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THE CANADA BUSINESS CORPORATIONS ACT: SOME ASPECTS OF TRANSNATIONAL INTEREST

Robert W. V. Dickerson & David L. Vaughan***

With passage into law on March 24, 1975, of the Canada Business Corporations Act[1] (CBCA) it is probably safe to say by way of provocative introduction that Canada has enacted the most modern corporation law in the English-speaking world. The Act is to be proclaimed in force at the end of December, 1975. Although the predecessor statute, the Canada Corporations Act,[2] will remain in force, no new corporations may be incorporated under it.

I. INTRODUCTION

Although this paper is directed to certain aspects of the Act that may have transnational interest, a few preliminary comments about the new legislation are in order.

A. *Policy Objectives*

The task force appointed by the Minister of Corporate and Consumer Affairs for Canada to examine the need and scope of the reform evolved from its initial studies[3] the following key objectives:

(a) the new law should reflect the best synthesis of substantive and administrative law concepts set out in contemporary corporation laws of other modern states;

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1. S.C. 1974-75, c. 33 (CBCA).
2. Canada Corporations Act, CAN. REV. STAT. c. C-32 (1970).
3. 1 R. DICKERSON, J. HOWARD & L. GETZ, PROPOSALS FOR A NEW BUSINESS CORPORATIONS LAW FOR CANADA (1971).

(b) a corporation law cannot be used to achieve economic and social reforms; and

(c) the new law should as far as possible avoid administrative discretion and should be self-enforcing to obviate the need for surveillance by the state, *i.e.*, the law should state clearly the rights of all persons concerned and not be subject to the policies or whims of officials responsible for its administration.

These objectives resulted in the abolition of the letters patent system of the former statute, which, theoretically at least, conceived of incorporation as an act of Royal prerogative. Following the pattern of the Companies Act of the United Kingdom and many of the Canadian provinces, the new legislation adopts the thesis that incorporation is a matter of right achieved by registration of the required incorporation documents. Express rules and standards replace administrative discretion. Empty formalities, such as the requirement for three incorporators, have been eliminated.

B. *Constitutional Aspects*

To appreciate fully the capacity and powers of a corporation incorporated under the CBCA, it is necessary to offer a few basic comments on the structure of the constitution of Canada which is contained in The British North America Act 1867[4] (BNA Act). This legislation of the Imperial Parliament of the United Kingdom divides legislative competence between the Parliament of Canada and the legislatures of each of the ten provinces of Canada.

Section 92 of the BNA Act empowers a provincial legislature of Canada to pass laws regulating the incorporation of companies "with provincial objects." Section 91 of the BNA Act, which prescribes the legislative competence of the Parliament of Canada, does not expressly assign to Parliament legislative jurisdiction in relation to the incorporation of companies, other than banks, but does confer a general power on Parliament to make laws for the peace, order, and good government of Canada. As tested in the case of *John Deere Plow Co. v. Wharton*,[5] this general power conferred on Parliament extends in terms only to matters not coming within the classes of subjects specifically and exclusively assigned to the legislatures of the provinces.

Many other decisions of the Privy Council and Supreme Court

4. British North American Act of 1867, 30 & 31 Vict., c. 3 (Can.).
5. John Deere Plow Co. v. Wharton, [1915] A.C. 330 (B.C.).

of Canada have established that Parliament may enact legislation for the incorporation of companies by virtue of its general power to make laws for the peace, order, and good government of Canada. The essential distinction between provincial and federal competence in respect to the incorporation of companies is territorial. Each may enact laws for the formation of companies with power to carry on lawful business activities as of right in its sphere of competence, *i.e.*, a provincial legislature may enact laws for the formation of companies with power to carry on business within that province, whereas Parliament may enact laws for the formation of companies with power to carry on business throughout Canada. The corporate bodies created either by the Parliament of Canada or any provincial legislature may be empowered by any other jurisdiction to carry on business outside Canada and the province, respectively.

The courts have also developed the principle that federally created corporations are immune from provincial statutory provisions that deprive them of their ability to function. Provincial legislation that encroached on national areas of authority has been held invalid. The *Bonanza Creek*[6] decision of 1916 established that an incorporating province does not have authority to empower a corporation to carry on business as of right beyond its borders, but may, however, grant a provincial corporation the capacity to accept such rights from other jurisdictions in which it desires to carry on its operations.

The foregoing may serve to explain section 4 of the CBCA which states that one of the purposes of the new Act is to revise and reform the law applicable to "business corporations incorporated to carry on business throughout Canada."

Now that the Parliament of Canada has modernized its law with respect to federally incorporated companies, nationals of other countries seeking incorporation in Canada would be well advised to consider incorporation under the CBCA rather than under one of the companies acts of a province, notwithstanding that, initially at least, their operations may be confined to one province. In addition to obtaining the power to do business anywhere in Canada and freedom from any provincial legislation that purports to restrict that general capacity, the new corporations so created will by virtue of section 15 of the CBCA have the capacity and, subject to the Act, the rights, powers, and privileges of a natural person. Any

6. Bonanza Creek Gold Mining Co. v. Rex, [1916] 1 A.C. 566 (Can.).

such corporation will also have the capacity to carry on its business, conduct its affairs, and exercise its powers in any jurisdiction outside Canada to the extent that the laws in that other jurisdiction permit.

Of course, a corporation may itself decide to restrict its business activities, either territorially or in some other way, and it may do this by including an appropriate provision in its articles of incorporation. Section 16(2) provides that a corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall such corporation exercise any of its powers in a manner contrary to its articles.[7]

II. DIRECTORS

A. *Residency Requirements*

Notwithstanding the Task Force's argument that the new Act should not be an instrument of economic or social reform, subsection 100(3) provides that a majority of the directors of a corporation must be "resident Canadians."[8] This provision is an example

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7. To protect innocent third parties, subsection 16(3) provides that no act of a corporation is invalid only by reason that the act is contrary to the articles or the Act.

8. CBCA § 2(1) defines "resident Canadian" as an individual who is:

> (a) a Canadian citizen ordinarily resident in Canada,
>
> (b) a Canadian citizen not ordinarily resident in Canada who is a member of a prescribed class of persons, or
>
> (c) a landed immigrant within the meaning of the Immigration Act and ordinarily resident in Canada for more than one year after the time at which he first became eligible to apply for Canadian citizenship;

Pursuant to the authority conferred in paragraph (b) of this definition, draft regulation 12 further provides:

> In the Act and these regulations "resident Canadian" includes a Canadian citizen who is not ordinarily resident in Canada but who
>
> (a) is a full-time employee of the Government of Canada or a province of an agency of any such government of a federal or provincial Crown corporation,
>
> (b) is a full-time employee of a body corporate
>
> > (1) of which more than 50 per cent of the voting shares are beneficially owned or over which control or direction is exercised by resident Canadians, or
> >
> > (2) a majority of the directors of which are resident Canadians, and the principal reason for the employee's residence outside Canada is to act as such employee,
>
> (c) is a full-time student at a university or other educational institution recognized by the educational authorities of a majority of the provinces of

of the growing sense of nationalism evident in Canada.[9] In its report on the new legislation, a subcommittee of the Commercial, Consumer and Corporate Law Section of the Ontario Bar Association stated that:

> It has become fairly common in Canada to require that a majority of the directors of a company be 'resident Canadians'. It is our view that this really has no place in a corporation law statute but it is also arguable that it is as appropriate to say that the directors must be resident Canadians as to say that they should not be of unsound mind (or at least not so found).[10]

The bill originally presented to Parliament contained a further provision, even more nationalistic in flavor, to the effect that a majority of the directors of a corporation must be "resident Canadians who are not employees of the corporation or its affiliates." This provision was obviously designed to prevent foreign parent corporations from appointing to the board of a Canadian subsidiary senior employees of the foreign parent who had become residents of Canada or, as the Ontario Bar report stated, to ensure that the board of Canadian corporations would act truly in the business interests of the corporation in the Canadian community and not simply in accordance with directors appointed by a foreign parent. But this provision also would have barred even native born and resident Canadians, who were employed by the subsidiary. The Ontario Bar suggested that the new Act should provide that directors in making decisions must give priority to or at least take into account the best interests of Canada or of some local area of Canada. The solution adopted, however, was to delete from the original

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Canada and has been resident outside Canada less than 10 consecutive years,

(d) is a full-time employee of an international association or organization of which Canada is a member, or

(e) was ordinarily resident in Canada when he reached his sixtieth birthday and has been resident outside Canada less than ten consecutive years.

9. For a discussion see Lamont, *Emerging Neo-Mercantilism in Canadian Policy Toward State Enterprises and Foreign Direct Investment*, 8 VAND. J. TRANSNAT'L L. 121 (1974); Note, *Foreign Investment—The Canadian Foreign Investment Act—An Act to Screen Foreign Investment in Canada Allowing those Investments of Significant Benefit to Canada*, 7 VAND. J. TRANSNAT'L L. 725 (1974).

10. Report on Bill C-213, prepared by a Special Committee of the Section on Commercial, Consumer, and Corporate Law of the Ontario Bar Association; submitted with the approval of the Executive Committee, Canadian Bar Association, April, 1974.

bill the requirement that the majority of resident Canadian directors not be employees of the corporation or its affiliates.

Subsection 100(3) is qualified by subsection 100(4), which provides that not more than one-third of the directors of a holding corporation need be resident Canadians if the holding corporation earns in Canada less than 5 per cent of the total revenue of the holding corporation and all of its subsidiaries taken together.

Other provisions have been included in the Act to bolster the Canadian residency requirements. For example, subsection 109(3) states that directors shall not transact business at a meeting of directors unless a majority of directors present are resident Canadians. Also, subsection 110(1) provides that any managing director of a corporation must be a resident Canadian, and subsection 100(2) requires that if the directors appoint a committee of directors, a majority of the members of the committee must be resident Canadians.

The unfortunate result that may flow from this little burst of nationalism is to force the election of resident Canadians who are otherwise uninterested in the corporation and may therefore add little to the deliberations of the directors. It has been suggested that employees of foreign corporations who are appointed to the boards of Canadian corporations often subordinate the true interests of the latter to their interest in personal advancement in the foreign parent. The mere fact of Canadian residency, however, does nothing to ensure that a director will be diligent and perform his duties in the best interests of the corporation. Instead of a Canadian residency requirement, it might have been preferable to require that a majority of the directors not be employees of any foreign corporation that owns a majority of the issued shares of the Canadian corporation concerned.

B. *Duties*

This raises the general question as to material and conflicting interests and the duty generally of the director. In this regard, the new Act follows the pattern of most modern corporation statutes. Subsection 117(1) provides that directors and officers in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation and exercise the care, diligence, and skill that a "reasonably prudent person" would exercise in comparable circumstances. This provision simply expresses what has generally been regarded as the common law—that the duty of a director, with possibly a slight expansion in the standard of care, is related to that which any reasonably prudent person would exercise in the circumstances.

Other provisions of the CBCA require any director or officer to disclose in writing to the corporation the nature and extent of his interest in a material contract or proposed material contract with the corporation which is a party to a material contract or proposed material contract with the corporation.[11] A director may not vote on any resolution to approve such a contract unless it is an arrangement by way of security for money lent by him, or relates to the indemnity of insuring of directors or officers or to the remuneration of directors or officers of the corporation or its affiliates. The restriction on voting is also lifted in respect of contracts between the corporation and an affiliate. If a director or officer fails to disclose his interest in a material contract, a court may, upon the application of the corporation or a shareholder, set aside the contract on such terms as it thinks fit.

Further provisions of the new Act entitle directors to dissent from any resolutions passed by the board and also to rely in good faith upon financial statements presented by an officer or on the reports of lawyers, accountants, engineers, appraisers, or other professional advisors.[12] Directors who acted honestly and in good faith with a view to the best interests of the corporation or, in the case of criminal or administrative actions, had reasonable grounds for believing that their conduct was lawful, are with certain exceptions entitled to indemnification from the corporation in respect of matters and things done as a director or officer at the corporation's request. Also, a corporation may purchase and maintain insurance for the benefit of directors and officers against any liability incurred by them for failure to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.[13] Understandably, such insurance may not extend coverage to deliberate violations of other specific statutory duties.

III. CONTINUANCE AND DISCONTINUANCE

A. *Introduction to the Concept*

The terms "continuance" and "discontinuance" embody a new and interesting concept, and one which should prove particularly useful in the corporate law of a federal country. The terms are used in three distinct senses in the Canada Business Corporations Act.

11. CBCA § 115.
12. CBCA § 118.
13. CBCA § 119.

1. As a *transitional* device by which *existing* companies incorporated under the "old Act" (*i.e.* The Canada Corporations Act) and certain other federal Acts can be brought under the CBCA. Section 261 describes those *existing federal* companies, which may or may not be continued under the CBCA.
2. As an *inter-jurisdictional transfer* device by which companies incorporated under the laws of either a province of Canada or of a foreign jurisdiction can bring themselves under the CBCA. Section 181 describes how such a company can be *imported* into Canadian federal jurisdiction.
3. As an *inter-jurisdictional transfer* device by which a corporation governed by the CBCA can remove itself to a province or foreign jurisdiction. Section 182 describes how such a corporation can be *exported* out of Canadian federal jurisdiction.

Before considering these techniques more closely, the scope of the Act should be properly understood.

B. *Basic Terminology*

The CBCA has not quite succeeded in establishing one regime of corporation law applicable to all business corporations incorporated at the federal level. The application section, section 3, and some of the key definitions in section 2 should be examined first.

Section 3(1) states that the CBCA applies to every *corporation* incorporated under the Act, and also to every *body corporate* that has been continued (whether by section 261 or section 181) under the Act. Of course the Act ceases to apply to any corporation that has become discontinued under section 182.

The terms "corporation" and "body corporate" (both of which are defined in section 2) are used frequently and precisely throughout the Act. The thing to remember is that "corporation" means *only* the entity that is governed by the CBCA. Thus, a *corporation* is incorporated under the Act but if that corporation discontinues (*i.e.* exports itself to another jurisdiction) under section 182, it is thereafter a "body corporate" so far as the CBCA is concerned.

Similarly, any incorporate entity not governed by the CBCA—including those incorporated under *other* federal statutes—is a "body corporate." If a body corporate becomes continued under section 261 or section 181 of the CBCA it is from that moment a "corporation." It can become a "body corporate" again only by discontinuing under section 182.

C. *Scope of the Canada Business Corporations Act (Exclusions)*

By virtue of subsections 3(2) and 3(4), the CBCA does not apply at all to any *body corporate* that is a bank, insurance company, trust company or loan company; and no *corporation* may carry on such business. The CBCA also does not apply to railways and telephone and telegraph companies, which must be incorporated under the Railway Act and the Telegraphs Act.

There is an important change regarding companies incorporated to construct or operate pipelines or commodity pipelines, to carry on the business of a money lender within the meaning of the Small Loans Act, or the business of investment within the meaning of the Investment Companies Act. Previously, such companies could only be incorporated with the consent of the designated Minister. Incorporation for such purposes may be effected under the CBCA, however, without the prior consent of anyone, although the relevant department (Energy, Mines and Resources, or Insurance) will be notified of the incorporation by the officials of the Corporation Branch.

D. *Continuance as a Transitional Device*

1. *Mandatory Continuance—Subsection 261(3).*—This category includes most of the "ordinary" companies incorporated under Part I of the Canada Corporations Act. These companies must apply for a certificate of continuance within five years after the CBCA comes into force; companies that do not apply will be automatically dissolved under subsection 261(8).

2. *Mandatory Continuance Unless the Cabinet Orders Otherwise—Subsection 261(4).*—This category applies to those companies incorporated under a "special" act to which, by that special act, Part I of the Canada Corporations Act also applies. It is possible that many companies in this category would find themselves in an awkward position were they continued under the CBCA unless appropriate amendments were made to the special Act governing them. Companies that could be so affected should apply either for a deferment of their continuance or to have the necessary amendments made to their special legislation, or both.

3. *Mandatory Continuance as and when the Cabinet Directs—Subsection 261(5).*—This category applies to those companies incorporated under various federal statutes and to which *neither* Part I nor Part II of the Canada Corporations Act applies, *except*—consistent with section 3—insurance, trust, and loan companies, and banks. Considerations similar to those of category (2) apply when the CBCA clashes with other federal statutes. Again, it is anticipated that the cabinet would not order continuance of companies in this group until the appropriate amendments were

made to the other statutes. As in mandatory continuance, any company in this group which does not continue within the time that may be ordered will be automatically dissolved under subsection 261(9).

4. *Optional Continuance at the Election of the Corporation—Subsection 261(6).*—This category is designed for those companies to which Part IV of the Canada Corporations Act applies. Unless they are among those prohibited from continuing —category (5)—companies in this category may continue under the CBCA as and when they wish.

5. *Continuance Prohibited—Subsections 261(6) & (10).*—The companies that may not be continued under the CBCA are those that carry on the business of an insurance, trust, loan or small loan company, or the business of constructing or working telegraph or telephone lines in Canada. Companies to which Part II or Part III of the Canada Corporations Act apply or a "similar" body corporate are also prohibited from continuing.

There are, however, two curious omissions from the prohibited category. First, there is no mention of banks, although these are specifically excluded from the category of companies for which the cabinet may *direct* continuance. Secondly, there is no prohibition in the CBCA against the continuation of a railway company, although, by inference, continuation of such a company may be prohibited by section 11 of the Railway Act.

E. *Continuance by Inter-Jurisdictional Transfer*

1. *Import.*—Whether a provincial or foreign company would want to continue under the CBCA will depend on an assessment made by the company of the relative advantages and disadvantages of its present incorporating law as compared with the CBCA. One of the most compelling reasons for wishing to bring a company under the CBCA would be to amalgamate it with a company already under that Act. Whether a non-federal company may be "imported" into the CBCA depends on the law under which the company is incorporated. Obviously, a federal act cannot confer such a right on a company governed by the law of another jurisdiction.

At the present time the provincial acts of Alberta, Saskatchewan, Manitoba, Ontario, and New Brunswick contain, in whole or in part, trans-jurisdictional machinery of the kind found in the CBCA. These statutes should be checked closely because it is understood that, in at least some of them, the "export" provisions have not been proclaimed into force. It is not known what foreign legislation, if any, would permit the export of a company to the

CBCA. Assuming that the provincial or foreign law does permit export, application should be made to the appropriate officials of the relevant jurisdiction for permission to be continued under the CBCA. Of course, the CBCA cannot set out the grounds or standards upon which the officials in the other jurisdiction will grant or refuse permission, but assuming that the company does wish to continue under the CBCA, and that permission to do so can be obtained from the other jurisdiction, the steps outlined below under "Mechanics" must be followed.

On the date shown in the certificate of continuance, the company—it is now a corporation—is treated as if it had been incorporated under the CBCA in the first instance.[14] It is assumed that its former law of incorporation will thereafter not apply to it at all. This, however, is a matter of interpretation of the former law, and is not something the CBCA can affect directly.

Although a continuance is a *de facto* re-incorporation in the sense that the corporation begins its new life with a fresh set of constating documents, *it is not a re-incorporation in law*. Subsection 181(6) makes clear that the corporation has all the property and is subject to the same obligations that it had before. Pending litigation is unaffected. Several other important provisions affect the share capital and the share certificates of a continued corporation. Although these provisions are substantive in nature, it is more convenient to describe them under "Mechanics" below.

2. *Export.*—Export of a corporation to another jurisdiction is the converse of the import mechanism described above. The same assessment of relative advantages and disadvantages must be made and, of course, the law of the jurisdiction to which the corporation wants to transfer must authorize the importation. The mechanics of the move are necessarily somewhat different (see discussion below).

Substantively, the CBCA cannot lay down the effect of discontinuance because the position of the corporation after its discontinuance—the corporation will then be a "body corporate" under the CBCA—will be for the law of the new jurisdiction to determine.

F. *Mechanics of Continuance and Discontinuance*

1. *Transitional Continuance under Section 261.*—The shareholders of an existing federally-incorporated company, which is permitted to continue under the CBCA and that wishes to do so,

14. CBCA § 181(4).

must first pass a special resolution authorizing the directors to apply for continuance. "Special resolution" is apparently defined in section 2 of the CBCA, not by the act under which the corporation was incorporated. If so, this is an example of a provision of the CBCA which applies to a company *before* it becomes continued. Otherwise, the mechanics of the application are the same as those for a company coming in from another jurisdiction because section 181 is incorporated by reference into section 261.

A federal company's special resolution to continue under the CBCA may also amend the company's constating documents, *including its Act of incorporation.* "Act of incorporation" in this context must surely be confined to "special" Acts incorporating one particular company, otherwise the old Canada Corporations Act could be amended each time a company incorporated thereunder applied for continuance under the CBCA. So restricted, the delegation by Parliament of law-making powers to companies is rather less startling.

Companies that wish to amend their incorporating documents and that must (or wish to) continue under the CBCA as well, can effect some economies by combining both matters in the same resolution. Amendments to present documents will require a fee to be paid under the Canada Corporations Act (and, presumably, other federal Acts also); and there is a fee when amendments are made by a company already under the CBCA. By subsection 261(7), however, an existing federal company pays no fee to continue. Thus, desired amendments can be effected without fee if they are made part and parcel of the resolution to continue. More significantly, only one shareholders meeting is necessary to accomplish both purposes.

By virtue of subsection 184(3) a shareholder of an existing federal company may not "dissent" from the resolution to continue. This does *not* mean that the shareholder cannot vote against the special resolution. It means that he cannot invoke the provisions of section 184 to compel the company to purchase his shares on the occasion of the continuance. A shareholder of a *non-federal* company, on the other hand, may have dissenting rights (or other rights) under the law of the jurisdiction from which the company seeks to leave.

The "no dissent" rule may be especially important if there is a desire to make controversial amendments to the incorporating documents. If such amendments are left until the company has continued under the CBCA, the corporation may have to reckon with dissenting shareholders if the proposed amendment is one described in subsection 184(1) or 184(2).

A final point of practice concerns the result if a company is dissolved under subsections 261(8) or 261(9) for failing to continue within the specified time. The revival provisions of section 202 apparently apply to such a company even though it has never become a "corporation." Some doubt will remain until this unfortunate drafting error in subsection 202(1) is corrected. If section 202 does apply to a dissolved body corporate, it will, upon revival, be a "corporation." Thus, the dissolution and revival provisions together may be another (though probably undesirable) means by which a federal company may be continued under the CBCA.

2. *Trans-jurisdictional Continuance under Section 181.*— Procedurally (so far as the CBCA is concerned), the steps which a non-federal company must take to become continued are identical with those which a federally-incorporated company must take. The difference lies in their respective entitlements to be continued. An existing federal company's entitlement is spelled out in section 261. By contrast, a non-federal company's entitlement must be found in its present incorporating law.

Apart from statutory authorization or official permission, the CBCA does not (and cannot) say how, as an internal corporate matter, the decision to continue is to be taken. It is for the law of the exporting jurisdiction to say whether the directors or the shareholders may authorize it, what majority is required, and whether there are any dissenting or other rights available to the shareholders who may disagree with the decision. Also, section 181 makes no mention of the possibility that a non-federal company may wish to combine its decision to continue with simultaneous amendments to its constating documents. Again, this is a matter for the law of the exporting jurisdiction. The Director of the CBCA will not be concerned with such internal matters; indeed, he will require evidence only of the *official* authorization of the continuance by the appropriate authority of the other jurisdiction.

Once the necessary authorization and consent have been obtained, the non-federal company applies for continuance under the CBCA by sending to the Director the following:

(1) Articles of continuance, in duplicate (Form 9);
(2) Notice of registered office, in duplicate (Form 2, and see section 101);
(3) Notice of directors, in duplicate (Form 4, and see section 101);
(4) Copy of the authorization issued by the exporting jurisdiction (see instructions to Form 9); and
(5) Fee of $200 (Draft Regulation X, item 2(3)).

It will be seen that the procedure required to effect a continuance under the CBCA is almost the same as to incorporate.

One of the provisions of the CBCA which is likely to cause trouble in the future is subsection 12(3), which permits continued corporations to retain their pre-continued names. This provision seriously erodes the rights of existing federal companies. It may mean that they will have to seek their remedy in the law of passing off instead of in corporation law. Also, on names, subsection 10(2) allows the Director to exempt a continued corporation from the provision in subsection 10(1) requiring use of "Ltd.", "Inc.", etc., as part of the corporate name. This rule will be of particular interest to United States companies that may continue under the CBCA.[15]

Upon receiving the required documents and fee, the Director proceeds according to section 255. Assuming that the documents "conform to law," *i.e.*, that the requirements of the CBCA have been complied with, the Director will issue the requested certificate of continuance. If for any reason the Director refuses to accept the documents, he must notify the applicants of that fact in writing within twenty days. If the Director does not give notice within twenty days he is deemed to have refused the documents.[16] The applicant can appeal this refusal in court under section 239 in a "summary manner";[17] there is a further remedy of appeal to the court of appeal.[18]

Although a certificate of continuance will normally be effective on the date of its issue, subsection 255(3) permits the Director to date the certificate as of the date he received the *articles,* or any later date specified by the applicant. Any delay in delivery or processing, or delay caused by errors in the documents, will not prejudice the continuing corporation so long as it makes known to the Director the date that the certificate must bear. Another provision which will be useful in reducing delays in section 257, under which the Director, if authorized by the applicant, may correct a document that contains an error, instead of returning it to the applicant for corrections.

Subsection 181(7) (partially) exempts continuing bodies corpo-

15. Draft regulation IX stipulates the procedure to be followed in applying for exemption. If the exemption is denied by the Director, this decision is reviewable by a court of competent jurisdiction. CBCA ¶ 239(e).

16. CBCA § 238.

17. CBCA § 241.

18. CBCA § 242.

rate from the rule in subsection 25(2) that only fully paid shares may be issued. Shares issued *before* the continuance are deemed to be validly issued even if not fully paid, but after the company becomes a "corporation" the normal rule will apply to new issues of shares. Also, by subsection 26(3), any payment received after continuance on shares issued partly-paid before continuance must be added to stated capital.

Another special rule applying to the share capital of continued corporations is found in subsection 26(2). Although the consideration received for every share issued by "corporation" must be credited to stated capital, contributed surplus (*i.e.*, share premium) arising from the issue, before continuance, of a par value share for an amount in excess of par need not be added to stated capital. This rule was put in the CBCA to avoid a dividend which might have been "deemed" to have been paid under the Income Tax Act by virtue of a rule in the CBCA requiring contributed surplus to be added to stated capital. The amendments made to the definition of "paid-up capital" in section 89 of the Income Tax Act in 1975 have removed this worry; therefore, subsection 26(2) of the CBCA is probably redundant.

Although contributed surplus need not be added formally to stated capital, subsection 26(4) deems it to be included for the purposes of the solvency tests which the Act lays down as a condition before a corporation may purchase its own shares or make certain other payments to shareholders.

By subsection 24(2), par value shares issued before continuance are deemed to be shares without par value, and there will be no need to call in, cancel, and re-issue share certificates. To the same effect, subsection 181(7) provides that shares issued before continuance are deemed to have been issued in accordance with the CBCA and the articles of continuance, preserving intact the rights and obligations of existing shareholders. Subsections 181(8) and 181(9) expressly expand on this general theme to preserve the status of shares convertible to bearer shares.[19]

Subsection 45(8) contains an important exception to the rule that share certificates issued before continuance do not have to conform to the CBCA and the articles of continuance. If such a previously-issued certificate is or becomes subject to:

19. Some federal companies listed on European stock exchanges have such shares, although subsection 24(1) prohibits their future issue.

(1) a restriction on its transfer (not including a "constraint" under section 168);
(2) a lien in favor of the corporation;
(3) an unanimous shareholder agreement; or
(4) an endorsement under subsection 184(10), *i.e.* a claim by a "dissenting shareholder,"

then the appropriate notation must be made on the share certificate, otherwise, the restriction, lien, etc., will not be effective against a transferee with no actual knowledge of it. This is consistent with the general scheme of Part VI of the CBCA under which shares are equated with negotiable instruments and are transferable by endorsement and delivery instead of by registration in a share register.

Under subsection 45(9), a share certificate is deemed to comply with subsection 45(8) if it carries the words "private company." This provision will allow most former "private companies" to preserve their customary transfer restrictions without re-endorsing all outstanding share certificates.

3. *Trans-Jurisdictional Discontinuance under Section 182.*— To discontinue, a corporation must first obtain the proper authorization of its shareholders by special resolution,[20] and notice of the meeting should point out the shareholders' dissenting right given by section 184.[21] Note particularly that under subsection 182(4) *every* share has a right to vote on a resolution to discontinue.

Recognizing that circumstances may change after a resolution to discontinue has been passed, the shareholders may, in the special resolution, also authorize the directors to abandon the application for discontinuance without further approval by the shareholders.[22] This authorization should probably be given in every case, if only because the demands of dissenting shareholders may impose an impossible burden on the corporation.

After shareholder approval for discontinuance has been obtained, the corporation must still satisfy the Director that the law of the jurisdiction under which the corporation wishes to be governed will not adversely affect shareholders or creditors. The Director may require more than a showing that the law of the other jurisdiction meets the criteria listed in subsection 182(9). These conditions are the converse of those that apply to a company coming from another jurisdiction to continue under the CBCA (com-

20. CBCA § 182(5).
21. CBCA § 182(3).
22. CBCA § 182(6).

pare subsections 182(9) and 181(6)).

If the corporation seeking discontinuance is one to which the Investment Companies Act applies, subsection 182(2) requires the consent of the Minister of Finance. Regrettably, this latter consent seems to be discretionary, because no standards are set out in either the CBCA or the Investment Companies Act to indicate the grounds upon which that consent will be given or withheld. The next step will be an application to the appropriate officials of the jurisdiction to which the corporation wants to move, requesting continuance in that jurisdiction. Presumably the corporation will also have to file in that other jurisdiction constating documents in the form required under the relevant statute. After the corporation has been continued in the other jurisdiction, proper notice thereof should be given to the Director. Upon receipt of that notice the Director will issue a certificate of discontinuance,[23] and the CBCA will thereafter cease to apply.[24] As a matter of practice, the Director and his counterpart in the other jurisdiction will probably effect continuance and discontinuance simultaneously in both jurisdictions through their own administrative procedures, so as to avoid the possibility that, even for a short period, the corporation may be subject to two statutes.[25]

IV. AMALGAMATION

A. *General*

It is convenient to discuss amalgamation in the same paper as continuance and discontinuance because one of the most usual reasons for wanting to move a company from one jurisdiction to another is to effect an amalgamation with a company already in that other jurisdiction. In the CBCA, as under other company statutes in Canada, a statutory amalgamation is only possible between companies in the same incorporating jurisdiction.[26]

Philosophically and legally, the concept of an amalgamation under the CBCA is that of two or more tributaries—the "amalgam-

23. CBCA § 182(7).

24. CBCA § 182(8).

25. There is a right of appeal to a court if the Director refuses to issue a certificate of discontinuance. CBCA ¶ 239(d).

26. Under the CBCA, it is irrelevant that one or more of the amalgamating corporations may have been incorporated originally under another statute, whether federal, provincial or foreign. Once such a corporation has become continued under the CBCA it is thereafter treated exactly like a corporation that was incorporated under the CBCA in the first instance.

ating corporations"—joining together in a single stream—the "amalgamated corporation."[27] The concept is *not* that of a new corporation arising from the ashes of the predecessor corporations. Section 180 of the CBCA is really a statutory codification of the "single stream" concept. Note that the rules are parallel to those in subsection 181(6) declaring that property, liabilities, and pending litigation are unaffected by the amalgamation (or continuance).

B. *Internal Corporate Steps*

Section 175 of the CBCA confers the substantive right to amalgamate. The internal steps to be taken by the amalgamating corporations are different, according to whether the amalgamation is a "short-form" or "long-form" amalgamation.

1. *Short-Form Amalgamation.*—Subsection 178(1) deals with amalgamations between a "holding" corporation[28] and one or more of its *wholly-owned* "subsidiary" corporations.[29] In this case the only *corporate* authorization required is a resolution of the *directors* of *each* amalgamating corporation. *Each* resolution must provide for the cancellation of the shares of *each* subsidiary with no repayment of capital and that no fresh securities of the amalgamating corporation will be issued in connection with the amalgamation. The articles of amalgamation must be the same as the articles of incorporation of the *holding* corporation.

Because a short-form amalgamation is effected without reference to the shareholders of any of the amalgamating corporations, there is no provision for simultaneous amendments to the articles of the holding corporation. Any such amendments would have to be effected in the manner provided for in the articles of incorporation, either before or after the amalgamation.

Under subsection 178(2) a very similar short-form procedure is available for the amalgamation of two or more wholly-owned subsidiaries of the *same* holding corporation. In this case the shares of *all but one* of the subsidiaries must be cancelled, with no repayment of capital, and the stated capital of *all* the subsidiaries is aggregated. The articles of amalgamation must be the same as the articles of incorporation of the subsidiary whose shares are *not* cancelled.

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27. *See* Regina v. Black & Decker Mfg. Co., [1974] 43 D.L.R. 3d 393.
28. CBCA § 2(4) (definition of "holding corporation").
29. CBCA § 2(5) (definition of "subsidiary" corporations).

2. *Long-Form Amalgamation.*—If the conditions of section 178 for short-form amalgamation cannot be satisfied, the amalgamating corporations must proceed according to the more elaborate provisions of sections 176 and 177.

The first step is the execution of an amalgamation agreement. The CBCA lists, in subsection 176(1), certain matters that the agreement must contain. The amalgamating corporations are, of course, free to include in the agreement any other provisions that they may wish to have. The essential items to be contained in the agreement are the articles of amalgamation, the directors of the amalgamated corporation, and the manner by which the shares of each amalgamating corporation are to become shares *or other securities* of the amalgamated corporation. It would be useful to provide in the amalgamation agreement which corporation will have the duty of preparing and sending to the Director the articles of amalgamation and the other documents (and the fee) required by section 179.

If any shares of any of the amalgamating corporations are to be redeemed, instead of becoming shares or other securities of the amalgamated corporation, the manner in which this redemption is to be made must be described. By subsection 176(2), intercorporate share holdings must be cancelled without repayment of capital.

Section 177 then requires the amalgamation agreement to be submitted to the shareholders of each amalgamating corporation for approval. By subsection 177(3) *each* share in each amalgamating corporation has a vote, but each corporation with more than one class or series of shares outstanding must decide which classes and series are entitled to vote *separately*. Subsection 177(4) provides that this entitlement is to be determined by measuring the terms of the amalgamation agreememt against the criteria set out in section 170 in reference to amendments to articles. It will be very important to make a proper evaluation of the matter of separate voting entitlement because, under subsection 177(5), the amalgamation agreement must be approved, in each amalgamating corporation, by special resolutions of *each* class and series of shareholders entitled to vote on it.[30]

The notice of meeting (or meetings) must comply with the usual rules in section 129. In addition, it must include or be accompanied by a copy or summary of the amalgamation agreement, and it

30. Voting procedure for amalgamation may be contrasted with that for discontinuance under section 182. In a discontinuance every share also has a vote, but there is no provision for voting separately by classes and series.

should point out the shareholders' dissenting right under section 184.

As with discontinuance and other "fundamental changes," which give shareholders a right to dissent under section 184, the amalgamation agreement should give the directors of every amalgamating corporation authority to stop the amalgamation if circumstances make it impossible for the corporation to complete it.[31]

3. *Steps to be Taken in Conjunction with the Director.*—The requirements outlined in section 179 apply irrespective of whether, as an internal corporate matter, the amalgamation was approved according to the short-form or the long-form procedure.

Unless the amalgamation has been aborted by the directors of one or more of the amalgamating corporations pursuant to subsection 177(6), articles of amalgamation (Form 8) must be sent to the Director. As with continuance and incorporation, the articles must be accompanied by a notice of registered office (Form 2), a notice of directors (Form 4), and a fee of $200 (Reg. X, Item 2(d)).

In addition, there must be attached to the articles of amalgamation a statutory declaration of corporate solvency from a director or officer of *each* amalgamating corporation. These declarations must satisfy the Director that all the corporations are solvent according to the test set out in paragraph 179(2)(a). Also, there must be a declaration that no creditor will be prejudiced, *or* that all creditors have been notified and that none of them have reasonable grounds to object.[32] Note that it is *not* necessary to notify creditors of the proposed amalgamation if there are reasonable grounds for believing that none of them would be prejudiced by it. If notice is given to creditors, subsection 179(3) specifies the manner in which it has to be given. Upon receipt of the required documents and fee, the Director proceeds according to section 255. The remarks under "continuance and discontinuance" concerning dates, correction of errors and appeals apply also in an amalgamation.

31. CBCA § 177(6).
32. CBCA § 179(2)(b).