Old Act will have to direct their minds to the advantages and disadvantages of voluntarily continuing the company under the New Act. The decision should be carefully considered as it is an irrevocable step.[92]

The mechanics of continuing under the New Act are simpler than those involved in obtaining supplementary letters patent under the Old Act because no affidavits are required. The company need only file three forms[93] (Articles of Continuance, Notice of Directors and Notice of Registered Office). It will also be essential to pass a new general by-law that corresponds to the New Act.

There are two alternative procedures for continuing an existing New Brunswick company under the New Act. If no changes are to be made to the letters patent of the company upon continuance, other than an amendment required to conform to the New Act, the directors of the company may authorize the continuance without a shareholders' meeting.[94] This would be done by resolution, passed in accordance with the by-laws of the company, authorizing the application for a certificate of continuance and naming someone to sign the necessary forms.

If amendments are to be made to the letters patent upon continuance the shareholders must approve the continuance by two-thirds majority of the voting shares.[95] Changes may only be made in accordance with the limits prescribed by the New Act.[96] However there is no right of

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[89]*Supra*, footnote 3, at s. 38(1).

[90]*Supra*, footnote 1, at s. 43(1); *cf. CBCA*, *supra* footnote 7, at s. 42, which does not permit the solvency test to be overridden by the articles unless the case falls within the exceptions.

[91]*Supra*, footnote 5 and 6 and text.

[92]*Supra*, footnote 1, at s. 192(6).

[93]*Ibid.*, at s. 126(2).

[94]*Ibid.*, at s. 192(4).

[95]*Ibid.*, at s. 192(2)(a).

[96]*Ibid.*, at s. 192(2)(b).

dissent on continuance.[97] The shareholder's right to dissent would, if it applied, give the shareholder the right to be paid the fair value of the shares in respect of which he dissents.[98] After continuance, the right arises if, for example, amendments to the share capital are proposed or if the corporation resolves to amalgamate, to change the restrictions on its business, to sell, lease or exchange all or substantially all its property or to provide for meetings outside New Brunswick.

Until January 1, 1984 companies governed by the Old Act may still apply for supplementary letters patent[99] under that Act (including letters patent of amalgamation).[100] Examples of changes that one might prefer to make under the Old Act are change of name[101] (because only a simple majority of the shareholders need approve it compared to two-thirds majority under the New Act); amalgamation[102] (because there are no shareholder dissenting rights, no separate class votes, no declaration of solvency and no requirement of notice to creditors—but the requisite majority is three-quarters under the Old Act as opposed to two-thirds under the New Act); and removal of a director[103] (because the New Act has more extensive cumulative voting).

If the company's shares or debt may be sold in the next five years it might be wise to remain under the Old Act in order to avoid the insider trading liability.[104] If there are potential claims by shareholders against the directors for oppressive or unfair acts[105] the Old Act is a safer haven. Disgruntled minority shareholders (both past and present) and unhappy creditors have considerably more ammunition under the New Act.[106]

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[97]*Ibid.*, at s. 192(5).

[98]*Ibid.*, at s. 131(3).

[99]*Supra*, footnote 4.

[100]The definition of "supplementary letters patent" in section 2(1) of the Old Act includes any letters patent granted to a company subsequent to the letters patent incorporating the company. This would include letters patent of amalgamation because the amalgamating companies are not extinguished: *R.* v. *Black & Decker Manufacturing Co. Ltd.*, (1975) 1 S.C.R. 411; and *Witco* v. *The Corporation of Oakville*, (1975) 1 S.C.R. 273.

[101]*Supra*, footnote 3, at s. 33; *cf.* New Act, *supra*, footnote 7, at s. 113(1)(d).

[102]*Ibid.*, at s. 31; *cf.* New Act, at s.120.

[103]*Ibid.*, at s. 92; *cf.*, New Act, at s. 65.

[104]*Supra*, footnote 1 at s. 83, and see section "Insider Trading", *supra*.

[105]*Ibid.*, at ss. 141(1)(a), 155(2)(b) & 166(2).

[106]The definition of " complainant" in section 163 of the New Act includes a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a share of the corporation or any of its affiliates, a director or officer or a former director or officer of a corporation or any of its affiliates, a creditor of the corporation, the director, or any other person who, in the discretion of the Court, is a proper person to make an application under Part XV.

Even some of the obvious benefits of the New Act can be achieved under the Old Act by circuitous and sometimes more favourable means. For instance, a result analagous to the purchase by a company of its common shares may be achieved by reduction of capital[107] under the Old Act without satisfying a solvency test. It is sometimes desirable for investment or income tax purposes for a company to hold shares in its parent company. There are more defensible means of accomplishing this result under the Old Act than under the New Act.[108]

On the other hand, if the company is closely-held and not likely to be involved in shareholder disputes the advantages of the New Act are obvious. Indeed, even if disputes between minority and majority shareholders are foreseen, with careful planning, important changes to the capital and management structure of the company may be made upon continuance without giving minority shareholders any rights to dissent.[109] Measures can be adopted on continuance to authorize unlimited capital[110], change the size of the board[111], permit short notice shareholders' meetings[112], exclude pre-emptive rights[113]. permit loans to shareholders without passing the solvency test[114] and to limit the effect of cumulative voting.[115] A new general by-law could be adopted at the same time and the number of votes required to change the by-law fixed by the articles at a figure higher than a bare majority.[116]

Although it is by no means clear[117], section 2(5) of the New Act appears to provide a means to "grandfather" provisions of the letters patent of existing companies. The sub-section states, *inter alia*, that:—

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[107]*Supra*, footnote 3, at s. 64.

[108]There is no express prohibition in the Old Act against a company acquiring or holding shares of its parent company. At common law the *Trevor* v. *Whitworth* (*supra*, footnote 85) prohibition may not extend to a purchase for investment by a subsidiary of shares of its parent: *Prairie Realty Ltd.* v. *J.M. Sinclair Co. Ltd.* (1967), 63 D.L.R. (2d) 555 (Sask.); cf *Schiowitx et al.* v. *I.O.S. Ltd. et al.*, (1971) 3 O.R. 684. Under the New Act the prohibition is explicit, albeit subject to a gradual divestment rule and some minor exceptions: s. 29. *Quaere* whether section 2(5) of the New Act may be used to delay the application of section 29 to continued companies: see *infra*, footnote 117, and text.

[109]*Supra*, footnote 1, at ss.192(2)(b), 192(5).

[110]*Ibid.*, at s. 113(1)(*d*).

[111]*Ibid.*, at s. 113(1)(n).

[112]*Ibid.*, at ss. 113(1) & 87(1).

[113]*Ibid.*, at ss. 113(1) & 27.

[114]*Ibid.*, at ss. 113(1) & 43(1).

[115]*Supra*, footnotes 15 to 18 and text.

[116]*Supra*, footnote 1, at s. 4(3).

[117]An official of the Department of Justice indicated to the writer that section 2(5) of the New Act was intended to ensure that certain extended powers of some companies incorporated by special Act not be lost on continuance. An example might be the power to expropriate granted to a company incorporated by Special Act.

> "Notwithstanding any other provisions of this Act, where a body corporate incorporated under letters patent . . . is continued or deemed to have been continued under this Act, any provisions in the letters patent . . . or supplementary letters patent . . . which are valid immediately before the coming into force of this Act continue to be valid and to have effect, but any amendments thereto shall be made in accordance with this Act."

Quaere: whether supplementary letters patent stipulating that the election of directors shall be staggered over two years[118], that there shall be no cumulative voting[119] except in accordance with section 92 of the Old Act and that directors may be removed by ordinary resolution of the shareholders[120] (all of which would be inconsistent with the New Act) would be valid and continue to have effect after continuance notwithstanding the New Act.

It is evident that there are many factors to be considered in deciding when to continue a company under the New Act. The following table contains a somewhat over-simplified comparison of some of the differences between the Old Act, the New Act and the CBCA; it is intended as a reminder that the differences are numerous and varied and not as a substitute for careful study of the respective acts.

[118] *Supra*, footnote 15.

[119] *Supra*, footnote 1. Section 65 makes cumulative voting mandatory.

[120] *Ibid.*, at s. 67(1), which provides for removal of a director by ordinary resolution of the shareholders and is expressly subject to the limitation on removal set out in section 65(6) of the New Act.

	Old Act	New Act	CBCA
incorporation	letters patent issued in discretion of Minister	articles of incorporation as of right	
name	Limited, Limitée or abbreviations only permissible endings for name	Limited, Limitée, Incorporation or abbreviation permitted	same as New Act plus "Societé commerciale canadienne"
powers	listed objects and statutory incidental powers	powers of natural person unless restricted	
shares	no par or par value common, par value preferred—partly paid shares	par value or no par value, fully paid only	no par value, fully paid only
pre-emptive right	none	unless excluded by articles or listed company	if articles so provide
purchasing own shares	permitted only if redeemable shares, or fractions on consolidation	permitted subject to solvency tests	
reduction of capital	supplementary letters patent confirming by-law approved by ⅔ shareholder vote	special resolution (⅔ shareholder vote) subject to solvency test	
minimum capital	$500	no minimum	
dividends	if dividend impairs capital or renders company insolvent—directors jointly and severally liable to company, shareholders and creditors for all debts then existing or thereafter contracted	subject to solvency test	
loans to shareholders	section 38(1)	section 43	section 42
restrictions on transfer	close corporation by-law, private company restrictions	corporation may only impose restrictions if authorized by articles	restrictions not permitted for most distributing corporations

	Old Act
number of directors	fixed number of three or more
share qualifications of directors	shareholder within week of election
residence of directors	no residence requirement
place of directors' meetings	within N.B. unless authorized by letters patent to hold meetings outside N.B.
cumulative voting	when full board elected
telephone meetings of directors or shareholders	not statutorily authorized
signed resolutions for shareholders or directors	not permitted
directors liability	prohibited loans, improper dividends
place of shareholders' meetings	in N.B. unless letters patent otherwise permit

New Act	CBCA
minimum and maximum or fixed number of one or more	same as under New Act but minimum of three for public company
consent or acquiesce to act, no share qualification	no share qualification
no residence requirement	majority of directors resident Canadians
at registered office unless by-law otherwise stipulates (within or outside N.B.)	no restriction
mandatory	only where articles so provide
permitted for both shareholders and directors if all consent or if by-laws so provide	permitted for directors if all consent
permitted for both	permitted for both
improper reduction of capital, purchase or redemption of shares, commissions, dividends, financial assistance, indemnities to directors, issue of share for inadequate consideration	
in N.B. unless all shareholders consent or articles specify places outside N.B.	in Canada unless all shareholders otherwise agree

	Old Act	New Act	CBCA
notice of shareholders' meeting	not less than 14 days unless by-laws or letters patent otherwise provide	not less than 21 days or more than 50 days unless articles or unanimous shareholder agreement otherwise provides	not less than 21 days or more than 50 days
shareholder proposal	shareholders holding 10% of value of voting shares may requisition meeting of shareholders	shareholders may propose by-law for annual meeting; shareholders representing 10% of votes may requisition shareholders' meeting	same as New Act except that shareholders representing 5% of votes may requisition meeting
unanimous shareholders' agreement	shareholder agreement may not fetter discretion of directors	unanimous shareholder agreement may restrict powers of directors	
auditor	not required	not required, specified rights and duties if appointed	required except in special circumstances
fundamental changes			
— change capital	supplementary letters patent confirming by-law approved by ⅔ shareholder vote, file within 6 months of by-law	articles of amendment by special resolution (⅔ shareholder vote), separate class votes in many cases, to be sent to Director within 3 months of resolution	same as New Act except no time period for sending to Director
— amalgamation	letters patent of amalgamation: ¾ vote of shareholders of amalgamating companies, companies must have same or similar objects	articles of amalgamation: ⅔ vote of shareholders of all classes (even if non-voting shares), dissenting shareholder may be entitled to fair value of his shares — declaration of solvency and notice to creditor provisions — short form amalgamations within group of companies	

	Old Act	
— change of name	supplementary letters patent confirming majority vote of shareholders	
— extraordinary sale, lease or exchange	no specific requirement for shareholder approval	
dissenting shareholder appraisal rights	not available	
takeover bid, dissenting offeree	not permitted	
involuntary liquidation	— by Minister for inactivity or non-payment of annual fees — by Court under *Winding-up Act* on application of shareholder or creditor on grounds:—majority vote of shareholders, just and equitable, impairment of capital, mismanagement	
receivers and receiver managers	governed by common law	Part VII
derivative action	restricted common law right	

New Act	CBCA
articles of amendment: ⅔ vote of shareholders	
special resolution, (⅔ shareholder vote) all shares vote	
right to be paid fair value of shares in case of certain changes	
offeror who acquires 90% of shares of company may force out remaining shareholders	
— by Director for inactivity or failure to file or pay fees.	
— by Court on application of Director or interested person for non-compliance with disclosure to shareholder provisions, procuring certificate by misrepresentation, not holding annual meetings for 2 years	
— by Court on application of shareholder on grounds—oppression of shareholder, creditor, director, officer or pursuant to unanimous shareholder agreement, or just and equitable	
	Part VIII
wide group of complainants may institute action on behalf of corporation or subsidiary or intervene with leave of court	

	Old Act
oppression remedy	no statutory provision
compliance order	no statutory provision

New Act	CBCA
complainant may apply to court for order on grounds corporation or its affiliates or management has acted oppressively, or unfairly to shareholder, creditor, director, officer	
complainant may apply for order compelling person to comply with Act	