



ONTARIO  
BAR ASSOCIATION  
A Branch of the  
Canadian Bar Association

L'ASSOCIATION DU  
BARREAU DE L'ONTARIO  
Une division de l'Association  
du Barreau canadien

July 17, 2009

The Honourable Mr. Ted McMeekin  
Minister of Consumer Services  
900 Bay Street  
6th Floor, Mowat Block  
Queen's Park  
Toronto, ON  
M7A 1L2

Dear Minister:

**Re: Uncontroversial Housecleaning Amendments to the *Business Corporations Act* (Ontario) (the "OBCA")**

We understand that there may be an opportunity to make changes to the OBCA and the general regulations under the OBCA (the "OBCR") that are of an uncontroversial or housecleaning nature.

With that in mind, we submit the following list of potential OBCA and OBCR amendments that we think meet the test of "uncontroversial".

### **Part I - Proposed OBCA Amendments**

#### **Subsection 1(1) - Definition of "Auditor"**

Since public accountants are now allowed to incorporate in Ontario, we propose that the definition of "auditor" be extended to include an auditor that is incorporated, similar to what has been done under the 2001 amendments to the *Canada Business Corporations Act* (the "CBCA"). Thus,

"auditor" includes a partnership of auditors or an auditor that is incorporated."

#### **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) or has listed and posted any of its securities on the TSX or the TSX Venture Exchange. In our view, s. 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.<sup>1</sup>

### **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.

### **Section 7 – Effect of Incorporation**

To facilitate opinion practice in Ontario, we recommend that s. 7 adopt the stronger conclusive proof language of the *Business Corporations Act* (Alberta), 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.”

---

<sup>1</sup> 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 Can. B.L.J. 223.

### **Subsection 21(5) – Assignment, Amendment and Termination of Pre-Incorporation Contract**

To increase understanding and the transparency of s. 21, we recommend that the useful gap-filling Ontario Court of Appeal decision in *1394918 Ontario Inc. v. 1310210 Ontario Inc.*<sup>2</sup> be codified in proposed new s. 21(5). In *1394918 Ontario*, the Appeal Court held, in effect, that, until the corporation adopts a pre-incorporation contract, the promoter is the person who, subject to the terms of the contract, may assign, amend, breach or terminate the contract.

### **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. We, therefore, recommend that s. 34(9) 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, we recommend that s. 38(3) be amended by adding the following words to the beginning thereof:

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

### **Subsection 92(1) – Shareholder Liability Shield**

Section 92(1) codifies the shareholder immunity rule. However, it omits references to ss. 130(4) and (5), which, like s. 34(5), provide further exceptions to the immunity principle. We recommend that these references be added to s. 92(1).

---

<sup>2</sup> (2002), 57 O.R. (3d) 607.

## **Section 99 – Shareholder Proposal**

Section 99 of the OBCA was amended in 2007 to allow beneficial owners of shares to make a proposal. However, no mechanism was included whereby a corporation can obtain evidence from a beneficial owner of shares that the person qualifies as a beneficial owner. Accordingly, we recommend that provisions modelled on ss. 137(1.1) through (1.4) of the CBCA (excluding, as irrelevant under the OBCA, the requirement in s. 137(1.2)(b) for disclosure of the number of shares beneficially held) be adopted as part of s. 99 of the OBCA. These provisions require a beneficial owner of shares to provide basic information, enable the corporation to demand proof that the person submitting a proposal meets the requirements of s. 137(1.1) and state that the information provided is not part of the proposal for purpose of the word limit.

## **Subsection 108(10)(b) – Rights of Transferee under Undisclosed Unanimous Shareholder Agreement**

A correction is required to s. 108(10)(b). Thus, “transferor delivers the notice of objection” should be changed to “transferee delivers the notice of objection”.

## **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. We, therefore, recommend that s. 126(3) be amended to delete the 40% minimum quorum requirement.

## **Subsection 132(5.2) – Shareholder Approval**

Subsection 132(5.2) was added to the OBCA effective August 1, 2007. 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 approve the contract or transaction. The CBCA contains no similar requirement. We, therefore, recommend that s. 132(5.2) be restated as follows:

“Where subsection (5) prohibits all of the directors from voting on a resolution to approve a contract or transaction, the contract or transaction may be approved only by the shareholders.”

## **Section 145 – Examination of Records by Shareholders and Creditors**

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. We, therefore, recommend that s. 145 be amended by adding a provision like s. 21(1.1) of the CBCA.<sup>3</sup>

### **Subsection 152(2) – Auditor Independence**

We recommend that the concept of “business partner” be extended to include a person’s shareholder as set out in ss. 161(2.1) of the CBCA, which reads as follows:

“For the purposes of subsection [CBCA, 161(2); OBCA, s. 152(2)] a person’s business partner includes a shareholder of that person.”

### **Subsection 159(1) – Approval of Financial Statements by Directors**

We recommend that financial statements be allowed to be signed by one or more directors in all circumstances in a manner similar to s. 158(1) of the CBCA. Revised s. 159(1) might read as follows:

“The financial statements shall be approved by the board of directors and the approval shall be evidenced by the signature at the foot of the balance sheet by any director, and the auditor’s report, unless the corporation is exempt under section 148, shall be attached to or accompany the financial statements.”

## **Section 169 – Proposal to Amend Articles**

The language of s. 169(1), which is copied from s. 175(1) of the CBCA, is flawed. Directors do not make shareholder proposals under s. 99. Also, s. 169(1) should be extended to

---

<sup>3</sup> 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.”

beneficial shareholders to be consistent with s. 99(1). Accordingly, we recommend that s. 169(1) be amended by deleting the words “The directors or any” and substituting the word “Any” and that the opening words of s. 169(2) be amended to read as follows:

“Where the directors or a shareholder make a proposal to amend the articles, notice of the meeting of shareholders at which the proposal to amend the articles ....”

#### **Subsection 184(1) - Borrowing Powers**

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) in 1992. Consistent with the changes made in 2001 to s. 189(1) of the CBCA, we recommend that the opening language of s. 184(1) of the OBCA be amended to read as follows:

“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 from shareholders,...”

#### **Subsection 185(1) - 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).

#### **Subsections 185(11), (13) and (14) - Certificates to be Sent in, etc.**

Consistent with s. 54 of the OBCA, these provisions should contemplate dematerialized or uncertificated shares.

#### **Subsections 188(4), (11) and (12) - Sending in Share Certificates**

Consistent with s. 54 of the OBCA, these provisions should also contemplate dematerialized or uncertificated shares.

### **Subsection 189(13) - Costs**

The costs language now provided for in the *Rules of Civil Procedure* has for some time replaced “costs on a solicitor and client basis” with “substantial indemnity” costs. Consistent terminology would suggest that s. 189(13) be updated to refer to “substantial indemnity” costs. However, the purpose of s. 189(13), which is to ensure that shareholders who are given an opportunity to sell their shares under s. 189, should not be required to bear any costs, suggests that s. 189(13) be amended to read as follows:

“The costs under this section shall be on a full indemnity basis.”

Substantial indemnity costs would fall short of achieving the policy of s. 189.

### **Section 190 - Going Private Transactions**

Since s. 190 was introduced, Ontario and Québec have adopted Multilateral Instrument 61-101 (*Protection of Minority Security Holders in Special Transactions*). 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, we recommend that s. 190 of the OBCA 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, repealing ss. 190(3) through (7):

“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*.”

### **Subsection 223(4) – Good Faith Reliance by Liquidator**

Consistent with the August 1, 2007 amendments to the OBCA, we recommend that s. 223(4), governing good faith reliance by a liquidator, be conformed to s. 135(4) governing good faith reliance by directors.

### **Section 272, Paragraphs 16.1, 22 and 28 – Regulations**

Each of these regulation-making powers should be deleted as obsolete.

## Part II- Proposed OBCR Amendments

### Sections 27, 28 and 29 – Form of Proxy

To achieve greater national uniformity, we recommend that these provisions be conformed to National Instrument 51-102 (*Continuous Disclosure Requirements*), especially Part 9 thereof. Note that the comparable provisions<sup>4</sup> of the *Canada Business Corporations Regulations, 2001* (the “CBCR”) are in the process of being 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*).

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

The same reason applies to the conformance of ss. 30 and 31.

### Section 37 – Information Circulars – General

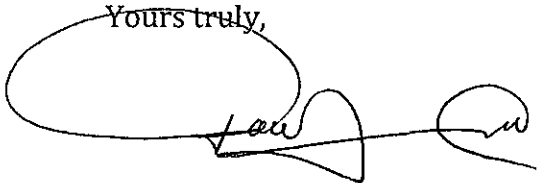
See the rationale for conformance of ss. 30 and 31.

### Section 38 – Financial Statements in Information Circular

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

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

Yours truly,

A handwritten signature in black ink, appearing to read 'J. Trimble', written over a large, light-colored oval scribble.

Jamie Trimble  
President  
Ontario Bar Association

---

<sup>4</sup> Namely, ss. 54, 55 and 56 of the CBCR.