

Discussion Paper

Business Corporations Act Securities Transfer Act

1.0 Introduction

This discussion paper has been prepared by the Consumer, Labour and Financial Services Division of the Department of Environment, Labour and Justice (the Division) in order to facilitate public consultation regarding proposed new legislation consisting of:

1. A new *Business Corporations Act* to replace Part I of the *Companies Act*;
2. A new *Securities Transfer Act* based on uniform Canadian securities transfer legislation.

All interested persons are invited to provide written input on the discussion paper and the draft legislation. On request, the Division will also arrange meetings with any interested persons.

In the event the comments received indicate it is appropriate to do so, the Division will develop a further consultation paper, amended draft legislation and a second public comment period will take place.

Comments should be submitted by September 12, 2014 to:

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2.0 Business Corporations Act

Draft legislation

- 2.1 Draft legislation is attached as Appendix A.

Background

- 2.2 The PEI *Companies Act* was enacted in 1888 as *The Prince Edward Island Joint Stock Companies Act*. This statute provided for incorporation upon successful application to

the Lieutenant Governor in Council for the issuance of letters patent. Prior public notice of intention to incorporate was required. The statute has remained substantially unchanged to date, with its name shortened in 1949 to the *Companies Act*. In 1984, the power to incorporate was transferred from Cabinet to the Minister with public notice given after incorporation.

- 2.3 The draft legislation is based on the *Canada Business Corporations Act* (CBCA). All common law provinces have adopted forms of business corporations acts more or less similar to the federal act. Nova Scotia is the exception. The PEI draft (PEIBCA) (Appendix A) incorporates many of the recent amendments made to the CBCA.

CBCA consultation

- 2.4 Industry Canada has recently consulted on proposed further amendments to the CBCA with comments closed on May 15, 2014. These amendments primarily involve an expanded role for the corporate regulator in relation to corporate governance and shareholder participation in large publicly traded companies. Comment letters in response to this consultation are available on the Industry Canada website. Generally, it is the position of the Division that it is not appropriate to regulate public companies as such through corporate legislation. This is a role better undertaken by the securities regulatory authorities.

Distributing corporations

- 2.5 The PEIBCA does adopt the distinction between “distributing corporations” and other corporations of the business corporations model. Distributing corporations will be defined by regulation to include corporations that are reporting issuers under Canadian securities legislation in any of the provinces and territories. While it is recognized that few, if any, PEI corporations will be distributing corporations, the legislation will permit the incorporation of distributing corporations which will be reporting issuers subject to Canadian securities regulation.

Insider-Trading, take-overs and proxies

- 2.6 The Division requests comment on whether the PEIBCA should include the sections relating to insider trading (sections 101 to 105), the details of proxy solicitation (sections 124-129) and take-over bids (sections 167-168).

Professional corporations

- 2.7 Unlike the business corporation acts of some of the other provinces, the PEIBCA does not specifically provide for nor does it prohibit the incorporation or use of professional corporations. As is the case under the existing *Companies Act*, each profession will be required to evaluate whether its members can carry on practice through a professional corporation in accordance with its own legislation and its own governing body.

Regulations under the PEIBCA will include a regulation similar to the CBCA regulation prohibiting the use of a name that connotes approval of a professional organization without consent of the organization.

Shareholder information

- 2.8 The PEIBCA does not require filing of shareholder information with the Corporate Registry. Shareholder information must be retained by the corporation at its registered office or other designated location in the province and the corporation must make this list available, on payment of a reasonable fee, to any person who requests it. In certain circumstances the list may be maintained outside the province if there is computer access to the information from a normal business location in the province.

Prohibited loans and guarantees

- 2.9 The PEIBCA does not include a section comparable to existing section 69 of the *Companies Act* dealing with prohibited loans and guarantees of a corporation to its directors, officers, shareholders and employees, and setting out two solvency tests for when those loans are permitted. Section 69 was amended in 2002 to remove the second solvency test (which was problematic in practice) where there is unanimous consent of the shareholders.
- 2.10 The latest amendments to the CBCA removed the comparable CBCA provision entirely, relying on enhanced directors' liability to ensure only appropriate actions are taken by the corporation. Certain other provinces have adopted an interim position requiring simple disclosure of loans and guarantees to shareholders. Comments are welcomed on whether the PEIBCA should include a section comparable to the amended *Companies Act*, section 69, or an interim position as in other provinces, or whether the Act should remain silent on this issue.

Director residency

- 2.11 The PEIBCA does not place any residency requirements on directors of corporations. This is consistent with our present position under the *Companies Act*. As an anti-money laundering and anti-corruption provision, the PEIBCA does include a requirement that a lawyer entitled to practice law in the province provide a certificate in the form the Director of Corporations fixes where there is no PEI resident director.

Directors' liability and shareholder remedies

- 2.12 The PEIBCA includes the enhanced directors' liability provisions of the CBCA along with directors' liability for wages. This is significantly different from the legal position of directors under the *Companies Act* which is governed by the common law. The PEIBCA also includes enhanced shareholders remedies in accordance with the CBCA.

Unlimited liability corporations

- 2.13 The PEIBCA includes provisions which permit the incorporation of unlimited liability corporations (ULC). The ULC is a hybrid entity since it is treated as a corporation for Canadian tax purposes but disregarded for US tax purposes. The ULC may be an attractive tax-avoidance vehicle for US investors expanding into Canada. At present the ULC business structure is offered by Alberta, British Columbia and Nova Scotia. The PEI provisions have been modelled on the Alberta *Business Corporations Act*. Comment on the ULC is specifically requested.

Transitional

- 2.14 The PEIBCA sets a three year transitional period for continuance of all *Companies Act* Part I companies under the new legislation. At the end of that period, companies which have not continued will be automatically dissolved by operation of law. Dissolved companies can revive under the new legislation if required.
- 2.15 The *Companies Act* will remain in force for the purposes of Part II non-profits and for any other private act companies which rely on its provisions. The PEIBCA prohibits any new incorporations, continuances or revivals under Part I of the *Companies Act* upon the coming into force of the PEIBCA. The PEIBCA also includes a provision permitting the continuance of private act companies under the PEIBCA.

3.0 Securities Transfer Act

Draft legislation

- 3.1 Draft legislation is not attached as it is still in development. It is proposed that the new legislation will be brought into force at the same time the PEIBCA is brought into force. Under the PEIBCA, transfer or transmission of securities is governed by the proposed *Securities Transfer Act*.

Background

- 3.2 Current Canadian law in this area is uniform based on a *Uniform Securities Transfer Act* developed by the Uniform Law Conference of Canada. All provinces and territories have adopted the uniform legislation with the exception of PEI.
- 3.3 The securities transfer legislation across the country has replaced the sections in provincial and territorial corporate statutes governing the transfer of shares. Consequential amendments have also been made to the personal property security legislation in the jurisdictions and to the judgment execution legislation in the jurisdictions.

Further consultation

- 3.4 The Division will be releasing draft securities transfer legislation in the fall of 2014. Prior to that time comments are welcome if there are any general concerns relating to moving to that framework.

4.0 Request for Information

Posting open until August 22, 2014

- 4.1 The Department has posted a Request for Information (RFI) for an On-Line Corporate and Business Registry System on the Government Procurement Site. The Request for Information is open until August 22, 2014.

On-line registry

- 4.2 The RFI advises that the Department intends to use the system initially to hold all data to be filed under a proposed new *Business Corporations Act* for Prince Edward Island.
- 4.3 The RFI advises that the Department is also seeking information regarding the addition of modules to the proposed new system, to hold all data under the current *Extra Provincial Business Corporations Act* as well as all partnership and sole proprietorship data under the current *Partnership Act*.
- 4.4 The long-term goal is to move from the existing paper filing system in our existing business and corporate registry to a fully on-line system in which the authentic documents are the electronic documents and most functionality takes place on-line.

July 28, 2014