



February 23, 2010

The Honourable Ms. Sophia Aggelonitis
Minister of Consumer Services
900 Bay Street
6th Floor, Mowat Block
Queen's Park
Toronto, ON
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Dear Minister:

Re: OBA Submission on the *Business Corporations Act* (Ontario)

We understand that there may be a future 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”).¹ Thus, “auditor” includes a partnership of auditors or an auditor that is incorporated.”²

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” would be moved from s. 24(11) to s. 1(1) so that it is applicable to the entire Act.

Subsection 1(1) – Definition of “Resident Canadian”

¹ R.S.C. 1985, c., C-44.

² *Ibid*, s. 2(1).

The reference in paragraph (c) of this definition should now refer to the “*Immigration and Refugee Protection Act (Canada)*”,³ no longer the *Immigration Act (Canada)*.

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.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*. This change has already been made to s. 49(2)(b)(ii).

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.

Proposed New Section 3.5 – Open-End Mutual Funds

Currently, s. 24(10) exempts an open-end mutual fund from the provisions of the Act 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 Act). We propose that the list of exemptions for open-end mutual funds 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.

³ S.C. 2001, c. 27.

⁴ 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. Bus. L.J. 223.

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 unitholder 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.

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),⁵ 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

⁵ 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.

(b) that the corporation has been incorporated under this Act as of the date shown in the certificate of incorporation.

Proposed New 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.*⁶ be codified in proposed new s. 21(5). In *1394918 Ontario*, the Court of Appeal 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 14(5) – Change of Registered Office

Subsection 14(5) should be deleted as it still refers to filings under the OBCA that are now obsolete (*viz.*, changes to the registered office).

Paragraph 19(c) – Indoor Management Rule

Paragraph 19(c) should be updated to reflect that the registered office is now set out in the most recent notice filed under the *Corporations Information Act*, no longer in a notice filed under s. 14(3) of the OBCA.

Subsection 24(10) – Stated Capital

Subsection 24(5) houses two separate rules. The first rule deals with stated capital for corporations formed before July 29, 1983, when the predecessor 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, we recommend that the two 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.

Subsection 34(9) – Application of s. 130

⁶ (2002), 57 O.R. (3d) 607.

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 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.

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).

Subsection 94(1) – Shareholders' Meetings

Bill 63, the newly-enacted, *Business Corporations Act (Québec)* (the “QBCA”)⁷ contains some useful innovations that should be emulated in the OBCA. One of these is to dispense with the needless formality of an annual meeting of shareholders where there is only one shareholder.⁸

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 that

⁷ S.Q. 2009, c. 52. The QBCA is not yet been proclaimed into force.

⁸ *Ibid.*, s. 217.

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.⁹ 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 104(1) – Resolution in Lieu of Meeting

Subsection 104(1) 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 two 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 withdrawal provisions.

A recent Ontario trial decision¹⁰ 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 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 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.¹¹

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 withdrawal exceptions.

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

⁹ Note, also, that s. 146.1 of the OBCA contains a similar provision that could instead be used as a model for the proposed new mechanism to be added to s. 99.

¹⁰ *Kaiser v. Borillia Holdings Inc.* (2007), 32 B.L.R. (4th) 306 (Ont. S.C.J., *per.* Forestell J.)

¹¹ ABCA, *supra*, footnote 5, s. 141(1).

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”.

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)¹² as exceptions to the deemed director rule in s. 115(4).

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 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.¹³ We, therefore, recommend that s. 119(2) be repealed.

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.

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.

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.

Subsection 132(5.2) – Shareholder Approval

¹² R.S.C. 1985. c. C-36.

¹³ CBCA, s. 108(2).

Subsection 132(5.2) was added to the OBCA effective August 1, 2007. We recommend two changes 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.

We, therefore, recommend that s. 132(5.2) 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).

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.¹⁴

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 copy.¹⁵

Section 149 – Auditors

See the comment on s. 148 above. If adopted, a one-shareholder corporation could dispense with the formality of annually waiving the appointment of an auditor.

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 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 “*CICA Handbook*”). However, the additional reference to GAAS, which is not found in the CBCA, is confusing and should be deleted. The *CICA Handbook* should be treated as an exhaustive statement of GAAS.¹⁶

Section 155 – Auditor Independence

¹⁴ 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.

¹⁵ QBCA, s. 217.

¹⁶ However, on GAAS, GAAP and the *CICA Handbook*, see the changes recommended to ss. 40(1) and 41(1) of the OBCR below, which are intended to accommodate the pending switch effective January 1, 2011 from GAAP to international financial reporting standards (“IFRS”).

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 *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 and warrant deletion. The *CICA Handbook* should be treated as an exhaustive statement of GAAP.¹⁷

Subsection 158(1) – Audit Committee

We propose two amendments 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 two- person audit committee may be preferable to no audit committee.

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 165 – Privileged Statements

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. We recommend that this approach be applied in s. 165.

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 beneficial shareholders to be consistent with s. 99(1). Accordingly, we recommend that s. 169(1) be

¹⁷ See the comment in footnote 16.

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 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)

As a reduction of stated capital no longer requires that the articles be amended, this provision can be deleted.

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 jurisprudence¹⁸ that has developed under the CBCA), there should be 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.

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. The CBCA contains no counterpart provision in s. 192. As under the CBCA, the court can decide whether separate class or series votes should be held and what weight to give them in deciding whether to approve the plan of arrangement.

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)¹⁹ 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:

¹⁸ Such as the Supreme Court of Canada decision in *BCE Inc., Re.* [2008] 3 S.C.R. 560. However, we do not recommend that s. 182 of the OBCA 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.

¹⁹ R.S.Q. 1977, c. P-16, as amended by S.Q. 1992, c. 48, ss. 643-644.

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*.

Section 212 – Liquidation Costs and Expenses

Since “court” is a defined term in s. 1(1), the reference to “Superior Court of Justice” in s. 212 can be changed to “court”.

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.

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

There are two 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”.

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

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. We, therefore, recommend that s. 6(2)(d) be deleted and that the requirement for a legal opinion be replaced with a certificate or statutory declaration satisfactory to the Director as to the matters in s. 6(2)(a), (b) and (c).

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 provisions²⁰ of the *Canada Business Corporations Regulations, 2001* (the “CBCR”) were recently amended for the same reasons.²¹

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 were recently amended for the same reasons.²²

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 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 an OBCA corporation.

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.

Subsection 40(1) – Financial Statements

Effective for financial periods or interim financial periods ending after December 31, 2010, Canadian reporting issuers (including OBCA corporations that are reporting issuers) will be required to prepare their financial statements and interim financial statements in accordance with international financial reporting standards (“IFRS”), as adopted from time to time by the International Accounting Standards Board (“IASB”). For these corporations, IFRS will replace the standards set out in the *CICA Handbook*. In the case of private issuers (including non-offering corporations under the OBCA), use of IFRS will initially be optional.

²⁰ Namely, ss. 54, 55 and 56 of the CBCR.

²¹ SOR/2008-315, s. 2 (amending CBCR, s. 54).

²² *Ibid* (amending CBCR, ss. 55 and 56).

While the switchover date is January 1, 2011, OBCA corporations (and other reporting issuers) must prepare comparative financial statements on a consistent basis. Thus, many reporting issuers are becoming IFRS-compliant in 2010.

Subsection 40(1) should be amended to contemplate the use of IFRS. As an example, the Canadian Securities Administrators are currently in the process of revising National Instrument 81-106 (*Investment Fund Continuous Disclosure*) to contemplate that financial statements must be IFRS-compliant.

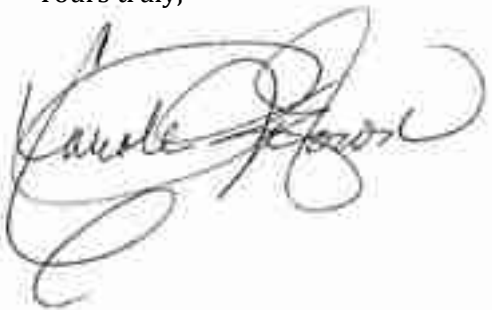
We recommend that s. 40 be updated to reflect the arrival of IFRS.

Subsection 41(1) – Audits

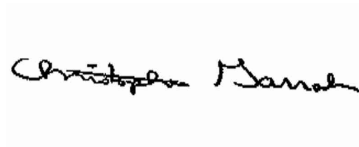
The comments with respect to s. 40(1) also apply to IFRS-compliant audit reports.

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 "Carole J. Brown". The signature is highly stylized and cursive.

Carole J. Brown, President

A handwritten signature in black ink, appearing to read "Christopher Garrah". The signature is in a cursive style.

Christopher Garrah, Chair, Business Law Section