MINORITY SHAREHOLDER RIGHTS IN ONTARIO PRIVATE COMPANIES

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Even without a unanimous shareholders' agreement, minority shareholders in private Ontario companies are afforded substantial protection by the Ontario *Business Corporations Act*. In fact, one of the main purposes of the Act is to impose restrictions and limitations on private corporations and the people who control and govern them to protect minority shareholders and third parties.

This article reproduces many of the minority shareholder rights set out in the Act, based upon the legislation as it was as of January, 2003. As always, the current version of the Act itself should be consulted if issues arise. In addition, this article should not be considered as an exhaustive list of issues and rights protected by the Act, or the many exceptions or limitations on accessing minority shareholder rights. The Act itself consists of many hundreds of sections and sub-sections, and should be reviewed with the assistance of professional advisors whenever any specific questions arise.[1]

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[1] See also: *Shareholders' Agreements: A Checklist for Discussion Purposes*, available from my website www.thompsonlaw.ca.

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SHAREHOLDERS MEETINGS

Must be an annual shareholders' meetings – s.94

The directors of a corporation shall call an annual meeting of shareholders not later than eighteen months after the corporation comes into existence and subsequently not later than fifteen months after holding the last preceding annual meeting

Minority shareholders can requisition a shareholders meeting – s.105

The holders of not less than 5 per cent of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition. The requisition referred to in subsection (1) shall state

the business to be transacted at the meeting and shall be sent to the registered office of the corporation. Upon receiving the requisition referred to in subsection (1), the directors shall call a meeting of shareholders to transact the business stated in the requisition.

If the directors do not within twenty-one days after receiving the requisition referred to in subsection (1) call a meeting, any shareholder who signed the requisition may call the meeting.

The corporation shall reimburse the shareholders for the expenses reasonably incurred by them in requisitioning, calling and holding the meeting unless the shareholders have not acted in good faith and in the interest of the shareholders of the corporation generally.

Minority shareholders may requisition the court to call a shareholders meeting – s.106

If for any reason it is impracticable to call a meeting of shareholders of a corporation in the manner in which meetings of those shareholders may be called or to conduct the meeting in the manner prescribed by the by-laws, the articles and this Act, or if for any other reason the court thinks fit, the court, upon the application of a director or a shareholder entitled to vote at the meeting, may order a meeting to be called, held and conducted in such manner as the court directs and upon such terms as to security for the costs of holding the meeting or otherwise as the court deems fit.

Must be adequate notice of shareholders' meetings – s.96(1)

Notice of the time and place of a meeting of shareholders shall be sent not less than ten days and not more than fifty days before the meeting.

Notice must include particulars of items to be discussed – s.96(5)

All business transacted at a special meeting of shareholders and all business transacted at an annual meeting of shareholders, except consideration of the minutes of an earlier meeting, the financial statements and auditor's report, election of directors and reappointment of the incumbent auditor, shall be deemed to be special business.

Notice of a meeting of shareholders at which special business is to be transacted shall state or be accompanied by a statement of, (a) the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon; and (b) the text of any special resolution or by-law to be submitted to the meeting.

Annual financial statements and auditor's report (if any) must be presented to the annual shareholders meeting – s.154(1)

The directors shall place before each annual meeting of shareholders (a) in the case of a corporation that is not an offering corporation, financial statements for the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting; ... (c) the report of the auditor, if any, to the shareholders; and (d) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

... the report of the auditor to the shareholders shall be open to inspection at the annual meeting by any shareholder

A corporation shall, not less than ... ten days, in the case of a corporation that is not an offering corporation, before each annual meeting of shareholders … send a copy of the documents referred to in this section to each shareholder, except to a shareholder who has informed the corporation in writing that the shareholder does not wish to receive a copy of those documents.

Voting shareholders may add items to the agenda for a shareholders' meeting – s.99(1), (3)

A shareholder entitled to vote at a meeting of shareholders may (a) submit to the corporation notice of a proposal; and (b) discuss at the meeting any matter in respect of which the shareholder would have been entitled to submit a proposal. If so requested by a shareholder giving notice of a proposal, the corporation shall include in the management information circular or attach thereto a statement by the shareholder of not more than two hundred words in support of the proposal along with the name and address of the shareholder.

A proposal may include nominations for directors – s.99(4)

A proposal may include nominations for the election of directors if the proposal is signed by one or more holders of shares representing in the aggregate not less than 5 per cent of the shares or 5 per cent of the shares of a class or series of shares of the corporation entitled to vote at the meeting to which the proposal is to be presented, but this subsection does not preclude nominations being made at a meeting of shareholders.

Notice and remedies where corporation refuses to include a proposal in a management information circular – s.99(7)

Where a corporation refuses to include a proposal in a management information circular, the corporation shall, within ten days after receiving the proposal, send notice to the shareholder submitting the proposal of its intention to omit the proposal from the management information circular and send to the shareholder a statement of the reasons for the refusal. Upon the application of a shareholder aggrieved by a corporation's refusal under subsection (7), the court may restrain the holding of the meeting to which the proposal is sought to be presented and make any further order it thinks fit.

A shareholder may examine the corporation's list of shareholders – s.100(4)

A shareholder may examine the list of shareholders (a) during usual business hours at the registered office of the corporation or at the place where its central securities register is maintained; and (b) at the meeting of shareholders for which the list was prepared.

A shareholder may require a ballot – s.103

Unless the by-laws otherwise provide, voting at a meeting of shareholders shall be by show of hands, except where a ballot is demanded by a shareholder or proxyholder entitled to vote at the meeting A shareholder or proxyholder may demand a ballot either before or after any vote by show of hands.

No second or casting vote – s. 97

Subject to this Act or the articles or by-laws of a corporation or a unanimous shareholder agreement all questions proposed for the consideration of the shareholders shall be determined by the majority of the votes cast and the chair presiding at the meeting shall not have a second or casting vote in case of an equality of votes.

A shareholder is entitled to vote via proxy – s.110(1), 114(2)

Every shareholder entitled to vote at a meeting of shareholders may by means of a proxy appoint a proxyholder or one or more alternate proxyholders, who need not be shareholders, as the shareholder's nominee to attend and act at the meeting in the manner, to the extent and with the authority conferred by the proxy.

A proxyholder or an alternate proxyholder has the same rights as the shareholder who appointed him or her to speak at a meeting of shareholders in respect of any matter, to vote by way of ballot at the meeting and, except where a proxyholder or an alternate proxyholder has conflicting instructions from more than one shareholder, to vote at such a meeting in respect of any matter by way of a show of hands.

DIRECTORS

Directors must be elected by the shareholders at a shareholders meeting – s.119(4)

Subject to clause 120 (a), shareholders of a corporation shall elect, at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

A sharehholder may apply to the court to determine a controversy related to the election or appointment of directors or auditors – s.107

A corporation, shareholder or director may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation. Upon an application under this section, the court may make any order it thinks fit including, without limiting the generality of the foregoing (a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute; (b) an order declaring the result of the disputed election or appointment; (c) an order requiring a new election or appointment and including in the order directions for the management of the business and affairs of the corporation until a new election is held or appointment made; and (d) an order determining the voting rights of shareholders and of persons claiming to own shares.

A minority shareholder can not be made to be a director without his or her consent – s.119(9)

Subject to subsection (10), the election or appointment of a director under this Act is not effective unless the person elected or appointed consents in writing before or within 10 days after the date of the election or appointment. If the person elected or appointed consents in writing after the time period mentioned in subsection (9), the election or appointment is valid.

Directors can be removed by a simple majority vote – s.122(1)

Subject to clause 120 (f), the shareholders of a corporation may by ordinary resolution at an annual or special meeting remove any director or directors from office.

Directors are entitled to receive notice of and attend and be heard at all shareholders meetings – s.123(1)

A director of a corporation is entitled to receive notice of and to attend and be heard at every meeting of shareholders.

Directors can insist that their position be circulated in writing to all shareholders if they resign or are being forced out – s. 123(2)

A director who (a) resigns; (b) receives a notice or otherwise learns of a meeting of shareholders called for the purpose of removing him or her from office; or (c) receives a notice or otherwise learns of a meeting of directors or shareholders at which another person is to be appointed or elected to fill the office of director, whether because of the resignation or removal of the director or because his or her term of office has expired or is about to expire, is entitled to submit to the corporation a written statement giving the reasons for the director's resignation or the reasons why he or she opposes any proposed action or resolution, as the case may be.

Upon receiving a statement under subsection (2), a corporation shall forthwith send a copy of the statement to every shareholder entitled to receive notice of meetings of shareholders and to the Director unless the statement is included in or attached to a management information circular required by section 112.

Directors can become personally liable for approving matters they should not have – s. 130

Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share for a consideration other than money contrary to section 23 are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

Directors of a corporation who vote for or consent to a resolution authorizing (a) any financial assistance contrary to section 20; (b) a purchase, redemption or other acquisition of shares contrary to section 30, 31 or 32; (c) a commission contrary to section 37; (d) a payment of a dividend contrary to section 38; (e) a payment of an indemnity contrary to section 136; or (f) a payment to a shareholder contrary to section 185 or 248, are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

Directors must disclose conflict of interests – s.132

A director or officer of a corporation who (a) is a party to a material contract or transaction or proposed material contract or transaction with the corporation; or (b) is a director or an officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the corporation, shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of his or her interest.

A director referred to in subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction is one of four limited exceptions.

Directors must act in good faith – s.134(1)

Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors must comply with the Act and unanimous shareholders agreement – s.134(2)

Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

Unless the articles or unanimous shareholder agreements applies otherwise, directors have corporation borrowing powers – s.184(1)

Unless the articles or by-laws of or a unanimous shareholder agreement otherwise provide, the articles of a corporation shall be deemed to state that the directors of a corporation may, without authorization of the shareholders (a) borrow money upon the credit of the corporation; (b) issue, reissue, sell or pledge debt obligations of the corporation; (c) subject to section 20, 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.

All director initiated by-laws must be confirmed by by shareholders at a shareholders meeting – s. 116(2)

Where the directors make, amend or repeal a by-law under subsection (1), they shall submit the by-law, amendment or repeal to the shareholders at the next meeting of shareholders, and the shareholders may confirm, reject or amend the by-law, amendment or repeal.

SHARE CERTIFICATES AND TRANSFER RIGHTS

A shareholder is entitled to receive a share certificates and details of any restrictions associated with it – s.54(1), (7)

Every security holder is entitled upon request to a security certificate in respect of the securities held by the security holder that complies with this Act. Where a share certificate contains a notice of restrictions, the corporation shall furnish to a shareholder on demand and without charge a full copy of the text of the rights, privileges, restrictions and conditions attached to that class authorized to be issued and to that series in so far as the same have been fixed by the directors.

A shareholder is entitled to have a lost certificate replaced – s.90(2)

Where the owner of a security claims that the security has been lost, apparently destroyed or wrongfully taken, the issuer shall issue a new security in place of the original security if the owner takes appropriate steps as set out in the Act.

A Corporation can not impose restrictions on transfer except as authorized by its articles – s.42(1)

A corporation shall not impose restrictions on the transfer or ownership of shares of any class or series except such restrictions as are authorized by its articles

APPROPRIATION OF CORPORATE FINANCIAL RESOURCES

Shareholders to receive disclosure of financial assistance provided by a corporation to shareholders, directors, officers, their affiliates etc. – s. 20

A corporation may give financial assistance to any person for any purpose by means of a loan, guarantee or otherwise.

Subject to subsection (3), a corporation shall disclose to its shareholders all material financial assistance that it gives to, (a) a shareholder, a beneficial owner of a share, a director, an officer or an employee of the corporation, an affiliate of the corporation, or an associate of any of them; or (b) a person for the purpose of, or in connection with, the purchase of a share or a security convertible into or exchangeable for a share issued or to be issued by the corporation or an affiliate of the corporation.

The disclosure that a corporation is required to make under subsection (2) in respect of financial assistance shall include, (a) a brief description of the financial assistance given, including its nature and extent; (b) the terms on which the financial assistance was given; and (c) the amount of the financial assistance initially given and the amount, if any, outstanding

A corporation that is not an offering corporation shall make the disclosure by giving a notice to all shareholders no later than 90 days after giving the financial assistance.

Shares of the same class to be treated equally – s.22(6)

Except as provided in section 25, each share of a class shall be the same in all respects as every other share of that class.

Shares may not be issued until paid for – s.23(3)

A share shall not be issued until the consideration for the share is fully paid in money or in property or past service that is not less in value than the fair equivalent of the money that the corporation would have received if the share had been issued for money.

A corporation may not redeem its shares unless it can afford to do so – s.32(2)

A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or after the payment, the realizable value of the corporation's assets would be less than the aggregate of its liabilities and the amount that would be required to pay the holders of shares who have a right to be paid, on a redemption or in a liquidation, rateably with or prior to the holders of the shares to be purchased or redeemed.

A corporation may not declare or pay a dividend unless it can afford to do so – s.38(3)

The directors shall not declare and the corporation shall not pay a dividend if there are reasonable grounds for believing that the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and its stated capital of all classes.

CORPORATE RECORDS

Corporations must maintain basic corporate records – s.140(1)

A corporation shall prepare and maintain, at its registered office or at such other place in Ontario designated by the directors (a) the articles and the by-laws and all amendments thereto, and a copy of any unanimous shareholder agreement known to the directors; (b) minutes of meetings and resolutions of shareholders; (c) a register of directors in which are set out the names and residence addresses, while directors, including the street and number, if any, of all persons who are or have been directors of the corporation with the several dates on which each became or ceased to be a director; and (d) a securities register complying with section 141.

A corporation must also maintain adequate accounting and other records – s.140(2)

In addition to the records described in subsection (1), a corporation shall prepare and maintain (a) adequate accounting records; and (b) records containing minutes of meetings and resolutions of the directors and any committee thereof, but, provided the retention requirements of any taxing authority of Ontario, the government of Canada or any other jurisdiction to which the corporation is subject have been satisfied, the accounting records mentioned in clause (a) need only be retained by the corporation for six years from the end of the last fiscal period to which they relate.

All records must be available to examination by directors – s.144(1)

The records mentioned in sections 140 and 141 shall, during normal business hours of a corporation, be open to examination by any director and shall, except as provided in sections 140 and 143 and in subsections (2) and (3) of this section, be kept at the registered office of the corporation.

Basic corporate records must be available for examination by shareholders – s.145(1)

Shareholders and creditors of a corporation, their agents and legal representatives may examine the records referred to in subsection 140 (1) during the usual business hours of the corporation, and may take extracts therefrom, free of charge.

Shareholders are entitled to copies of articles, by-laws and unanimous shareholders agreement – s.145(2)

A shareholder of a corporation is entitled upon request and without charge to one copy of the articles and by-laws and of any unanimous shareholder agreement.

Shareholders are entitled to a list of shareholders and option holders – s.146(1), (2), (5)

Shareholders and creditors of a corporation, their agents and legal representatives ... may require the corporation or its transfer agent to furnish a basic list setting out the names of the shareholders of the corporation, the number of shares of each class and series owned by each shareholder and the address of each shareholder, all as shown on the records of the corporation.

The basic list referred to in subsection (1) shall be furnished to the applicant as soon as is practicable and, when furnished, shall be as current as is practicable having regard to the form in which the securities register of the corporation is maintained, but, in any case, shall be furnished not more than ten days following the receipt by the corporation or its transfer agent of the statutory declaration referred to in subsection (1) and shall be made up to a date not more than ten days before the date on which it is actually furnished. R.S.O. 1990, c. B.16, s. 146 (2).

A person requiring a corporation to supply a basic or supplemental list may also require the corporation to include in that list the name and address of any known holder of an option or right to acquire shares of the corporation.

FINANCIAL RECORDS, STATEMENTS AND AUDITORS

A corporation must maintain adequate accounting records – s.140(2)

In addition to the records described in subsection (1), a corporation shall prepare and maintain (a) adequate accounting records ...

All records must be available to examination by directors – s.144(1)

The records mentioned in sections 140 and 141 shall, during normal business hours of a corporation, be open to examination by any director and shall, except as provided in sections 140 and 143 and in subsections (2) and (3) of this section, be kept at the registered office of the corporation.

Minority shareholders can insist that a corporation have audited financial statements – s.148

In respect of a financial year of a corporation, the corporation is exempt from the requirements of this Part regarding the appointment and duties of an auditor if (a) the corporation is not an offering corporation; and (b) all of the shareholders consent in writing to the exemption in respect of that year.

Auditors shall be appointed at a shareholders meeting – s.149(1), (2)

The shareholders of a corporation at their first annual or special meeting shall appoint one or more auditors to hold office until the close of the first or next annual meeting, as the case may be, and, if the shareholders fail to do so, the directors shall forthwith make such appointment or appointments.

The shareholders shall at each annual meeting appoint one or more auditors to hold office until the close of the next annual meeting and, if an appointment is not so made, the auditor in office continues in office until a successor is appointed.

A minority shareholder may apply to the court to have an auditor appointed – s.149(8)

If a corporation does not have an auditor, the court may, upon the application of a shareholder or the Director, appoint and fix the remuneration of an auditor to hold office until an auditor is appointed by the shareholders.

A sharehholder may apply to the court to determine a controversy related to the election or appointment of directors or auditors – s.107

A corporation, shareholder or director may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation. Upon an application under this section, the court may make any order it thinks fit including, without limiting the generality of the foregoing (a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute; (b) an order declaring the result of the disputed election or appointment; (c) an order requiring a new election or appointment and including in the order directions for the management of the business and affairs of the corporation until a new election is held or appointment made; and (d) an order determining the voting rights of shareholders and of persons claiming to own shares.

A minority sharehholder can insist that the auditor attend a shareholders meetings – s.151(1)

If any director or shareholder of a corporation, whether or not the shareholder is entitled to vote at the meeting, gives written notice, not less than five days or more before a meeting of shareholders, to the auditor or a former auditor of the corporation, the auditor or former auditor shall attend the meeting at the expense of the corporation and answer questions relating to the auditor's duties.

A minority shareholder can insist that the auditor be "independent" – s. 152

Subject to subsection (5), a person is disqualified from being an auditor of a corporation if the person is not independent of the corporation, all of its affiliates, or of the directors or officers of the corporation and its affiliates.

For the purposes of this section (a) independence is a question of fact; and (b) a person is deemed not to be independent if the person or the person's business partner, (i) is a business partner, director, officer or employee of the corporation or any of its affiliates, or a business partner of any director, officer or employee of the corporation or any of its affiliates, (ii) beneficially owns directly or indirectly or exercises control or direction over a material interest in the securities of the corporation or any of its affiliates, or (iii) has been a receiver, receiver and manager, liquidator or trustee in bankruptcy of the corporation or any of its affiliates within two years of the person's proposed appointment as auditor of the corporation.

An interested person may apply to the court for an order declaring an auditor to be disqualified under this section and the office of auditor to be vacant.

Annual financial statements and auditor's report (if any) must be presented to the annual shareholders meeting – s.154(1)

The directors shall place before each annual meeting of shareholders (a) in the case of a corporation that is not an offering corporation, financial statements for the period that began on the date the corporation came into existence and ended not more than six months before the

annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting; ... (c) the report of the auditor, if any, to the shareholders; and (d) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

... the report of the auditor to the shareholders shall be open to inspection at the annual meeting by any shareholder

A corporation shall, not less than ... ten days, in the case of a corporation that is not an offering corporation, before each annual meeting of shareholders or before the signing of a resolution under clause 104 (1) (b) in lieu of the annual meeting, send a copy of the documents referred to in this section to each shareholder, except to a shareholder who has informed the corporation in writing that the shareholder does not wish to receive a copy of those documents.

Financial statements must be prepared in accordance with generally accepted accounting principles - s.155

The financial statements required under this Act shall be prepared as prescribed by regulation and in accordance with generally accepted accounting principles.

VOLUNTARY LIQUIDATION

Voluntary liquidation requires 2/3rds approval at a meeting of shareholders – s.193(1)

The shareholders of a corporation may, by special resolution, require the corporation to be wound up voluntarily.

Note: Part XVI of the Act sets out a detailed process for winding up corporations, which is not reproduced in this summary.

AMENDING ARTICLES

A resolution to amend the articles of the corporation requires 2/3rds approval at a meeting of shareholders – s.168(1), (5)

Amending the articles requires a special resolution of shareholders, including (a) change its name; (b) add, change or remove any restriction upon the business or businesses that the corporation may carry on or upon the powers that the corporation may exercise; (c) altering its share capital or changing the rights and restrictions associated with shares; (d) changing the minimum and maximum number of directors; and (e) add, change or remove restrictions on the issue, transfer or ownership of shares.

A minority shareholder can propose to amend articles – s.169(1)

The directors or any shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with section 99, make a proposal to amend the articles.

The notice of a meeting to amend the articles shall set out the proposed amendment and dissenting rights – s.169(2)

Notice of a meeting of shareholders at which a proposal to amend the articles is to be considered shall set out the proposed amendment and, where applicable, shall state that a dissenting shareholder is entitled to be paid the fair value of the shares in accordance with section 185, but failure to make that statement does not invalidate an amendment.

Shareholder's right to be paid fair value if they object to approved amendment – s.185(4)

In addition to any other right the shareholder may have, but subject to subsection (30), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents becomes effective, to be paid by the corporation the fair value of the shares held by the shareholder in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted.

Note: s.185 contains a detailed set of procedures with respecting to exercising this right, which are not reproduced in this summary.

AMALGAMATIONS

Amalgamation agreements require 2/3rds approval at a meeting of shareholders – s.176(1), (4)

The directors of each amalgamating corporation shall submit the amalgamation agreement for approval at a meeting of the shareholders of the amalgamating corporation of which they are directors and, subject to subsection (3), of the holders of shares of each class or series entitled to vote thereon.

An amalgamation agreement is adopted when the shareholders of each amalgamating corporation have approved of the amalgamation by a special resolution of the holders of the shares of each class or series entitled to vote thereon.

Note: Holding company amalgamations do not require shareholder approval.

The notice of a meeting to approve an amalgamation shall set out the proposed amalgamation agreement and dissenting rights – s.169(2)

The notice of the meeting of shareholders of each amalgamating corporation shall include or be accompanied by (a) a copy or summary of the amalgamation agreement; and (b) a statement that a dissenting shareholder is entitled to be paid the fair value of the shares in accordance with section 185, but failure to make that statement does not invalidate an amalgamation.

Shareholder's right to be paid fair value if they object to approved amalgamation – s.185(4)

In addition to any other right the shareholder may have, but subject to subsection (30), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents becomes effective, to be paid by the corporation the fair value of the shares held by the shareholder in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted.

Note: s.185 sets out a detailed procedure for exercising this right, including a court application if necessary to resolve "fair value", which is not reproduced in this summary.

SALE OF THE CORPORATION

Sale of the corporation, etc., requires 2/3rds approval at a meeting of shareholders – s.184(3), (7)

A sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (4) to (8).

The approval of a sale, lease or exchange referred to in subsection (3) is effective when the shareholders have approved the sale, lease or exchange by a special resolution of the holders of the shares of each class or series entitled to vote thereon.

Notice must include particulars of the transaction – s.184(2)

The notice of a meeting of shareholders to approve a transaction referred to in subsection (3) shall be sent to all shareholders and shall include or be accompanied by (a) a copy or summary of the agreement of sale, lease or exchange; and (b) a statement that a dissenting shareholder is entitled to be paid the fair value of the shares in accordance with section 185, but failure to make that statement does not invalidate a sale, lease or exchange referred to in subsection (3).

Shareholder's right to be paid fair value if they object to approved sale of the company – s.185(4)

In addition to any other right the shareholder may have, but subject to subsection (30), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents becomes effective, to be paid by the corporation the fair value of the shares held by the shareholder in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted.

Note: s.185 sets out a detailed procedure for exercising this right, including a court application if necessary to resolve "fair value", which is not reproduced in this summary.

COURT ORDERED INVESTIGATIONS

A minority shareholder may apply to court for an investigation – s.161(1)

A security holder of a corporation ... may apply, without notice or upon such notice as the court may require, to the court for an order directing an investigation to be made of the corporation and any of its affiliates.

Where, upon an application under subsection (1), it appears to the court that (a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person; (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of a security holder; (c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or (d) persons concerned with the formation,

business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly, the court may order an investigation to be made of the corporation and any of its affiliates.

In connection with an investigation under this Part, the court may make any order it thinks fit including, without limiting the generality of the foregoing (a) an order to investigate; (b) an order appointing and fixing the remuneration of an inspector or replacing an inspector; (c) an order determining the notice to be given to any interested person, or dispensing with notice to any person; (d) an order authorizing an inspector to enter any premises in which the court is satisfied there might be relevant information, and to examine anything and make copies of any document or record found on the premises; (e) an order requiring any person to produce documents or records to the inspector; (f) an order authorizing an inspector to conduct a hearing, administer oaths and examine any person upon oath, and prescribing rules for the conduct of the hearing; (g) an order requiring any person to attend a hearing conducted by an inspector and to give evidence upon oath; (h) an order giving directions to an inspector or any interested person on any matter arising in the investigation; (i) an order requiring an inspector to make an interim or final report to the court; (j) an order determining whether a report of an inspector should be made available for public inspection and ordering that copies be sent to any person the court designates; (k) an order requiring an inspector to discontinue an investigation; (l) an order requiring the corporation to pay the costs of the investigation.

DERIVATIVE ACTIONS – RIGHTS TO INTERVENE IN CORPORATION LITIGATION IN CERTAIN CIRCUMSTANCES

A minority shareholder may take over litigation the corporation is not prosecuting, or defend a lawsuit the corporation is not defending – s.246, 247

Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

No action may be brought and no intervention in an action may be made under subsection (1) unless the complainant has given fourteen days' notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) and the court is satisfied that, (a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action; (b) the complainant is acting in good faith; and (c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

In connection with an action brought or intervened in under section 246, the court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, (a) an order authorizing the complainant or any other person to control the conduct of the action; (b) an order giving directions for the conduct of the action; (c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; and (d) an order requiring the corporation or its subsidiary to pay reasonable legal fees and any other costs reasonably incurred by the complainant in connection with the action.

COURT ORDERED WINDING UP IN CERTAIN CIRCUMSTANCES

A minority shareholder can apply for a court ordered winding up in certain circumstances, including unfair treatment at the hands of the majority – s.207(1), (2), 208

A corporation may be wound up by order of the court,

(a) where the court is satisfied that in respect of the corporation or any of its affiliates,

> (i) any act or omission of the corporation or any of its affiliates effects a result,
>
> (ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

(b) where the court is satisfied that,

> (i) a unanimous shareholder agreement entitled a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred,
>
> (ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,
>
> (iii) the corporation, though it may not be insolvent, cannot by reason of its liabilities continue its business and it is advisable to wind it up, or
>
> (iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or

(c) where the shareholders by special resolution authorize an application to be made to the court to wind up the corporation.

Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit.

A winding-up order may be made upon the application of the corporation or of a shareholder or, where the corporation is being wound up voluntarily, of the liquidator or of a contributory or of a creditor having a claim of $2,500 or more.

OPPRESSION REMEDY - RIGHTS TO SEEK COURT PROTECTION FROM OPPRESSIVE ACTIONS BY BOARD OR MAJORITY SHAREHOLDERS

A minority shareholder may seek court intervention if majority acts improperly or unfairly – s.248

Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates, (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result; (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, (a) an order restraining the conduct complained of; (b) an order appointing a receiver or receiver-manager; (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement; (d) an order directing an issue or exchange of securities; (e) an order appointing directors in place of or in addition to all or any of the directors then in office; (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder; (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities; (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract; (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine; (j) an order compensating an aggrieved person; (k) an order directing rectification of the registers or other records of a corporation under section 250; (l) an order winding up the corporation under section 207; (m) an order directing an investigation under Part XIII be made; and (n) an order requiring the trial of any issue.

UNANIMOUS SHAREHOLDER AGREEMENTS

Shareholders can have a pooling agreement for voting purposes - s.108(1)

A written agreement between two or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as therein provided.

All shareholders can agree to restrict the powers of directors – s.108(2)

A written agreement among all the shareholders of a corporation or among all the shareholders and one or more persons who are not shareholders may restrict in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of the corporation.

Transferees are automatically bound by a unanimous shareholder agreement – s.108(4)

Subject to subsection 56 (3), a transferee of shares subject to a unanimous shareholder agreement shall be deemed to be a party to the agreement.

Where shareholders assume the directors powers, they assume the directors' duties and liabilities – s.108(5)

A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers, duties and liabilities of a director of the corporation, whether arising under this Act or otherwise, to which the agreement relates to the extent that the agreement restricts the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation and the directors are thereby relieved of their duties and liabilities, including any liabilities under section 131, to the same extent.

Phil's Note: Shareholder rights under the Act can probably not be waived or seriously impaired by a unanimous shareholders agreement

The Act permits unanimous shareholder agreements to limit the powers of directors (see s.108(2) above), but says nothing about minority shareholders waiving their rights under the Act. Therefore it is not clear that minority shareholders can waive some or all of their rights under the Act by signing a unanimous shareholders agreement. Even if a waiver is permitted, the question always arises as to whether the passage of time or a change in circumstances revokes the waiver. As a general rule, it is best to assume that minority shareholders have all the rights set out in the Act in addition to whatever rights are set out in the company articles or the unanimous shareholders agreement.

The question is somewhat moot, as the powers of the Court under the oppression remedy (see s. 248 above) include the power to ignore or order an amendment to a unanimous shareholders agreement if the majority abuses its position of power to the detriment of minority shareholders. In addition, the power of the court to order a winding up of the company under s. 207 (see above) is extremely broad when minority shareholder rights are being unfairly trampled. For these reasons, unanimous shareholder agreements are often of limited influence when the trust and respect between shareholders breaks down to the point where the minority takes the majority to court to resolve their differences.