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BARREAU DE L'ONTARIO
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November 28, 2011

The Honourable Margaret Best
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The Honourable Harinder Takhar
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Dear Ministers:

Re: List of Proposed Amendments to the *Business Corporations Act* (Ontario)[1] (interchangeably, the "OBCA" or the "Act"), the general regulations[2] under the OBCA (the "OBCR") and O.Reg. 289/00 (the "OBCA Forms Regulation")

Overview

For the past several years, the Ministry of Consumer Services and its predecessors and the Ministry of Government Services (the "Ministries"), working with the Ontario Bar Association (the "**OBA**"), have made periodic amendments to the OBCA and OBCR with a view to keeping this legislation current and competitive by Canadian standards.

In anticipation that there may be future opportunities to make changes to the OBCA, the OBCR and the OBCA Forms Regulation, we set out below a comprehensive list. We will periodically revisit the list to reflect the constant changes in the relevant law and commercial practices.

[1] R.S.O. 1990, c. B.16.

[2] R.R.O. 1990, Reg. 62 (General).

With that in mind, the OBA submits the following list of potential amendments to the OBCA, OBCR and OBCA Forms Regulation that merit consideration.

Many of the amendments for consideration merely reflect substitution of equivalent provisions of the new *Not-for-Profit Corporations Act, 2010*[3] (the "**ONCA**") for current provisions of the OBCA. Much of the OBCA was drafted in 1982, and it, in turn, reflects drafting contained in the *Canada Business Corporations Act*[4] (the "**CBCA**") passed in 1975, *i.e.*, more than 35 years ago.

The ONCA, therefore, reflects state-of-the-art legislative drafting (*e.g.*, generally, simpler and less legalistic than the OBCA) of a corporate statute in Ontario. In the long run, it might be useful to avoid unwarranted differences between the OBCA and the ONCA because, for example, jurisprudence that arises in the interpretation or application of one statute should, as much as possible, also be applicable to the other. Forms and procedures developed or followed for one statute should be applicable to both.

Where this submission states that a provision of the OBCA should be "conformed" to the ONCA, this is intended to mean that the ONCA provision is to be adapted (not necessarily copied verbatim) into the OBCA. For example, often changes to a provision would have to be made to reflect that the OBCA has shares (not membership interests), shareholders (not members), has offering corporations and makes provision for unanimous shareholder agreements. Also, internal cross-referencing would have to be conformed.

Bill 63, the newly-enacted, *Business Corporations Act* (Québec)[5] (the "**QBCA**") contains some useful innovations that should be considered in conjunction with amending the OBCA. The QBCA represents the most recent and innovative contribution to for-profit corporate legislation in the country.

Part I - Possible OBCA Amendments

Subsection 1(1) – Definition of "Day"

Adopt the simple ONCA approach to this defined term.

Subsection 1(1) – Definition of "Minister"

Update the definition from "Minister of Consumer and Business Services" to the "Minister of Consumer Services" and add the flexibility for changing portfolios as has been done in the ONCA, which provides:

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[3] S.O. 2010, c. 15 (not yet in force).

[4] R.S.C. 1985, c. C-44.

[5] S.Q. 2009, c. 52. The QBCA was proclaimed into force on February 14, 2011.

> "Minister" means the Minister of Consumer Services or such other member of the Executive Council to whom responsibility for the administration of this Act may be assigned or transferred under the *Executive Council Act*

New Subsection 1(1) – Definition of "Open-End Mutual Fund"

To accommodate the proposed addition of s. 3.5, the definition of "open-end mutual fund" must be moved from s. 24(11) to s. 1(1) so that it is applicable to the whole Act.

Subsection 1(1) – Definition of "Officer"

Conform the OBCA definition to the definition in the ONCA.

Subsection 1(1) – Definition of "Ordinary Resolution"

Conform the OBCA definition to the definition in the ONCA.

Subsection 1(1) – Definition of "Person"

To eliminate any doubt, add "limited liability company" to the list of specific non-corporate entities that are "persons" under the OBCA. For conformity, the same change could be made to the ONCA.

Subsection 1(1) – Definition of "Resident Canadian"

The reference in paragraph (c) of this definition should now refer to the "*Immigration and Refugee Protection Act* (Canada)",[6] no longer the *Immigration Act* (Canada). If the recommended change to s. 118(3) of the OBCA below is accepted, then this definition (together with s. 26 of the OBCR) would be repealed.

Subsection 1(1) – Definition of "Telephonic or Electronic Means"

Conform the OBCA definition to the same definition in the ONCA.[7]

Subsection 1(6) – Offering Securities to the Public

Currently, s. 1(6) of the OBCA limits the meaning of "offering securities to the public" so that it only applies where the OBCA corporation has either filed a prospectus or statement of material facts under the *Securities Act* (Ontario)[8] or has listed and posted any of its securities on The

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[6] S.C. 2001, c. 27.

[7] In preparing this Submission, the OBA Corporate Law Subcommittee requested an explanation from the Ministry as to what is intended by the carve-out for "direct speech or writing" in s. 1(1) of the ONCA. As at the time of making this Submission. no response had yet been received.

[8] R.S.O. 1900, c. S.5 (the "***Securities Act***" or the "**OSA**").

Toronto Stock Exchange ("**TSX**") or The TSX Venture Exchange. Subsection 1(6) is cast too narrowly and should be extended to include OBCA corporations that have any securities listed and posted for trading on any stock exchange in or outside Canada or in any over-the-counter market wherever located.[9]

New Subsection 1(8) – Interpretation re Period of Days

Conform this OBCA provision to the ONCA.

Subsection 2(3)(d) – Non-application of Act

Correct the reference to the *Credit Unions and Caisses Populaires Act, 1994*[10] so that, *inter alia*, it is consistent with s. 188(7.1)(c) of the OBCA.

New Subsection 2(4) – Appointment of Minister

Conform the OBCA to the ONCA by moving s. 278 to become s. 2(4).

Subsection 3.1(2)(b) – Professions

The references in paragraphs 1 and 2 to the *Certified General Accountants Association of Ontario Act, 1983* and the *Chartered Accountants Act, 1956* should be replaced with a reference to the *Public Accounting Act, 2004.*[11] This change has already been made to s. 49(2)(b)(ii) of the OBCA and s. 69(1) of the ONCA.

Subsection 3.2(2)1 – Conditions for Professional Corporations

The inequity in ss. 3.2(2)1 are the subject matter of a separate OBA submissions.

Subsection 3.4(2) – Deemed Acts of Shareholders

Subsequent to the original enactment of s. 3.4, some Ontario legislation (for example, legislation governing medical practitioners and dentists but not legislation governing lawyers and public accountants) was amended to permit the relevant professional corporation to have non-professional members so long as they hold non-voting shares. Thus, the deemed liability rule under s. 3.4(2) should exclude shareholders who are not members of the relevant profession. Family members holding non-voting shares in professional corporations should not become personally liable for conduct over which they have no control.

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[9] For a more detailed account, see Philip Anisman, "'Offering Corporations' and Corporate Governance: A Proposal to Amend the Ontario Business Corporations Act, 1982" (1989), 15 C.B.L.J. 223.

[10] S.O. 1994, c. 11.

[11] S.O. 2004, c. 8.

Proposed New Section 3.5 – Open-End Mutual Funds

Currently, s. 24(10) exempts an open-end mutual fund from the provisions of the OBCA relating to stated capital. All other provisions of the Act (other than provisions applicable only to a non-offering corporation) apply to an "open-end mutual fund" (as defined in the OBCA). Instead, the list of exemptions for open-end mutual funds should be expanded to cover: (a) statutory amalgamations involving an open-end mutual fund as an amalgamating corporation; (b) a sale of all or substantially all the property of an open-end mutual fund to another open-end mutual fund; and (c) any appraisal right arising as a result of these exempted transactions.

Part 5 of National Instrument 81-102 (*Mutual Funds*)("**NI 81-102**") provides a fundamental change regime applicable to mutual funds. Mutual funds may either be incorporated or formed as trusts. If formed by a declaration of trust, the rights of unit-holders to approve fundamental changes are set out exhaustively in the declaration of trust and Part 5 of NI 81-201. If the mutual fund is incorporated under the OBCA or the CBCA, then, in addition to NI 81-102, unit-holders must not only look to the rights, privileges, restrictions and conditions set out in the articles but also to the incorporation statute. There is no comparable statute that is superimposed on the rights of unit-holders of a mutual fund formed as a trust.

To avoid unnecessary confusion, it is critical that investors in mutual funds enjoy substantially similar rights to approve fundamental changes irrespective of whether the mutual fund is incorporated or formed by trust instrument. It is also important that incorporated mutual funds (and indirectly their investors) not be put to additional steps and unnecessary expense when approving fundamental changes. Thus, corporate law should be conformed, as much as possible, to the unitary regime provided by NI 81-102. Paragraphs 5.1(f) and (g) of NI 81-102 provide for unit-holder approval of certain asset transfers and reorganizations involving mutual funds.

Since, however, mutual funds formed by trust instrument will have provided for class protection in the declaration of trust, it is important not to assume that open-end mutual funds can simply be excluded from s. 170(1) of the OBCA without undermining existing unit-holder rights. Unlike trust instruments, share provisions in the articles of an OBCA open-end mutual fund may have been drafted with the expectation that s. 170(1) provides for a set of approval rights that need not, therefore, be repeated in the share provisions.

Subsection 4(2) – Limitation on Incorporators

Conform this OBCA provision to s. 7(2) of the ONCA.

Subsections 5(4) and (5) – Where Articles Prevail

Conform these OBCA provisions to s. 8(6) of the ONCA.[12]

Section 6 – Certificate of Incorporation

Conform this OBCA provision to s. 9(1) of the ONCA.

Section 7 – Effect of Incorporation

To facilitate opinion practice in Ontario, we recommend that s. 7 of the OBCA adopt the stronger conclusive proof language of the *Business Corporations Act* (Alberta),[13] which reads as follows:

> 9(1) A corporation comes into existence on the date shown in the certificate of incorporation.
>
> (2) A certificate of incorporation is conclusive proof for the purposes of this Act and for all other purposes
>
> > (a) that the provisions of this Act in respect of the incorporation and all requirements precedent and incidental to incorporation have been complied with, and
> >
> > (b) that the corporation has been incorporated under this Act as of the date shown in the certificate of incorporation.

If this recommendation is accepted, then s. 9(2) of the ONCA should be amended accordingly.

Subsections 8(1), (3) and (4) – Assignment of Corporation Number

Conform these OBCA provisions to ss. 10(1), (2) and (3) respectively of the ONCA.

Subsection 9(1) – Rules re Name of Corporation

Conform s. 9(1) of the OBCA to s. 11(1) of the ONCA.

Subsection 9(2) – Exception

Conform s. 9(2) of the OBCA to s. 11(5) of the ONCA.

Subsection 10(3) – Other Restrictions

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[12] See the discussion in the "Overview" above to the effect that "conforming the OBCA to the ONCA" means, with all necessary changes, including preserving existing OBCA references to, *inter alia*, shareholders and unanimous shareholder agreements.

[13] R.S.A. 2000, c. B-9 (the "**ABCA**"). For a more complete discussion, see W.M. Estey, *Legal Opinions in Commercial Transactions*, 2nd Ed. (Markham: Butterworths, 1997) at 101-102.

Conform s. 10(3) of the OBCA to s. 11(1) of the ONCA.

Subsections 12(1) and (1.1) – Change of Name if Objectionable

Conform these OBCA provisions to ss. 12(1) and (2) respectively of the ONCA.

Section 13 – Corporate Seal

Conform s. 13 of the OBCA to s. 13 of the ONCA.

Section 14 – Registered Office

Ontario should reconsider its 2-tier rules on change of registered office address. The CBCA allows a corporation's board of directors complete freedom to choose a registered office within Ontario. There appears to be no evidence that this power has been abused. The OBCA could be simplified by allowing the board to choose the registered office anywhere in the Province (without the need for a special resolution if the municipality or geographic township is changed). If this change is made, consequential changes would be needed to ss. 14(1), (3) and (5). As well, corresponding changes should be made to s. 14 of the ONCA.

In any case, with the exception of s. 14(2), what remains of these OBCA provisions should be conformed to what remains of ss. 14(1), (3) and (4) of the ONCA.

Subsections 17(2) and (3) – Restricted Businesses and Powers

Conform these OBCA provisions to ss. 16(2) and (3) respectively of the ONCA.

Section 19 – Indoor Management Rule

Clause s. 19(c) should be amended to refer to the most recent notice filed under the *Corporations Information Act*[14] rather than to s. 14(3) of the OBCA. This conforms to s. 1(1)(c) of the ONCA. In all respects as well, conform these OBCA provisions to ss. 19(1) and (2) of ONCA.

Section 21 – Pre-Incorporation Contract

Conform this OBCA provision to s. 20 of the ONCA.

Subsection 24(3)(a)(iii) – Stated Capital

In calculating the amount that is added to stated capital on a transfer of property to the corporation, the rules in s. 24(3)(a) differ depending on whether the transfer is from a person acting at arm's length or non-arm's length with the corporation. Where the corporation is issuing

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[14] R.S.O. 1990, c. C.39.

shares to an arm's length transferor of property to the corporation, the stated capital can be for less than consideration received if the corporation and all holders of shares of the class or series issued consent. A consent has never been required in the case of a non-arm's length transfer, and there does not appear to be any reported abuses. It seems that the case for a consent is less (not more) compelling in the case of a non-arm's length transfer than in the case of an arm's length transfer (where the board of the corporate issuer has no incentive to subsidize the tax paid-up capital of the transferor). Hence, the consent requirement should be removed in s. 24(3)(a)(iii).

Subsection 24(3.1)) – Consent Not Required

If the recommended change to s. 24(3)(a)(iii) is made, there is no longer any need for the carve-out in s. 24(3.1) which should be repealed.

Subsection 24(5) and New Subsection 24(5.1) – Stated Capital

Subsection 24(5) houses 2 separate rules. The first rule deals with stated capital for corporations formed before July 29, 1983, when the current version of the OBCA first came into force. The second, more frequently-encountered rule provides that a corporation can add any amount credited to retained earnings or other surplus account to stated capital. The heading of the subsection only refers to the first rule. In the interests of transparency and ease of understanding, we recommend that the 2 rules be split into separate subsections. Thus, the second rule would become s. 24(5.1) with no substantive change. Subsection 26(6) of the CBCA provides a similar stand-alone rule.

Subsections 24(10) and (11) – Non-Application of Act

Since proposed s. 3.5 would conveniently consolidate in one place all exemptions applicable to open-end mutual funds and the definition of "open-end mutual fund" would be relocated to s. 1(1), ss. 24(10) and (11) should be deleted.

Section 28 – Subsidiaries Not to Hold Shares in Holding Bodies Corporate

Both the British Columbia *Business Corporations Act*[15] and the Nova Scotia *Companies Act*[16]are more permissive than the OBCA is permitting ownership of shares by subsidiaries in their parents. Such ownership does not permit the subsidiary to vote the shares held in the parent.

We discussed but did not recommend permitting an OBCA corporation (perhaps especially the where shares are not shares in an offering corporation) to hold shares in its parent permanently provided that (a) not more than 50% + 1 shares are held (so that it remains clear which corporation controls the other) and (b) the shares that the subsidiary holds must remain non-

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[15] S.B.C. 2002, c. 57 (the "**BCBCA**")

[16] R.S.N.S. 1989, c. 81 (the "**NSCA**").

voting. Instead, the consensus was that the OBCA should adopt the 30-day whitewash rule found in the ABCA and s. 86 of the QBCA. Section 32 of the ABCA is a more comprehensive provision than the QBCA and it states:

> **32(1)** Except as provided in subsections (2) and (2.1) and sections 33 to 36, a corporation
>
> (a) shall not hold shares in itself or in its holding body corporate, and
>
> (b) shall not permit any of its subsidiary bodies corporate to acquire shares of the corporation.
>
> **(2)** Not more than 1% of the issued shares of each class of shares of a holding body corporate may be held by all the subsidiaries of the holding body corporate.
>
> **(2.1)** A corporation may from time to time hold shares in itself, or a subsidiary of the corporation may from time to time hold shares in the corporation, for a maximum of 30 days.
>
> **(2.2)** At the expiry of the 30-day period set out in subsection (2.1), the corporation or the subsidiary of the corporation shall
>
> (a) cancel the shares, on the condition that if the articles of the corporation limit the number of authorized shares, the cancelled shares may be restored to the status of authorized but unissued shares,
>
> (b) return the consideration received by the corporation or the subsidiary of the corporation to the person or persons who paid it, and
>
> (c) cancel the entry for the consideration in the stated capital account of the corporation or the subsidiary of the corporation.
>
> **(2.3)** Subsection (2) does not apply to shares held by a corporation or a subsidiary of a corporation under subsection (2.1).
>
> **(3)** Subject to subsections (2) and (4), a corporation shall cause a subsidiary body corporate of the corporation that holds shares of the corporation to sell or otherwise dispose of those shares within 5 years from the date that
>
> (a) the body corporate became a subsidiary of the corporation, or
>
> (b) the corporation was continued under this Act.
>
> **(4)** This section does not apply to shares acquired by the subsidiary body corporate before the commencement of this Act.

Tax lawyers confirm that adoption of a provision in the OBCA modelled on s. 32 of the ABCA would be useful for certain tax reorganizations. Currently, OBCA and CBCA corporations have to be exported to the ABCA to carry out these reorganizations and re-continued under the OBCA or CBCA once the transaction is completed. The additional time and transaction cost entailed should be avoided.

Subsections 29(9), (10) and (11) – Exemption to Facilitate Foreign Acquisitions

If the recommended change to s. 28 is made to adopt the 30-day whitewash rule, then the limited carve-out from s. 28(1) in ss. 29(9), (10) and (11) of the OBCA and ss. 23, 23.1, 23.2 and 23.3 of the OBCR becomes redundant.

Subsection 34(9) – Application of s. 130

Section 34 of the OBCA deals with voluntary reductions of stated capital, which are implemented by shareholders. Section 130 deals with directors' liability where directors authorize the payment of dividends or the purchase or redemption of shares and other transactions in circumstances in which the corporation cannot satisfy the statutory solvency tests. Contrary to the implication of s. 34(9), s. 130 of the OBCA does not provide for any liability on the part of directors for a breach of s. 34. It is only shareholders who can approve a reduction of stated capital under s. 34. For this reason, s. 38(6) of the CBCA (the precursor of s. 34(9) of the OBCA) was repealed in 2001.[17] For the same reason, s. 34(9) of the OBCA should also be repealed.

Subsection 38(3) – When Dividend Not to be Declared

As they presently read, ss. 38(1) and (3) could be made more clear as to whether stock dividends are excluded from the application of the solvency tests set out s. 38(3). Accordingly, s. 38(3) should be amended by adding the following words to the beginning thereof:

> Except for a dividend paid in accordance with subsection 38(2), the….

Subsection 42(2) – No Public Offer if Transfer, *Etc.*, Restricted

In 2007, s. 45(1)(c) was added to the OBCA to enable the laws of foreign jurisdictions to be prescribed for the purposes of a sale of restricted shares under s. 45. A parallel change should be made to add s. 42(2)(e) so that the articles can validly restrict the transfer or ownership of its shares to comply with a prescribed foreign law.

New Section 44.1 – Borrowing Powers

Subsections 184(1) and (2) of the OBCA would be more logically placed under Part III (Corporate Finance) rather than Part XIV (Fundamental Changes). In any case, these OBCA provisions should be otherwise conformed to ss. 85(1) and (2) of the ONCA.

As well, the opening language of s. 184(1) of the OBCA is obsolete because of the repeal of various provisions in the *Special Corporate Powers Act* (Québec)[18] in 1992. Consistent with the

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[17] S.C. 2001, c. 24, s. 23, amending the CBCA.

[18] R.S.Q. 1977, c. P-16, as amended by S.Q. 1992, c . 48, ss. 643-644.

changes made in 2001 to s. 189(1) of the CBCA, ss. 184(1) and (2) of the OBCA should be amended to read as follows:

> 44.1(1) Unless the articles or by-laws of or a unanimous shareholder agreement relating to a corporation otherwise provide, the directors of a corporation may, without authorization of the shareholders,
>
> (a) borrow money on the credit of the corporation;
> (b) issue, reissue, sell or pledge debt obligations of the corporation;
> (c) give a guarantee on behalf of the corporation to secure performance of an obligation of any person; and
> (d) mortgage, hypothecate, pledge or otherwise create a security interest in all or any property of the corporation, owned or subsequently acquired, to secure any obligation of the corporation.
>
> (2) Despite subsection 127(3) and clause 133(a), unless the articles, by-laws or a unanimous shareholder agreement provide otherwise, the directors may by resolution delegate the powers referred to in subsection (1) to a director, a committee of directors or an officer.

The proposed change is consistent with s. 85(1) of the ONCA, except that the word "hypothecate" has been added to s. 44.1(1)(d) to conform to the CBCA and current OBCA and to eliminate any doubt about a OBCA corporation's ability to provide security on its Québec property. The same change should be made to s. 85(1)(d) of the ONCA.

Section 50 – Trustee Not to be Receiver

Section 50 (providing that an indenture trustee cannot be appointed as a receiver-manager or liquidator of the corporation) is in practice unnecessary and not found in the CBCA or any other corporate legislation in Canada. In the interests of harmonizing securities laws in Canada, we recommend that s. 50 be repealed accordingly.[19]

Subsection 57(3) – Rights of Holder of Fractional Share

The QBCA reverses the default rule in s. 57(3) of the OBCA so that, unless the articles otherwise provide, fractional shares are not disenfrancished nor disentitled to receive their proportionate share of dividends.[20] This rule is more attuned to the needs of non-offering corporations where factional shares are rarely a problem. Accordingly, analogous to the bifurcated rule applicable to the dissemination of financial statements to shareholders of offering corporations and non-offering corporations in ss. 154(3) and (4), we recommend that s. 57(3) be amended so that the

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[19] In August 2011, the Uniform Law Conference of Canada (the "**ULCC**") approved the adoption of a national instrument governing trust indentures pursuant to which prospectus-qualified bonds have been issued. The national instrument would have to be adopted by the Canadian Securities Administrators. See report of the ULCC working group (Mr. Philippe Tardif, Chair) on "Uniform and Simplified Trust Indenture Legislation", posted at http://www.ulcc.ca/en/poam2.

default rule for non-offering corporations is that fractional shares are voting and enjoy dividend rights but that the default rule for offering corporations remains that fractional shares are disenfranchised and carry no dividend rights.

Subsection 92(1) – Shareholder Liability Shield

Section 92(1) codifies the shareholder immunity rule. Consideration should be given to conforming s. 92(1) of the OBCA to s. 91(1) of the ONCA.

Subsection 94(1) – Shareholders' Meetings

A useful innovation under the QBCA is to dispense with the needless formality of an annual meeting of shareholders where there is only one shareholder.[21] In the case of a corporation, the default rule should be that there is no need for an annual meeting. Also, subject to the foregoing change, s. 94(1) of the OBCA should be conformed to ss. 52(1) and (2) of the ONCA.

Subsection 94(2) – Meetings by Electronic Means

Conform s. 94(2) to ss. 53(4) and (5) of the ONCA. Currently, the OBCA provides for participation in meetings of shareholders by electronic or telephonic means but, unlike the ONCA and s. 132(5) of the CBCA, does not provide for virtual meetings of shareholders.

Clause 96(1) – Notice of Shareholders' Meetings

The QBCA combines the best of the OBCA and CBCA with respect to meetings of shareholders in private corporations: providing for a 10-day notice period as a default rule rather than mandatory minimum.[22] The OBCA should consider adopting the same approach as s. 165 of the QBCA.

Clause 96(1)(c) – More

The concept of a person appointed to conduct a review engagement should be added into s. 96(1)(c) of the OBCA to conform with s. 55(1)(c) of the ONCA. This would clarify the shareholders (rather than directors) have primary call in appointing or removing a public accountant (whether that public accountant is performing an audit or a review engagement).

Subsections 96(2) and (4) – Idem

Conform these provisions of the OBCA to ss. 55(2) and (6) respectively of the ONCA .

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[20] QBCA, *supra*, note 5, s. 51.

[21] *Ibid.*, s. 217.

[22] *Ibid.*, s. 165.

Subsections 96(5) and (6) – Special Business

Conform these provisions of the OBCA to ss. 55(7) and (8) respectively of the ONCA (so as to add in, *inter alia*, the concept of a person who performs a review engagement).

New Subsection 96(7) – Waiver of Notice

Section 98 of the OBCA be moved to become s. 96(7) and the relocated provision should be conformed to s. 55(3) of the ONCA.

Subsections 101(1), (2) and (3) – Quorum

Conform these OBCA provisions to ss. 57(1), (2) and (3) respectively of the ONCA subject to an certain addition that should be made to both provisions. At the end of s. 101(1), add the words "irrespective of the number of persons actually present at the meeting" so that the recast provision reads as follows:

> 101(1) Unless the by-laws otherwise provide, the holders of a majority of the shares entitled to vote at a meeting of shareholders, whether present in person or represented by proxy, constitute a quorum irrespective of the number of persons actually present at the meeting.

This change would make the OBCA and ONCA substantially equivalent to the CBCA and CNCA respectively and would eliminate a potential abuse in which the dissendent minority shareholders who will be outvoted at a meeting walk out leaving only the one shareholder in attendance.

Subsections 102(2) and (3) – Representative of Non-Human Member

Conform these OBCA provisions to s. s. 48(7) of the ONCA.

Subsection 104(1) – Resolution in Lieu of Meeting

Subsection 104(1) of the OBCA sets out the well-used provision allowing shareholders entitled to vote to pass an ordinary resolution or a special resolution by a unanimous consent resolution. However, such a consent resolution is subject to 2 exceptions. The first is where a director submits a written statement under s. 123(2). The second is where an auditor submits a written statement under s. 149(6). These are the so-called noisy director withdrawal provisions.

A recent Ontario trial decision[23] seems to say that a unanimous consent resolution of the shareholders (even where there is only one voting shareholder) to remove a director will be invalid if it fails to comply with s. 123(2). The same issue would arise on removal of an auditor

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[23] *Kaiser v. Borillia Holdings Inc.* (2007), 32 B.L.R. (4th) 306 (Ont. S.C.J. *per* Forestell J.)

by unanimous consent resolution that is non-compliant with s. 149(6). This result would come as a surprise to many practitioners and their clients who may have reasonably expected that compliance with ss. 123(2) or 149(6) is superfluous where all the shareholders intend to effect the removal.

The ABCA[24] avoids this ambiguity by simply deleting reference to the noisy withdrawal provisions as exceptions to the ability of shareholders to pass ordinary resolutions and special resolution by unanimous consent of those entitled to vote thereon.[25]

For their own protection, corporations will still want to immediately notify former directors and auditors that they have been removed. Notification to directors or auditors who have been removed should be self-policing.

It is, therefore, recommended that s. 104(1) be amended to delete the noisy director withdrawal exceptions. If accepted, a corresponding repeal of s. 59(5) of the ONCA would be in order.

Apart from the foregoing substantive change, the rest of s. 104(1) of the OBCA should be conformed to ss. 59(1) and (2) of the ONCA.

Section 105 – Requisition for Shareholders' Meeting

Conform this OBCA provision to s. 60 of the ONCA (except that the lower OBCA threshold at should remain unchanged at 5%, not be raised to 10%).

Section 106 – Court-ordered Meetings of Shareholders

Conform s. 106 of the OBCA to s. s. 61 of the ONCA.

Section 109 – Definitions for Part VIII (Proxies)

To achieve greater national uniformity, strong consideration should be given to conforming these OBCA provisions to National Instrument 51-102 (*Continuous Disclosure Requirements*) ("**NI 51-102**"), especially Part 9 thereof and allowing NI 51-102 to carry most of the detailed legislative weight. Note that the comparable provisions[26] of the *Canada Business Corporations Regulations, 2001*[27] (the "**CBCR**") were recently amended for the same reasons.[28] In this area, uniform subordinate legislation (that can be more easily amended to keep current with market

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[24] *Supra*, note 14.

[25] *Ibid.*, s. 141(1).

[26] Namely, ss. 54, 55 and 56 of the CBCR, *infra*, note 28.

[27] SOR/2001-512 (the "**CBCR**").

[28] SOR/2008-315, s. 2 (amending, *inter alia*, CBCR, *ibid.*, s. 54).

practices) is a superior option than perpetuating separate proxy solicitation regimes in one-off corporate statutes.

If this recommendation is accepted, then Part VIII (Proxies) of the Act and the proxy-related provisions of the OBCR (*i.e.*, ss. 27 through 38) could be greatly reduced and simplified. For starters, NI 51-102 defines "form of proxy", "information circular" and "solicit".

The QBCA contains a set of brief provisions governing proxies.[29] These could serve as a model for what the OBCA needs should it rely primarily on NI 51-102 to provide for the details applicable to reporting issuers.

Subsection 110(3) – Form of Proxy

For the reasons stated in connection with s. 109, this provision governing the prescribed form of proxy could be deleted – relying on NI 51-102 for offering corporations. The QBCA takes this approach, omitting any detailed content requirements.

Section 111 – Mandatory Solicitation of Proxy

If the recommendation set out at s. 109 is accepted, then Part 9 of NI 51-102 should take the place of s. 111 of the OBCA, which can be repealed.[30]

Section 112 – Information Circular

If the recommendation set out at s. 109 is accepted, then Part 9 of NI 51-102 should also take the place of s. 112 of the OBCA, which can be repealed.[31]

Section 113 – Exemption Order re ss. 111, 112

If the recommendation set out at s. 109 is accepted, then s. 13.1(2) of NI 51-102 supplants the need for s. 113 of the OBCA, which can be repealed.

New Section 114.1 – Voting by Mail or by Telephonic or Electronic Means

Add a new s. 114.1 to the OBCA modeled on ss. 67(1) and (2) of the ONCA.

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[29] QBCA, *supra*, note 5, ss. 170 through 173.

[30] NI 51-102, s. 9.1(1).

[31] NI 51-102, ss. 9.1(2) and 9.2.

Paragraph 115(5)(c) – Exceptions to Deemed Directors

To keep current, s. 115(5)(c) should be expanded to include an interim receiver, a proposal trustee and a monitor under the *Companies' Creditors Arrangement Act* (Canada)[32] (the "**CCAA**") as exceptions to the deemed director rule in s. 115(4). The same change should be made to s. 29(2)(c) of the ONCA.

Subsection 117(1)(e) – First Directors Meeting

To be consistent with s. 32(1)(e)the ONCA, the concept of a person who conducts a review engagement should be added to s. 117(1)(e) of the OBCA.

Subsection 118(3) – Residency of Directors

Consistent with past recommendations, the 25% resident Canadian director rule should be repealed. Repeal would make the OBCA competitive with legislation in BC, MB, NB, NS, PE, QC, NU, NW and YK.

We do not think that the residency requirement is serving any useful purpose. Retention of the requirement makes the OBCA uncompetitive against the corporate laws of its sister jurisdictions. In particular, we are aware of no evidence to suggest that the residency requirement is needed or useful to collect or enforce tax liabilities imposed on corporations by the Province of Ontario. First, incorporation under the OBCA is only optional. Corporations that wish to avoid having any resident Canadian directors will simply choose to incorporate under another provincial/territorial law. Second, even under the OBCA, the liabilities of the directors can be removed by unanimous shareholder agreement ("**USA**") or, in the case of a single-shareholder corporation, unanimous shareholder declaration ("**USD**"). Most Ontario-based businesses will have resident Canadian directors because they are Canadian-owned or managed businesses.

There is no empirical evidence of which we are aware that would suggest that the residency requirement aids tax compliance or enforcement. Jurisdictions such as BC have abolished the rule, and there does not seem to be a report of any resultant revenue loss.

New Subsection 118(4) – No Alternate Directors

An equivalent to s. 23(5) of the ONCA should be added as s. 118(4) of the OBCA.

Subsection 119(2) – Resignation

Subsection 119(2) effectively prevents the resignation of the first directors named in the articles of incorporation unless (a) the first meeting of shareholders has been held or (b) a successor director

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[32] R.S.C. 1985. c. C-36.

has been elected or appointed at the time the resignation is to become effective. This provision creates a trap for unwary incorporators (especially office incorporators) who may not be able to validly resign or may resign incorrectly. The CBCA contains no such exception to the ability of a director to unilaterally resign.[33] The ONCA has no counterpart to s. 119(2), which will further confuse Ontario directors if the OBCA remains inconsistent with the ONCA/CBCA. Subsection 119(2) of the OBCA should, therefore, be repealed.

Subsection 121(1) – Ceasing to Hold Office

Conform this OBCA provision to s. 25(1) of the ONCA.

Subsection 123(4) – No Liability

Conform this OBCA provision to s. 27(3) of the ONCA.

Subsection 124(1) – Filling Vacancy

Conform this OBCA provision to ss. 28(1) and (6) of the ONCA.

Subsection 125(1) – Change in Number of Directors

Conform this OBCA provision to s. 30(1) of the ONCA.

New Subsection 125(1.1) – Change in Number of Directors

The OBCA should be amended to add a counterpart of s. 30(2) of the ONCA (which would enable shareholders to increase the number of directors at the same meeting that the articles are amended to increase the number of directors or maximum number of directors). This would not only conform the OBCA to the ONCA but also to s. 112(2) of the CBCA.

Subsections 125(3) and (4) – Minimum and Maximum Number of Directors

Conform these OBCA provisions to ss. 22(2) and (3) respectively of the ONCA.

Subsection 126(2) – Place of Meetings

The OBCA should include those default rules that are most likely to be chosen by the directors and shareholders if they put their collective minds to the issue. In particular, the OBCA should not force corporations to adopt by-laws just to avoid the imposition of default rules. Hence, s. 126(2) should be recast so that a meetings of the board of directors may be held outside Ontario unless the by-laws otherwise provide. This would conform the OBCA to s. 34(1) of the ONCa.

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[33] CBCA, s. 108(2).

Subsection 126(3) – Minimum Quorum at Board Meetings

There is no valid reason for the limitation in s. 126(3) to the effect that by-laws cannot reduce the quorum requirement to less than 40% of the number of directors or minimum number of directors provided for in the articles. This is a rare exception to the general philosophy of the OBCA to the effect that shareholders are free to shape the constating documents of the corporation (which includes the by-laws) to best serve their needs. The CBCA has no similar requirement. No such floor is set out under s. 34(2) of the ONCA. Unless the OBCA is amended to conform to the ONCA, there will be a continuing source of confusion in Ontario boardrooms. Subsection 126(3) should, therefore, be amended to delete the 40% minimum quorum requirement.

Subsection 126(4) – Idem

For the reason givens in connection with proposed amendment to s. 126(3) of the OBCA, there is no compelling reason to mandate that both directors on 2-person board must be present where there are 2 directors. This is the same result that would obtain under s. 34(2) of the ONCA (for example, if one of the 3 directors on the boards of an ONCA corporation resigned).

Subsection 126(13) – Participation by Electronic Means, etc.

Subsection of the 34(6) of the ONCA should be conformed to s. 126(13) of the OBCA, which is more clearly limited to physical, telephonic and audio-visual meetings. It is unclear what "communicate adequately" means under the ONCA.

Subsection 127(3) – Limitation on Delegation of Authority

Conform the drafting of s. 127(3) of the OBCA to that of s. 36(1) of the ONCA. However, the additional specific content of ss. 127(3) (*i.e.,* ss. 127(3), (b), (d), (e), (f), (g), (h), (i) and (i.1)) should be preserved. Also, the OBCA would omit an equivalent to s. 36(2)7 of the ONCA.

Section 128 – Validity of Acts of Directors and Officers

Conform this OBCA provision to s. 37 of the ONCA.

New Section 128.1 – Evidence of Resolution

A new provision should be added to the OBCA based on s. 38 of the ONCA. This would conform the OBCA to s. 142(3) of the CBCA.

Paragraph 130(2)(f) – Liability of Directors

Paragraph 130(2)(f) should be deleted. Where it is the court that orders the corporation to purchase shares (such as under the appraisal right or the oppression remedy), directors should not be made liable. In any event, if the corporation is insolvent, its shares should have no value.

Paragraph 130(5)(a) – Liability of Directors

For the reason stated with respect to s. 130(2)(f), the references to ss. 185 (appraisal right) and 248 (oppression remedy) should be deleted.

Section 131 – Director's Liability to Employees for Wages

Conform this OBCA provision to s. 40 of the ONCA.

Subsection 132(5.2) – Shareholder Approval

Subsection 132(5.2) was added to the OBCA effective August 1, 2007. Consistent with our prior recommendations, 2 changes should be made to s. 132(5.2).

First, there is a potential conflict between ss. 132(5) and (5.2) in that, under s. 132(5), all conflicted directors may validly vote on a contract or transaction involving, for example, an affiliate or his or her own remuneration, indemnity or insurance, whereas s. 132(5.2) requires that, if all directors are conflicted, the shareholders alone must approve the contract or transaction. The CBCA contains no similar requirement.

Second, the connection between ss. 132(5.2) and (8) is unclear. Subsection 132(8) provides that the shareholders can approve an interested director/officer transaction or contract by special resolution provided that (a) the nature and extent of the conflict is disclosed in reasonable detail in the information circular (or notice calling the meeting of shareholders) and (b) the contract or transaction is "reasonable and fair to the corporation at the time it was approved." It is unclear whether shareholder approval under s. 132(5.2) must be given in accordance with s. 132(8) or whether s. 132(5.2) creates a standalone shareholder approval regime (without, however, the need to comply with the disclosure, special resolution and fairness requirements set out in s. 132(8)). It appears that s. 132(5.2) is only intended to give the shareholders the statutory right to approve the interested director/officer transaction or contract, *i.e.,* creating an exception to the statutory division of powers enshrined in Act (especially s. 115(1), which gives the board of directors all residual powers to manage or supervise the management of the business and affairs of the corporation). Shareholders should have the power to confirm or approve interested director/officer transactions or contracts not only where all directors are prohibited from voting but also where those directors permitted to vote elect to submit the matter to shareholder decision. Section 129 of the QBCA is consistent with this recommendation.

Thus, s. 132(5.2) should be restated as follows:

> Where,
>
> (a) subsection (5) prohibits all of the directors from voting on a resolution to approve a contract or transaction; or
>
> (b) a majority of the directors entitled to vote on that resolution resolve to submit such approval to the shareholders,
>
> the contract or transaction may be approved by special resolution in accordance with subsection (8).

The same changes should be made to s. 41(7) of the ONCA.

Subsection 135(4) – Reasonable Diligence Defence

Conform this OBCA provision to s. 44 of the ONCA, in particular, making express provision for reasonable reliance on review engagement financial reports (not just audit reports). However, like s. 121 of the QBCA, the OBCA and ONCA would be improved if they explicitly included reference to "a committee of the board of directors of which the director is not a member if the director believes that the committee merits confidence" or words to that effect.

Subsections 136(3) and (4) – Limitation on Indemnification

Conform these OBCA provisions to s. 46(3) of the ONCA.

Subsections 139(1) and (2) – Records

Conform these OBCA provisions to ss. 100(1) and (2) respectively of the ONCA.

Subsections 140(1) and (2) – Corporate Records to be Kept

With one exception, we recommend that the drafting of these OBCA provisions be conformed to ss. 92(1), (2) and (3) of the ONCA. The exception is not to adopt s. 92(1)(g) of the ONCA. The OBCA does not mandate keeping a register of officers and introducing such a requirement might be onerous for existing OBCA corporations that do not have a register of officers. There may be a greater need to keep a register of officers in the case of an ONCA corporation than in the case of an OBCA corporation (which can be presumed to have shareholders who will monitor their boards of directors and other compliance requirements).

As discussed above, OBCA concepts such as shares, shareholders, unanimous shareholder agreements and securities registers would not be replaced by ONCA concepts.

Subsection 144(1) – Records Open to Examination by Directors

Conform this OBCA provision to ss. 94(1) and (2) of the ONCA.

Subsection 145(1) – Examination of Records by Shareholders and Creditors

Conform this OBCA provision to ss. 95(1) and (2) of the ONCA.

New Subsection 145(1.1) – Access to Securities Register

Under s. 146, shareholders and others may obtain a list of shareholders and a supplemental list of shareholders. The requirements under s. 146 include a statutory declaration and restrictions on the use that may be made of the list. However, instead of proceeding under s. 146, shareholders and others may obtain identical information under s. 145(1) free from any of the requirements or limitations imposed by s. 146. In 2001, the CBCA was amended to ensure that the same requirements and restrictions apply whenever shareholders and others access the same information. Section 145 should be further amended by adding a provision like s. 21(1.1) of the CBCA[34] and s. 96(1) of the ONCA.

Section 148 – Exemption from Audit Requirement

The QBCA allows a one-shareholder corporation to dispense with the appointment of an auditor. Again, this is a useful innovation that the OBCA should emulate.[35] The OBCA should go one step further than the QBCA. In the case of a one-shareholder corporation, the default rule should be that both an audit and a review engagement are waived in favour of a compilation report. We further recommend that the CBCA waiver rule be adopted such that the waiver need not be in writing.

Section 149(1) and (2) – Auditors

See the comments in support of the amendment to s. 148 above. If adopted, a one-shareholder corporation could dispense with the formality of annually waiving the appointment of an auditor. Review engagements and compilation engagements are prevalent in many non-offering corporations.

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[34] Subsection 21(1.1) of the CBCA states: "Any person described in subsection (1) who wishes to examine the securities register of a distributing corporation must first make a request to the corporation or its agent, accompanied by an affidavit referred to in subsection (7). On receipt of the affidavit, the corporation or its agent shall allow the applicant access to the securities register during the corporation's usual business hours, and, on payment of a reasonable fee, provide the applicant with an extract from the securities register.

[35] QBCA, *supra*, note 5, s. 217.

Subject to the qualification that follows, conform these OBCA provisions to s. 68 of the ONCA, especially the provisions in which a person is appointed to conduct a review engagement rather than an audit. However, ss. 68(2) and (3) of the ONCA should be amended to include reference to a person appointed to conduct a review engagement (to be consistent with ss. 32(1)(e) and 68(1) of the ONCA).

Subsection 149(3) – Casual Vacancy

A vacancy in the office of auditor or in the person appointed to conduct a review engagement should be filled by the directors. While such a vacancy continues, the surviving or continuing auditor or person conducting a review engagement should be entitled to act. This would make s. 149(3) of the OBCA consistent with s. 72(1) of the ONCA.

Subsection 149(4) – Auditors

Conform this OBCA provision to s. 71 of the ONCA, especially the provisions in which a person is appointed to conduct a review engagement rather than an audit.

Subsection 149(7) – Auditor Remuneration

Conform this OBCA provision to s. 68(4), which will, then, include a person appointed to conduct a review engagement. The default rule (under both the OBCA and the ONCA) should be that directors (rather than shareholders) fix the remuneration of auditors. Section 239 of the QBCA adopts this approach. In that way, s. 96(6) of the OBCA would be conformed to the reality that shareholders almost invariably authorize the directors to fix the remuneration of the auditors or the person who conducts a review engagement.

Section 150 – Ceasing to Hold Position as Auditor, *etc.*

Conform this OBCA provision to s. 70 of the ONCA.

New Section 151(4.1) – Effect of Non-compliance

A new provision should be added as s. 151(4.1) of the OBCA to replicate s. 75(9) of the ONCA. This change would make the OBCA consistent not only with the ONCA but also with s. 168(8) of the CBCA.

Section 152 – Qualifications and Independence

Subject to the qualification that follows, conform s. 152 of the OBCA to s. 69 of the ONCA, especially the provisions regulating a person who conducts a review engagement of a corporation's financial statements. However, unlike under the ONCA, the public accountant who audits or performs a

review engagement of an OBCA corporation should not be limited to public accountants permitted to do so under the *Public Accounting Act, 2004.*[36]

Subsection 153(1) – Examination by Auditor

An auditor is required to report on the financial statement "as prescribed and in accordance with generally accepted accounting standards" ("**GAAS**"). The OBCR prescribes the standards set out from time to time in the *Handbook of the Canadian Institute of Chartered Accountants* (the "***Former CICA Handbook***"). However, the additional reference to GAAS, which is not found in the CBCA, is confusing and should be deleted. The *CICA Handbook - Assurance* should be treated as an exhaustive statement of GAAS. Note that the ONCA follows the approach of the OBCA. Therefore, if this recommendation to the OBCA is accepted, a corresponding amendment should be made to s. 77(2) of the ONCA.

Apart from the foregoing, otherwise conform s. 153(1) of the OBCA to ss. 77(1),(2) and 78(1) of the ONCA (to, *inter alia*, regulate review engagements as well as audits).

Subsections 153(2), (3) and (4) – Reporting Errors

Conform these OBCA provision to ss. 81(1), (2) and (3) respectively of the ONCA (to, *inter alia*, regulate review engagements as well as audits).

Subsections 153(5), (6) and (7) – Obligation to Furnish Information

Conform ss. 153(5), (6) and (7) of the OBCA to ss. 79(1), (2) and (3) of the ONCA (to, *inter alia*, regulate review engagements as well as audits).

New Section 153.1 – Consolidation

A new provision should be added to the OBCA modelled on ss. 78(2), (3) and (4) of the ONCA. This would bring the OBCA into line not only with the ONCA but also with s. 157 of the CBCA. However, like the ONCA, the OBCA provisions would be extended to persons who perform a review engagement.

Subsections 154(1)(c) and (2) – Information to be Laid before Annual Meeting

These OBCA provisions should be amended so that they contemplate not only audited financial statements but also review engagements.

Section 155 – Preparation of Financial Statements

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[36] *Supra*, note 11.

Financial statements must be prepared "as prescribed by regulation and in accordance with generally accepted accounting principles" ("**GAAP**"). Again, the OBCR prescribes the principles set out from time to time in the *Former CICA Handbook*. However, the additional reference to GAAP, which again is not found in the CBCA, is confusing and should be deleted. Also the words "by regulation" are redundant in light of the defined word "prescribed" and warrant deletion. The *CICA Handbook – Accounting* and the *CICA Public Sector Accounting Handbook* (together, the "***CICA Accounting Handbooks***") should be treated as the exhaustive statement of GAAP. Notably, the ONCA does not follow the approach of s. 155 of the OBCA.

Section 157 – Financial Statements of Subsidiaries

Conform this OBCA provision to ss. 98 and 99 of the ONCA.

Subsection 158(1) – Audit Committee

Two separate amendments should be made to s. 158(1). First, with respect to an offering corporation, a strong consensus has now emerged that no officers or employees should be on the audit committee. The OBCA should be conformed to this accepted standard. Second, with respect to a non-offering corporation, there can be no valid objection to an audit committee consisting of less than 3 directors. A one or 2- person audit committee may be preferable to no audit committee. Subsection 80(1) of the ONCA is consistent with this second recommendation.

Subsection 158(2) – Audit Committee Role

Conform this OBCA provision to s. 83(3) of the ONCA.

New Section 161.1 – Qualified Privilege - Defamation

A new provision should be added to the OBCA modelled on s. 82 of the ONCA except that both provisions should be expanded to include statements or reports made by a person conducting a review engagement (as well as a person who performs an audit). Adoption of this recommendation would bring the OBCA into line not only with the ONCA but also with s. 172 of the CBCA (except that, unlike the *Canada Not-for-profit Corporations Act*[37] (the "**CNCA**") the CBCA still omits any reference to a financial statement prepared on a review engagement basis.

New Subsections 162(3) and (4) – Order to Enter a Dwelling

Add new ss. 162(3) and (4) to the OBCA modelled on s. 175 of the ONCA.

Section 165 – Privileged Statements

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[37] S.C. 2009, c. 23. The CNCA has been proclaimed into force effective October 17, 2011.

Section 165 states that inspector's reports and statements made in an investigation enjoy absolute privilege. There is nothing wrong with this conceptually. The issue is consistency and transparency with how the OBCA achieves absolute privilege elsewhere. For example, s. 123(4) uses a plain language approach in stating that: "No corporation or person acting on its behalf incurs any liability by reason only of circulating a director's statement in compliance with subsection (3)." Subsection 99(6) is to similar effect. This approach should be applied in s. 165. If this recommendation is accepted, a corresponding amendment should be made to s. 180(1) of the ONCA.

Section 167 – Inquiries by Director

Section 167 of the OBCA states that Director may make enquiries of any person relating to compliance with the OBCA but does not obligate anyone to respond to any such enquiry. The ONCA omits any such vague provision. Thus, s. 167 of the OBCA should be repealed.

Subsection 170(6) - Deeming Provision

If the change to s. 42(2) recommended above is made, then s. 170(6) would have to be amended to refer as well to the new provision (*i.e.,* new s. 42(2)(e)).

Subsection 171(2) – Application of s. 34(4, 5)

In light of the repeal of s. 168(1)(f) in 1994, this provision has become confusing and should be repealed. Stated capital reductions are no longer dealt with by way of articles of amendment.

Subsection 171(3) – Change of Name

Ontario appears to be alone among Canadian jurisdictions in purporting to prohibit a change of corporate name when the corporation is insolvent. In particular, the CBCA has never had a similar provision. Little purpose is served by s. 171(3). It should be repealed.

Insolvent companies wishing to change their name will, if unscrupulous, ignore s. 171(3) (as the Ministry will not know that the corporation is insolvent at the time that articles of amendment are filed) or, if scrupulous, either continue the corporation to the CBCA (or another province or territory) or obtain an overriding order under the s. 186 reorganization provision.[38] Ironically, the OBCA does not prevent an insolvent corporation from continuing to the CBCA (or another jurisdiction) and concurrently changing its corporate name. The s. 186 route is cumbersome as it

[38] See *Congress Financial Corp. (Canada) v. American Sensors Electronics Inc*. (1999, 85 A.C.W.S. (3d) 814 (Ont. Gen. Div.).

requires that an order be made as part of a part of a commercial proposal under the *Bankruptcy and Insolvency Act*[39] or a plan of arrangement under the CCAA.[40]

Thus, s. 171(3) creates no impediment for the unscrupulous but puts the scrupulous to added expense in a beneficial sale of the corporate assets to a buyer who is also purchasing the corporate name. This extra expense is indirectly borne by creditors of the OBCA corporation in the form of a lowered net realization from the disposition of assets.

If this change is made, a corresponding amendment should be made to s. 103(4) of the ONCA.

Section 173 – Restated Articles

The QBCA is more flexible than is the OBCA in what changes may be made by way of restated articles. The QBCA allows restated articles to make changes of wording necessary to obtain a uniform mode of expression and presentation and correct obvious reference, typographical, transcription and similar errors.[41] The OBCA should incorporate the same flexibility to make restated articles (that only require board, not shareholder, approval) more useful than has been the experience to date under the OBCA and CBCA. The same change should be made to s. 109 of the ONCA.

Subsection 177(2) – Amalgamation of Subsidiaries

In contrast to the need under s. 177(1), there is no logical reason in s. 177(2) to require that the common shareholder of the amalgamating corporations in a short-form horizontal amalgamation be a body corporate. An individual, partnership, limited liability company or any other common shareholder is sufficient. Section 281 of the QBCA does not limit the legal form of the parent shareholder in a horizontal short-form amalgamation. The expanded definition of "person" recommended in s. 1(1) will assist in qualifying amalgamations for the horizontal short-form procedure. Further changes may be in order to implement the intent since, under the OBCA, "holding body corporate" and "subsidiary corporation" are now defined only in relation to a body corporate holding shares in a corporation.

New Subsection 177(3) – USA of Amalgamated Corporation

To ensure that *Sportscope Television Network Ltd. v. Shaw Communications Inc.*,[42] in which a USA was held to be terminated upon amalgamation, is confined to long-form amalgamations, a new

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[39] R.S.C. 1985, c. B-3.

[40] *Ibid*., note 32.

[41] QBCA, *supra*, note 5, s. 262.

[42] (1999), 46 B.L.R. (2d) 87 (Ont. Gen. Div. [Commercial List] per R.A. Blair, J., now Blair J.A.).

provision should be added to the OBCA providing that a USA at the top-tier level survives a vertical short-form amalgamation pursuant to s. 177(1) and that a USA also survives a horizontal short-form amalgamation pursuant to s. 177(2) of the OBCA. The QBCA is to the same effect. If all the shareholders of the amalgamated corporation were bound by a USA or unanimous shareholder declaration ("**USD**") of the amalgamating corporation, they should remain bound by the USA or USD post-amalgamation. The rule for the survival of a USA on a vertical amalgamation should parallel the rule applicable to the by-laws of the amalgamated corporation. On a horizontal amalgamation, unless the resolutions approving the amalgamation provide otherwise, the USDs of each amalgamating corporation should survive or, alternatively, the default rule could be that only the USD and by-laws of that amalgamating corporation whose shares are not cancelled on the amalgamation survive.

Subsection 182(3) – Adoption of Arrangement

To increase the flexibility of the OBCA arrangement provision (especially in circumstances where the arrangement is being effected to restructure an insolvent corporation) and to more closely harmonize with the CBCA (and the jurisprudence[43] that has developed under the CBCA), the OBCA should be made clear that there is no mandatory shareholder approval threshold. Rather, like s. 192 of the CBCA, the court can determine the level of required approval of shareholders and holders of debt obligations in the initial order. Hence, confusing s. 182(3) should be repealed, and, similarly, s. 120(3) of the ONCA should be repealed.

Subsection 182(4) – Separate Votes

Again, the requirement for separate class votes for classes or series of shares reduces the flexibility and, therefore, the usefulness that the statutory arrangement provision otherwise affords. Section 192 of the CBCA contains no counterpart provision. As under the CBCA, the court can decide whether separate class or series votes should be held, what plurality (if any) is needed and what weight to give the shareholder votes in deciding whether to approve the plan of arrangement. Thus, s. 182(4) of the OBCA and s. 120(4) of the ONCA should be repealed.

Subsections 183(1) and (2) – Articles and Certificate of Arrangement

Conform these OBCA provisions to ss. 120 (6) and (7) respectively of the ONCA.

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[43] Such as the Supreme Court of Canada decision in *BCE Inc., Re.* [2008] 3 S.C.R. 560. However, s. 182 of the OBCA should not replicate the solvency and impracticability requirements set out in ss. 193(2) and (3) of the CBCA, which, in any event, have been largely emasculated by the courts.

New Subsection 183(3) – Effect of Certificate of Arrangement

A new provision should be added as s. 183(3) of the OBCA modelled on s. 120(8) of the ONCA. This would make the OBCA consistent not only with the ONCA but also with s. 192(8) of the CBCA.

Subsections 184(1) and (2) – Borrowing Powers

See proposed relocation as s. 44.1 of the OBCA.

Subsection 184(3) – Extraordinary Sale, Lease or Exchange

Assuming that ss. 184(1) and (2) are relocated as s. 44.1, s. 184(3) should be renumbered and its heading restated so that it can be more easily located than as currently cast at the bottom of s. 184. Subsection 118(1) of the ONCA should serve as a model for a recast s. 184(3).

Subsection 184(4)(a) – Notice of Sale of Substantially All Property

Contrary to the Ontario trial decision in *Pace Savings & Credit Union Ltd. v. CU-Connection Ltd.*[44] applying the OBCA, the QBCA allows shareholders to receive a copy or summary of the proposed terms of disposition (rather than the final agreement as held in *Pace*). Section 118(2) of the ONCA takes the same approach, only requiring inclusion of "a copy or summary of the proposed agreement of sale, lease or exchange". The OBCA should adopt the same approach.

Subsection 185(1)(d) – Rights of Dissenting Shareholders

The continuance of an OBCA corporation as a co-operative corporation under s. 181.1 should be included as a triggering event for the exercise of dissent and appraisal rights under s. 185(1)(d). This is clearly the intent of s. 181.1(2) of the OBCA. See, also, s. 187(1)(d) of the ONCA. Subsection s. 185(1) of the OBCA should be amended accordingly.

Subsection 186(1) – Reorganization

The final words of in the definition of "reorganization in s. 186(1) are "… or an order made under the *Companies Creditors Arrangement Act* (Canada) (*sic*) approving a proposal". In a proceeding under the CCAA,[45] the court does not approve a "proposal". Rather it approves a plan of arrangement. However, to avoid imposing an unnecessary limitation, the language describing the type of court order further should be deleted. Thus, the concluding words should simply be: "… or the *Companies' Creditors Arrangement Act* (Canada)." The same change should be made to the definition of "reorganization" in s. 119(1) of the ONCA.

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[44] 2000 CarswellOnt 3709 (Ont. S.C.J.)

[45] *Supra*, note 33.

Subsections 186(4) and (5) – Articles and Certificate of Reorganization

Conform these OBCA provisions to ss. 119(4) and (5) respectively.

Subsection 188(4)(d) – Court Order in Compulsory Acquisition

Consistent with the ONCA (and other provisions of the OBCA such as ss. 242(3) and (4) of the OBCA), change the reference in s. 188(4)(d) from the "Public Trustee" to the "Public Guardian and Trustee".

Section 189 – Compelled Acquisitions

It appears that s. 189 of the OBCA (entitling the minority on a 90% change of control of an offering corporation to demand fair value) has become a dead letter. Is the cost-benefit of demanding fair value in the face of a sale approved by not less than 90% of selling shareholder acting at arm's length with the successful bidder too high a hurdle as to make the rights in s. 189 largely illusory? Section 206.1 of the CBCA provides a right of exit for the minority but at the offer price. It does not enable the minority to contest the price. The QBCA has no counterpart to either s. 189 of the OBCA or s. 206.1 of the CBCA. We, therefore, recommend that s. 189 of the OBCA be amended so that it conforms to s. 206.1 of the CBCA?

Section 190 – Going Private Transactions

After s. 190 was first introduced into the OBCA, the Ontario Securities Commission (the "**OSC**") developed OSC Policy Statement 9.1. Much later, Ontario and Québec adopted Multilateral Instrument 61-101 (*Protection of Minority Security Holders in Special Transactions*)("**MI 61-101**"). In essence, MI 61-1-1 represents a much more comprehensive or full-dress version of s. 190.

Section 1.1 of MI 61-101 defines "business combination" as, among other things, a transaction of the issuer, as a consequence of which, the interest of a holder of a equity security of the issuer may be terminated without the holder's consent. Part IV of MI 61-101 governs requirements for business combinations. For the sake of substantive uniformity with CBCA issuers, unincorporated issuers and other issuers governed by the more robust and modern MI 61-101, s. 190 of the OBCA should be amended so that OBCA offering corporations are governed exclusively by MI 61-101. Thus, s. 190(2) could be amended to simply read as follows:

> A corporation that proposes to carry out a going private transaction shall comply with the rules applicable to going private transactions under the *Securities Act*.

This is the approach taken by the CBCA amendments in 2001.[46] Subsections 190(3) through (7) of the OBCA would be repealed so as to eliminate the possibility of duplication or, worse, inconsistency with MI 61-101.

Section 191 – Definition Applicable to Part XVI (Liquidation and Dissolution)

The CBCA has long replaced the term "winding up" with the more modern "liquidation". The OBCA and ONCA still use "winding up" but refer to Part XVI as "Liquidation and Dissolution" and a "liquidator". The QBCA tracks the CBCA, not the OBCA, in describing a liquidation. The OBCA and ONCA would benefit from adopting the prevailing terminology. *Inter alia*, it would assist practitioners in drafting liquidation provisions in share conditions to have common terminology in the main federal and Ontario corporate statutes.

If this recommendation is accepted, then "liquidation" and "liquidate' would replace "winding up" and "wind up" respectively throughout Part XVI of the OBCA, *viz.*,: ss. 191; 192; 193(1); 193(4); 194; 197; 198; 199; 200; 201(1); 201(2); 203; 204(1); 204(2); 204(3); 205(1); 205(5); 206; 207(1); 208(1); 209; 210(1); 213; 214; 215(1); 215(2), 215(3); 216; 217(1); 218(1); 219; 221(1); 222; 223(1); 230(1); 230(2); 233; 234(2); 235(2); and 236(1).

Section 212 – Liquidation Costs and Expenses

Since "court" is a defined term in s. 1(1), for consistency, the reference to "Superior Court of Justice" in s. 212 should be changed to "court".

Subsection 223(4) – Good Faith Reliance by Liquidator

Consistent with the August 1, 2007 amendments to the OBCA, s. 223(4) of the OBCA, governing good faith reliance by a liquidator, should be conformed to s. 135(4) of the OBCA governing good faith reliance by directors. However, there is one further change, like s. 152(4) of the ONCA, s. 223(4) of the OBCA should make explicit reference not only to an audit but also to a review engagement report. A parallel amendment should be made to s. 152(4) of the ONCA.

Subsection 234(1) – Where Creditor Unknown

Consistent with ss. 163(1) and 167(2) of the ONCA (and other provisions of the OBCA), change both references in s. 234(1) from the "Public Trustee" to the "Public Guardian and Trustee".

Subsection 235(1) – Where Shareholder Unknown

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[46] See CBCA, s. 193.

Consistent with ss. 164(1) and 167(3) of the ONCA (and other provisions of the OBCA), change both references in s. 235(1) from the "Public Trustee" to the "Public Guardian and Trustee".

Subsection 238(3) – Where Creditor Unknown

Consistent with ss. 163(1) and 167(2) of the ONCA (and other provisions of the OBCA), change both references in s. 238(3) from the "Public Trustee" to the "Public Guardian and Trustee".

Subsection 238(4) – Where Shareholder Unknown

Consistent with ss. 163(4) and 167(3) of the ONCA (and other provisions of the OBCA), change both references in s. 238(4) from the "Public Trustee" to the "Public Guardian and Trustee".

Subsections 238(5) and (6) – Power to Convert

Consistent with ss. 167(5) and 167(6) of the ONCA (and other provisions of the OBCA), change all references in ss. 238(5) and (6) from the "Public Trustee" to the "Public Guardian and Trustee".

Subsection 240(1) – Cancellation of Certificate by Director

Consolidate as part of a revamped cancellation and correction regime. See the discussion at s. 275 below. A parallel consolidation should be made with ss. 169 and 202 of the ONCA.

Subsection 240(2) – Definition of "Sufficient Cause"

Conform s. 240 of the OBCA to s. 169 of the ONCA by repealing s. 240(2) of the OBCA, which sets out a non-exclusive definition of "sufficient cause".

Paragraph 241(1)6 – Revival

Paragraph s. 241(1)6 (which makes non-compliance with the *Retail Sales Tax Act* (Ontario)[47] grounds for dissolution) may, in due course, be repealed.

Subsection 241(5) – Revival

To minimize the expenditure of time and funds on private member's bills to revive corporations that were administratively dissolved for reasons other than non-compliance with the requirements of ss. 241(1), (2) or (3) of the OBCA, s. 241(5) should be expanded to also include administrative dissolutions under s. 240 of the OBCA. If this recommendation is accepted, a corresponding amendment should be made to s. 170(3) of the ONCA so that it also includes reference to an administrative dissolution under s. 169 of the ONCA.

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[47] R.S.O. 1990, c. R.31.

Subsection 241(5.1) – Time Limit for Revival

To minimize the expenditure of time and funds on private member's bills to revive very stale dissolved corporations, the 20-year limitation period on revivals in s. 241(5.1) of the OBCA should be repealed. If repealed, then the same change should be made to s. 170(4) of the ONCA.

New Subsection 242(5) – Defence of Dissolved Corporation

In *Malamas v. Crerar Properties Corp.*,[48] a case involving a plaintiff's motion to strike out the statement of defence filed on behalf of a dissolved corporation, Matlow J. stated that it was unthinkable that the law would recognize the right of a plaintiff to bring an action against a dissolved corporation but, at the same time, deny that dissolved corporation the right to defend the action. For the sake of transparency in the law and to clarify who has authority to defend a dissolved corporation, a new s. 242(5) should be added to the OBCA, codifying the holding in *Malamas* and empowering the directors at the time of dissolution (or, with approval of the court, any other interested person) to defend the action on behalf of the dissolved corporation. While this does not resolve all possible issues that could possibly arise in defending dissolved corporations, it represents an incremental improvement in the law. As demonstrated in *Malamas*, the courts are more than capable of filling in statutory gaps.

Clause 248(3)(l) – Discontinuance and Settlement

If the recommendation at s. 209 (to replace all references to "winding up" with references to "liquidation"), then the same change should be made to s. 248(3)(l).

Subsection 249(2) – Discontinuance and Settlement

Section 441 of the QBCA is narrower than s. 249(2) of the OBCA in that the QBCA provision only requires leave of the court to settle or discontinue a derivative action since that is the only action that is brought in the name of and for the benefit of another person, *viz.*, the corporation or an affiliate thereof. A derivative action is also the only provision that requires leave of the court to commence proceedings. The OBCA provision requires court approval even if the underlying action is an oppression action, a compliance or restraining order or a statutory rectification. Subsections 249(2) of the OBCA and s. 185(2) of the ONCA should adopt the QBCA approach.

Subsection 249(3) – Security for Costs

Section 442 of the QBCA, which exempts an applicant from the requirement to post security for costs, only applies to a derivative action or an oppression action. Thus, under the QBCA, a court can require security for costs in an action involving compliance and restraining orders and statutory rectification. Also, under the QBCA, the court retains a discretion to require security

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[48] 2009 CarswellOnt 6878 (Ont. S.C.J.), leave to appeal to Div. Ct. refused 2010 CarswellOnt 3435 (Div. Ct.)

for costs even in a derivative or oppression action. Subsection 249(3) should only exempt a complainant from posting security for costs in a derivative action. A parallel amendment should be made to s. 185(3) of the ONCA. The court should have a discretion to require security for costs in oppression litigation (which appears to be indistinguishable in principle from many other forms of private litigation).

Subsection 249(4) – Interim Costs Award

Section 443 of the QBCA provides a much more detailed set of tests governing the award of interim costs than is provided for under s. 249(4) of the OBCA. In effect, the QBCA clarifies the law by electing to codify one line of cases on awarding interim costs that has arisen under s. 249(4) of the OBCA and cognate federal and provincial legislation. In Québec, the *Alles v. Maurice*,[49] *M. v. H.*,[50] *Hess v. Proudfoot Motels Ltd.*[51] and *Watkin v. Open Window Bakery Ltd*.[52] line of cases has been chosen in preference to the *Wilson v. Conley*,[53] *Organ v. Barnett*,[54] *Perretta v. Telecaribe Inc.*[55] and *Murphy v. Stefaniak*[56] line, reducing the expense of legal uncertainty to Québec litigants.

Thus, to grant interim costs under the QBCA, the court must be satisfied that the financial condition of the corporation or its subsidiary enables the payment of such costs, that the application appears to be reasonably founded and that the financial condition of the applicant does not allow the application to be made or maintained without payment of such interim costs. In addition, the costs must be reasonable. However, in its assessment of the financial situation of the applicant, the QBCA instructs the court that it need not consider whether the applicant's financial situation results from the conduct of the corporation or its subsidiary. As under s. 249(4) of the OBCA, the applicant is held accountable for the interim costs award at the time of the final decision.

Subsections 249(4) of the OBCA and s. 185(4) of the ONCA should be amended to adopt the QBCA clarifications and enhancements of the interim costs regime.

Subsections 252(5) and (6) – Court Order

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[49] (1992), 5 B.L.R. (2d0 146 (Ont. Gen. Div.).

[50] (1993), 15 O.R. (3d) 721 (Ont. Gen. Div.).

[51] (1993), 42 A.C.W.S. (3d0 645 (Ont. Gen. Div.).

[52] (1996), 26 B.L.R. (2d) 301 (Ont. Gen. Div. {Comm. List]), quashed (1996), 28 O.R. (3d) 441 (Div. Ct.).

[53] (1990), 1 B.L.R. (2d0 220 (Ont. Gen. Div.)

[54] (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.)

[55] 1999 CarswellOnt 3849 (Ont. S.C.J.).

[56] 2008 CarswellOnt 4775 (Ont. S.C.J.), revd. in part on other grounds (2010), 72 B.L.R. (4th) 10 (Ont. Div. Ct.).

There are 2 references in s. 252(5) and one reference in s. 252(6) to the "court", which is defined in s. 1(1) as the Superior Court of Justice. To be consistent with the remainder of s. 252 (dealing with appeals of decisions of the OBCA Director), each of these references should be changed to the "Divisional Court". This change is consistent with ss. 190(1) and (3) of the ONCA.

Subsection 259(2) – Limitation

Conform this OBCA provision to s. 194(2) of the ONCA.

Subsections 265(1) and (2) – Delegation of Director's Powers and Duties

Conform these OBCA provisions to ss. 201(1) and (2) respectively of the ONCA. In addition to harmonizing the OBCA and the ONCA by adopting the improved ONCA language, the amendment would introduce some flexibility in dating OBCA certificates of arrangement.

Section 275 – Corrected and Cancelled Articles

The OBCA provisions on corrections by the Director are unduly narrow in comparison to ss. 265 and 265.1 of the CBCA and ss. 246 through 260 of the QBCA. The narrow OBCA provision forces corporations to obtain court orders at a significant expenditure of time and resources – in many cases for relatively minor matters. We recommend that the powers of OBCA Director to correct or cancel articles be broadened without prejudicing the rights of third parties and without always necessitating that the corporation obtain a court order. The CBCA and QBCA could be used as models for a revamped OBCA correction and cancellation regime, which should be consolidated in one place. The same regime should be adopted in place of s. 202 of the ONCA.

Section 278 – Appointment of Minister

Conform the OBCA to the ONCA by moving s. 278 to become s. 2(4).

Part II - Proposed OBCR Amendments

Subsection 6(2) – Identical Names

Subsection 6(2) requires delivery of a legal opinion from a qualified Ontario lawyer in order for an OBCA corporation ("**Corp II**") to acquire a name identical to another OBCA corporation ("**Corp I**"). Subsection s. 6(2) specifies as the content for the legal opinion: (a) status of both Corp I and Corp II as non-offering corporations; (b) that the corporations are affiliates or associates of each other; (c) that Corp II is the "successor to the business" of Corp I; and (d) that Corp I has been dissolved or changed its corporate name. Only s. 6(2)(d) is the proper subject matter of a legal opinion, and the opining lawyer would rely on a certificate and articles of dissolution or a certificate and articles of amendment from the Ministry for such an opinion. Clause 6(2)(d) should, therefore, be deleted and the requirement for a legal opinion should be

replaced with a certificate or statutory declaration satisfactory to the Director as to the matters in ss. 6(2)(a), (b) and (c).

Paragraph 15.10 – Restricted Components of Corporate Names

The reference in s. 15.10 to the "Association of Professional Engineers of Ontario" should be updated to its current name, *viz.*, "Professional Engineers Ontario".

Sections 23, 23.1, 23.2 and 23.3 – Subsidiary Body Corporate Holding Shares of Holding Corporation

If the recommended relaxation of s. 28(1) of the Act is accepted and applies to shares in offering corporations, then these provisions of the ONCA would probably become redundant and could be revoked.

Section 24 – Form of Documents

Section 24 of the OBCR duplicates verbatim s. 1 of the OBCA Forms Regulation. One of these provisions should be revoked.

Section 26 – "Resident Canadian" Class of Persons Prescribed

If the recommendation in connection with repealing s. 118(3) is accepted, then s. 26 would be revoked.

Sections 27, 28 and 29 – Form of Proxy

For the reasons stated in conjunction with the recommended amendments to s. 109 of the Act, these provisions of the OBCR should be conformed to NI 51-102, especially Part 9 thereof. Note that the comparable provisions[57] of the CBCR were recently amended for the same reasons.

Sections 30 and 31 – Management Information Circular

For similar reasons, these provisions should be conformed to NI 51-102, especially the requirements of Form 51-102F5 (*Information Circular*). The CRCR was recently amended for the same reasons.[58]

The CBCR amendments preserved certain requirements for a management proxy circular of a CBCA corporation not otherwise contained in Form 51-102F5. These supplementary content requirements cover: (1) the percentage of votes required for any matter that is to be submitted to

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[57] Namely, ss. 54, 55 and 56 of the CBCR, *supra*, note 28.

[58] *Ibid.* (amending CBCR, *supra*, note 24, ss. 55 and 56).

the shareholders for a vote (other than the election of directors); (2) a statement of the right of a shareholder to dissent and a brief summary of the procedure to be followed to exercise such right; (3) a statement, signed by a director or an officer, stating that the directors have approved the contents of the circular and authorized its dissemination; and (4) a statement indicating the final date by which a corporation must receive a shareholder proposal. These supplementary content requirements should also be preserved with respect to OBCA corporations.

Sections 33, 34, 35 and 36 – Contents of Dissident's Information Circular

The same reasoning applies to the conformance of ss. 30 and 31 to NI 51-102 and the CBCR.

Section 37 – Information Circulars – General

See the rationale for conformance of ss. 30 and 31.

Section 38 – Financial Statements in Information Circular

See the rationale for conformance of ss. 30 and 31.

Subsection 40(1) – GAAP

Consistent with the recent changes to the CNCR,[59] the reference to the *Former CICA Handbook* should be replaced by a reference to the *CICA Accounting Handbooks*.

Subsection 41(1) – GAAS

Consistent with the recent changes to the CNCR,[60] the reference to the *Former CICA Handbook* should be replaced by a reference to the *CICA Handbook - Assurance*.

Subsection 42(1) – Financial Statements

Effective for financial periods or interim financial periods ending after December 31, 2010, the names of the financial statements for Canadian reporting issuers (including OBCA corporations that are reporting issuers as well as non-offering corporations whose financial statements must be consolidated with those of a reporting issuer) will be changed to conform International Financial Reporting Standards ("**IFRS**"), as adopted from time to time by the International Accounting Standards Board ("**IASB**"). For these corporations, IFRS names will replace the names set out in s. 42(1) of the OBCR. These names have been adopted for purposes of the CBCA[61] and

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[59] SOR/201-305 (which came into force on January 1, 2011), amending, *inter alia*, CBCR, *supra* note 28, ss. 70 and 71(1).

[60] *Ibid.*, amending, *inter alia*, CBCR, *supra*, note 28, s. 70 and 71.1(1).

[61] *Ibid.*, amending, *inter alia*, CBCR, *supra*, note 28, s. 72(1).

National Instrument 52-107 (*Acceptable Accounting Principles and Auditing Standards*) ("**NI 52-107**"). Non-offering corporations (whose financial statements are not required to be consolidated into a reporting issuer) can opt to comply with IFRS. Accordingly, s. 42(1) should be amended to read as follows:

> 42(1) The financial statements referred to in clause 154(1)(a) of the Act shall include at least,
>
> (a) a statement of financial position or a balance sheet;
> (b) a statement of comprehensive income or an income statement;
> (c) a statement of changes in equity or a statement of retained earnings; and
> (d) a statement of cash flows or a statement of changes in financial position.

Subsection 42(1) should be updated to reflect the arrival of IFRS and conformity with NI 52-107 and the amended CBCR.

Part III - Proposed Amendments to the OBCA Forms Regulation

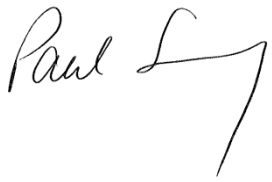
Subsection 6(3) – Revival

Substitute "Public Guardian and Trustee" in s. 6(3) for "Public Trustee".

Conclusion

We commend each of these proposed amendments to you and would be pleased to respond to any questions that you might have in relation to them.

Yours truly,



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