



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 74

Minority Buy-Outs

August 2001
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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30 July 2001

Dear Ministers

I am pleased to present to you Report 74 of the Law Commission *Minority Buy-Outs*, which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

The Hon Justice Robertson
President

The Hon Phil Goff
Minister of Justice
Parliament Buildings
Wellington

The Hon Margaret Wilson
Associate Minister of Justice and Attorney-General
Parliament Buildings
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The Hon Paul Swain
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Preface

PREPARATION OF THIS REPORT was embarked upon (with the concurrence of the Ministry of Economic Development which administers the Companies Act 1993) as a response to the July 2000 decision of Doogue J in *Natural Gas Corporation Holdings Ltd v Infratil 1998 Ltd* [2000] 3 NZLR 727. Current Commissioners took the view that as it was the Law Commission that in 1989 recommended the measure that was in that case subjected to such strong (and we think justified) criticism, today's Law Commission had a clear moral obligation to try to devise a cure.

Because the point is narrow and highly specialised, the method of consultation we employed was to send an early draft of our report to individuals and institutions knowledgeable in the field and invite their comments. Those who assisted were:

Tony Agar, Phillips Fox, Lawyers, Auckland

Stephen Franks, MP

Ross Grantham, Department of Commercial Law, University of Auckland

John Hagan, Deloitte Touche Tohmatsu, Chartered Accountants, Auckland

Institute of Directors in New Zealand Incorporated

New Zealand Law Society (Commercial and Business Law Committee)

David Quigg, Quigg Partners, Solicitors, Wellington

Mark Russell, Buddle Findlay, Solicitors, Christchurch

Securities Commission

Lynne Taylor, School of Law, University of Canterbury

Susan Watson, Department of Commercial Law, University of Auckland

In addition, the Natural Gas Corporation, which found itself thrust into the position of guinea pig in the first trial of the sections, was so

public-spirited as to permit its advisers (Alan Galbraith QC, Brigid McArthur and Nicole MacFarlane of Chapman Tripp, Solicitors, Wellington, and in-house counsel Steve Bielby (we were also provided with a letter setting out the views of Miriam Dean)) to discuss with us the difficulties encountered. We are grateful for all this help. We should make it plain that, of course, the responsibility for this report remains that of the Commission.

The Commissioner having the carriage of this project was DF Dugdale and the researcher was Helen Colebrook.

Minority buy-outs

BACKGROUND

1 ALL NORTH AMERICAN business corporation statutes confer on minority shareholders who have unsuccessfully opposed specified types of fundamental change to a company's structure or operations an entitlement to have their shares purchased by the company at an appraised price. The historical justification for appraisal rights seems to have been as a trade-off for abandoning an earlier requirement that unanimity was needed for such changes.¹ Their current function is to provide an exit regime at a fair price for dissenting minority shareholders who acquired their shares before the change. If the goalposts are moved despite the shareholder's opposition, he is entitled to decide that he no longer wishes to be a player and also to be protected from losing financially by reason of his decision to leave the field. The intended functioning of buy-out provisions has been described in a merger context in these terms:

In theory, the existence of appraisal statutes has a two-pronged effect on merger transactions. First, the appraisal remedy is supposed to guarantee that dissenting shareholders get a fair price for their equity stakes. This prong of the appraisal statute is embodied by a procedural scheme whose end result is a judicial valuation of the minority stake in the target with attendant money damages where appropriate. Perhaps more important than the actual exercise of the remedy is the *ex ante* effect which the mere existence of the remedy is supposed to produce. This second prong works by inhibiting the incentives of majority owners to act strategically by providing for the possibility of a threat of litigation and uncertain damage awards. The corporate planner's assumed preference for certainty, coupled with potential cash-flow constraints in meeting potentially sizeable judicial awards, should encourage the planner-majority owner to offer fair consideration in freeze-out transactions.²

¹ There are accounts of the history of such provisions in Mary Siegel "Back to the Future: Appraisal Rights in the Twenty-First Century" (1995) 32 *Harvard Journal on Legislation* 79, 86 and BM Wertheimer "The Shareholders' Appraisal Remedy and How Courts Determine Fair Value" (1998) 47 *Duke LJ* 613, 618.

² Alexander Khutorsky "Coming in from the Cold: Reforming Shareholders' Appraisal Rights in Freeze-out Transactions" [1997] *Columbia Business Law Review* 133, 141.

North American experience³ (and common sense) suggest that, in practice, the cost of pursuing the remedy inhibits its widespread use by any but a substantial shareholder (including of course an institutional investor).

2 Appraisal rights are inconsistent with the careful restrictions on reductions of capital to be found in the United Kingdom companies acts and their descendants in other jurisdictions. Those restrictions were abolished in New Zealand by the Companies Act 1993. That Act contains a fascicle of sections (sections 110–115) conferring a right to require the company to buy out their shares on minority shareholders who have unsuccessfully opposed a special resolution, that:

- alters the company's constitution in a way that imposes or removes a restriction on the company's activities; or
- approves a major transaction; or
- approves an amalgamation proposal.

A copy of these sections and of section 106, which lists the powers requiring such a special resolution, is to be found in Appendix A to this report. The ultimate ancestor of sections 110–115 is an Ohio statute of 1851. Their pedigree can be traced through the Delaware General Corporation Law section 262, the New York Business Corporation Law section 623, and what is now the Canadian Business Corporations Act 1985, c.C-44, section 190. (These are Appendices B, C and D to this report.)

3 The broad scheme of the New Zealand statute, so far as relevant to the matters to be discussed in this report, is as follows. The shareholder must give notice of an intention to invoke the procedure within 10 working days of the passing of the resolution (or 10 days of notification if the written resolution procedure is followed). The Board must then, within 20 days of receiving the shareholder's notice, elect one of the following courses of action and notify the shareholder of its election, namely:

- to back away from the resolution that has triggered the shareholder's notice; or

³ Wertheimer, above n 1, 623.

- to agree to buy the shareholder's shares, or procure a third party to do so;⁴ or
- to seek an exemption under section 114 or section 115. (These sections empower the High Court to excuse compliance by the company on financial or just and equitable grounds.)

If the company agrees to buy it must, within five working days of notifying its election, notify the shareholder of the price it is prepared to pay. If the price is unacceptable to the shareholder, the company must be notified forthwith; whereupon the issue of the price must be referred to arbitration, and the company must pay the price it has nominated within five days. Each side is bound by the decision of the arbitrator. If the price is fixed by the arbitrator at more than the company's proposal, the company must pay the shortfall forthwith. If the arbitrator fixes the price at less than the company originally offered, then the amount paid in excess of that amount is recoverable by the company from the shareholder. The arbitrator has power to award interest. The same procedure applies (*mutatis mutandis*) where the sale is to a third party procured by the company, rather than to the company itself.

- 4 The procedure provided by the New Zealand sections was essentially that recommended by the Law Commission.⁵ While the New Zealand procedure is obviously descended from that provided by the North American sections, there are important differences. It is not the concern of this report to revisit either the philosophy of the New Zealand sections or the basic framework of the procedure laid down. This report proceeds on the premise that the 1993 Act correctly identified appraisal as a solution to the problem of "latecomer terms", that is to say, unanticipated alterations to corporate contracts that change the risk of, or expected return from, an investment.⁶ But when they are measured against the North American provisions

⁴ The difficulties in procuring purchase by a genuinely independent third party (the short time-frame and the unlikelihood of finding a purchaser willing to become involved in a dispute as to price) will in practice probably prove insuperable, but there may be circumstances in which it suits the company better to park the shares in the ownership of a related company than to have them deemed cancelled under section 58(2).

⁵ Law Commission *Company Law: Reform and Restatement: NZLC R9* (Wellington, 1989) paras 202–213, pp 49–51 and cls 81–86 of "The Draft Companies Act", pp 230–234; and Law Commission *Company Law Reform: Transition and Revision: NZLC R16* (Wellington, 1990) cls 81–86 of "Appendix, Draft Companies Act: Recommended Modifications" pp 185–189.

⁶ See FN Easterbrook and DR Fischel *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, Massachusetts 1991) p 32 and ch 6.

reproduced in Appendices B, C and D and the model provision in Appendix E, the laconic style of the New Zealand sections becomes immediately apparent.⁷ In the first case on the sections to come before the Court, *Natural Gas Corporation Holdings Ltd v Infratil 1998 Ltd*,⁸ this lack of detail was trenchantly criticised. Doogue J said:

[3] To the best of the knowledge of the parties, this is the first time that the minority buy-out rights sections have come before the Court.

[4] It is common ground that the minority buy-out rights sections are defective. Although they provide for the company to nominate a fair and reasonable price for the shares to be acquired, they do not state at what date that price is to be ascertained. Nor do the sections make any provision for the company, in nominating the fair and reasonable price, to give any information to the minority shareholder of the basis of the valuation. Nor do the sections provide any mechanism for the completion of transactions falling within them. As already noted, s 112(4) is silent as to the basis upon which the shares at issue are to be dealt with at the time when the company is required to pay the provisional price. Nor has the arbitrator power to make orders in respect of the completion of the transaction following the arbitration. Having created minority buy-out rights, the Act fails to provide for important features of the transactions that can arise under them. In the context of the Act as a whole and its history, that is understandable. However, here there is a relatively substantial sum of money involved. In other cases there could be a substantial number of shareholders involved. While the Law Commission and the legislature may have been wise to avoid the complexity of some of the North American legislation, it would seem essential that, if the minority buy-out rights sections are to be effective, they should be urgently reconsidered.⁹

In the conclusion to his judgment, the Judge referred to a “statutory vacuum” and said “I regard the section as substantially flawed”.¹⁰ He said “If the minority buy-out rights are to be beneficial and workable, they should, as already indicated, be urgently reconsidered”.¹¹

⁷ This eschewing of a lengthy provision was intentional – see *Company Law: Reform and Restatement*, above n 5, para 472.

⁸ *Natural Gas Corporation Holdings Ltd v Infratil 1998 Ltd* [2000] 3 NZLR 727.

⁹ *Natural Gas Corporation*, above n 8, 728.

¹⁰ *Natural Gas Corporation*, above n 8, 739.

¹¹ *Natural Gas Corporation*, above n 8, 740. On the other hand, an Alberta Supreme Court judge has described the forerunner of the detailed provision adopted in Canada and set out in Appendix D as “a remarkably rigid procedure” and “this procedural morass” *Jepson v Canadian Salt Co Ltd* (1979) 99 DLR (3d) 513, 518, 520. A law reformer’s lot is not a happy one.

5 It is this judgment that has triggered the preparation this report.¹² A procedure described in the skeletal mode that the New Zealand statute adopts undoubtedly makes the bone structure more readily discernible than were it fattened out with minute detail. But we accept that it should have been anticipated that the parties would likely be at daggers drawn and reluctant to agree on how the bare bones of the statute should be fleshed out. The issues that seem to arise and to require discussion are these:

- Should notice be given of the availability of the buy-out rights along with the notice of the special resolution sought to be passed?
- Should the company be required to give particulars of the basis on which its offer has been calculated?
- Should the statute specify the date as at which the shares are to be valued or otherwise dictate the basis of valuation?
- Should the shareholder be required to convey title to the shares at the same time he is paid the price that has been calculated by the company on the basis of the value as initially assessed by it?
- Should the legislation spell out broader powers authorising the arbitrator to award compensation for costs and delay?
- Should the arbitrator have the power to make ancillary enforcement orders?

NOTICE OF RIGHTS

6 Where the power to be exercised by the shareholders is the power in section 106(1)(c) (to approve an amalgamation under section 221), the Board is under an express obligation imposed by section 221(3)(e) to send to each shareholder of the company a statement setting out the rights of the shareholder under section 110. There is no corresponding obligation in the case of the power under section 106(1)(a) (relating to altering the constitution) or section 106(1)(b) (relating to approving a major transaction). There seems to be no logical reason for this difference. It would seem appropriate for the statute to require notice of buy-out entitlements in every case to

¹² We have been particularly assisted by an article by Lynne Taylor “Minority Buy-Out Rights in the Companies Act 1993” (1997) 6 Canterbury Law Review 539.

which section 110 applies. All our consultants agreed with this solution. There is a comparable provision in the American Bar Association's Model Business Corporation Act (MBCA).¹³

PARTICULARS OF THE COMPANY'S VALUATION

7 The Canadian Business Corporations Act section 190(12)(a) requires the company to send to dissenting shareholders:

. . . a written offer to pay for his shares in an amount considered by the directors of the corporation to be the fair value thereof, *accompanied by a statement showing how the fair value was determined* [Italics added.]

It would seem sensible for the New Zealand statute to contain a comparable provision. This would enable the shareholder to make an initial decision on whether or not to object under section 112(2), but would not preclude the shareholder obtaining further information by discovery processes before the hearing to determine value. All our consultants agreed with this solution. One consultant expressed some reservations in relation to the disclosure of commercially sensitive information. It must, however, be kept in mind that the company is in this context an "insider" for the purposes of Part I of the Securities Amendment Act 1988.¹⁴

BASIS OF VALUATION

8 In his judgment in the *Natural Gas Corporation* case,¹⁵ Doogue J observed that:

At the moment, indeed, it is impossible to see how the company could ever make a truly fair and reasonable assessment of price when there is no indication within the section as to the date at which the assessment is to be made.¹⁶

There can be no quarrel with the proposition that the basis of the valuation that the statute contemplates, and in particular the date

¹³ Section 13.20 set out in Appendix E.

¹⁴ Section 3(1)(a).

¹⁵ *Natural Gas Corporation*, above n 8.

¹⁶ *Natural Gas Corporation*, above n 8, 739.

as at which it is to be made, should be defined as unequivocally as possible:

- for the reason suggested by Doogue J of enabling the Board to make its assessment;
- to enable the shareholder to judge whether or not to accept the price nominated by the Board; and
- for the purposes of the arbitration determining the price, if one be needed. Where there are fluctuations in value, there are of course practical difficulties in preparing evidence in the absence of agreement or statutory guidance as to the appropriate date. Where the calculation is one of any complexity, it adds to the cost if expert witnesses are required to prepare valuations as at a number of different dates in the hope of hitting on the one that the arbitrator decides is the correct one.

One element of uncertainty would be removed were the statute to specify the valuation date. Some consultants advocated an alternative approach, that of avoiding any settled rule and leaving the valuation date at large, with a view to doing justice on a case-by-case basis, as one aspect of overall fairness (a method that has been applied in the context of a claim for relief against oppression by a minority shareholder under the Companies Act 1955 section 208 (current section 174)).¹⁷ Apart from the general disadvantage inherent in its uncertainty, this approach seems to us inappropriate to a scheme that is not just one of ensuring *ex post* that the minority shareholder receives a fair price, but also imposes duties and rights to be performed and exercised *ex ante*.

- 9 If a date is to be specified, what should it be? The Canadian Business Corporations Act section 190(3) provides that the shares must be valued “as at the close of business on the day before the resolution was adopted or the order made”; the philosophy being that the minority shareholder having exercised the right to draw his skirts aside from the change should neither be prejudiced by the change (if the value goes down as a result of the change) nor benefit therefrom (if the value goes up). Minority shareholders should not be able to “have it both ways”: to exit the corporation through appraisal and at the same time share in future expected gains.¹⁸ The logical attraction

¹⁷ *Holden v Architectural Finishes Ltd* (1996) 7 NZCLC 260976, 261007. This judgment was upheld on appeal without it being necessary to refer to this issue (*Architectural Finishes Ltd v Thwaite* (unreported) CA272/95 Judgment 7 April 1997).

¹⁸ Siegel, above n 1, 139.

of this approach is diminished by the fact that in the case of a listed (and perhaps any) company, any effect on the price for good or ill is likely to have occurred when what was afoot became known, long before the formal resolution. This consideration led a number of those whom we consulted to suggest a fixed but earlier date. The Institute of Directors in New Zealand Incorporated, for example, referred to the obligations of listed companies to announce material changes. It suggested a valuation as at the close of business on the day before the relevant announcement or notice of meeting (in the case of listed companies) and on the day before the notice of meeting (in the case of unlisted companies).

- 10 While such a provision would identify a certain date there are, it seems to us, insuperable objections to it. It would take no account of changes in value resulting from extraneous causes between such date and the date on which the deemed contract is brought into existence by the company's acceptance of the shareholder's election. And if such a change is downward and becomes manifest before the voting date, it could influence the voting of any shareholder sufficiently astute to oppose a triggering special resolution, simply as a step towards procuring the purchase of his shares at a price equalling their value prior to the downward change.
- 11 We think the best way to tackle these difficulties is this. The valuation should be as at the date the company gives the notice agreeing to buy the shares pursuant to section 112(1)(a), that being the date that the contract of sale comes into existence, but the valuation should be adjusted to leave out of account any change in that valuation (be it up or down) attributable to the triggering event. In other words, the price should be determined in a way that reflects the value the shares would have had at the date of the notice of election to buy, had the transaction giving rise to the buy-out rights not occurred. It should be assessed, in the words of the Delaware General Corporation Law, "exclusive of any element of value arising from the accomplishment or expectation of" the triggering event.¹⁹ To broadly the same effect was the pre-1999 MBCA definition of "fair value" in the context of appraisals as:

¹⁹ Section 262(h) set out in Appendix B.

. . . the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.²⁰

- 12 The next issue is whether the valuation should be of the particular parcel of shares or whether the valuation technique employed should be that of valuing the whole company (or more precisely the whole of the class of shares of which the shares in question form part) and then apportioning the value so ascertained among the shareholders. If the latter technique is employed, the next question is what the basis of apportionment should be. The terms of the statute as it now stands leaves these questions open. There is no requirement that the price nominated by the company should be the same for each block of shares. One solution urged on us was that the statute should prescribe the valuation technique, and that such technique should be selected by analogy with New Zealand Stock Exchange Listing Rule 4.8.4(c)(iv) (relating to compulsory acquisition provisions). On this basis, the statute would require the arbitrator to arrive at a valuation calculated as the prorated value of the shares in question based on the aggregate value of the total number of shares of that class, unaffected by the proportion the shares being valued bears to that number (that is, allowing neither minority discount nor, on the other hand, uplift to take into account strategic or hold-out value). There is a provision comparable in effect in clause 57(4) of the takeovers code schedule to the Takeovers Code Approval Order 2000 (SR 2000/210), which applies where the calculation of the consideration payable by a dominant owner on compulsory acquisition is not determined by the terms of the takeover offer. Others pressed on us the contrary view that there is a difference between the position of dissenting shareholders under the minority buy-out procedure and that of shareholders facing compulsory acquisition. In the former situation, but not the latter, it may (as a matter of theory at least) be open to the shareholder to make a voting decision motivated by an awareness that (where such is the case) such a formula as the one discussed in this paragraph can be expected to yield a price higher (because of the minority discount inherent in a market price) than the current quoted price.

²⁰ Section 13.01. The version adopted in 1999 (s 13.01(4) set out in Appendix E) permits the taking into account of changes in value in anticipation of the triggering event on the basis that the deleted exclusion had “not been susceptible to meaningful judicial interpretation” so that the non-prescriptive terms of s 13.01(4)(ii) are preferable (see “Proposed Changes in the Model Business Corporation Act – Appraisal Rights” *The Business Lawyer* vol 54 (1998) 209, 255). We disagree with this approach for the reasons stated in para 13.

13 The issue of whether on the one hand the statute should prescribe a valuation technique applicable in every case or whether on the other hand the matter should be left to be determined on a case-by-case basis (which is the effect of the statute as it now stands) is one on which differing views may reasonably be held. We have concluded that there should be a fixed rule for the reasons already touched on in paragraph 8. The absence of a fixed rule affects the exercise of the statutory rights and the performance of the statutory duties. It seems to us that a clearer idea of the basis of the valuation that the statute requires is needed to enable the shareholder to decide whether and how to vote on the triggering proposal (we disagree with the view implicit in the submission recorded in the previous paragraph that this is a bad thing) and whether to require the purchase of his shares. It is needed by the company to enable it to decide whether to agree to the purchase, rather than rescind the resolution, and what price to nominate if purchase is decided upon. Both sides will be assisted in the arbitration process if this contentious aspect is settled in advance. As Willes J famously observed in the context of *judicial* law-making:

But as in all commercial transactions the great object is certainty, it will be necessary for this Court to lay down some rule, and it is of more consequence that the rule should be certain than whether it is established one way or the other.²¹

If there is a certain rule, the parties can adjust their actions to take account of it. If it seems likely to produce a valuation unacceptable to the shareholder, he can elect not to require a purchase. If it seems likely to produce a value unacceptable to the company, it can elect to have the resolution rescinded rather than deciding to buy. Indeed, to avoid the need for a rescission, a triggering resolution could be expressly subject to a condition waiveable by the company that no more than a stated percentage of shareholders exercise minority buy-out rights.

14 If this is the correct approach and a fixed rule is needed then what is the appropriate rule? The rule should require a valuation of the total class followed by allocation on a prorated basis. As noted in paragraph 12, this is the formula adopted by the listing rules and the takeover code in the contexts referred to and is to that extent familiar. It is a solution consistent with the minority protection rationale of the sections. Because a minority discount necessarily allocates a larger share of the company's value to the majority

²¹ *Lockyer & Ors v Offley* (1786) 1 TR 252, 259; 199 ER 1079, 1083.

shareholder or shareholders our proposal prevents the majority from unfairly enriching themselves at the expense of the minority. It is consistent with North American authority on the statutory provisions, which are the ancestors of the New Zealand sections. If the owner of a strategic holding believes there is an entitlement to a higher price than that which a pro rata apportionment would yield, the owner will know not to set in motion the minority buy-out process. If our proposal has the practical consequence that minority shareholders can use the minority buy-out process to thwart the fundamental change that requires the triggering resolution, this is just one aspect of the protection of minority rights that the statute insists on. If the majority is not prepared to face up to the financial consequences of changing the goalposts in a way unacceptable to a substantial proportion of minority shareholders, they will have to accept the need to abandon the proposed scheme. We should make it clear that the solution proposed in this paragraph does not command the support of all whom we consulted. The view of the Natural Gas Corporation was expressed by its General Counsel in these terms:

The procedure must essentially be a balanced one, which provides shareholders with an appropriate exit mechanism, but does not provide perverse incentives to shareholders or disincentives to appropriate corporate action. As we have discussed previously, there is a potential category of cases for publicly listed companies where shareholders will be provided with extraordinary arbitrage opportunities which incentivise the individual shareholder to vote against a triggering resolution, irrespective of the merits of that resolution. That must act as an inappropriate disincentive to future corporate actions and a potential prejudice to remaining shareholders. The ability of a corporate to withdraw a material transaction from shareholder approval is cold comfort and potentially a much weightier matter than an individual shareholder's decision whether to invoke the procedure.

This approach seems to us to be based on a mistaken underlying premise. Certain classes of transaction, which constitute a fundamental change to the risk that a shareholder in making his investment agreed to accept, are permitted by the statute, but only on the basis that minority shareholders have certain exit rights. Implicit in this is the possibility that there are circumstances in which the exercise, or possibility of the exercise, of such rights may function as a disincentive to the company to enter into a contemplated transaction falling within one of the specified classes. This is simply one of the consequences of not being a sole owner. The fairness of the rule is not affected by describing the contemplated transaction as an appropriate corporate action or by criticising the rule as one capable of providing perverse incentives.

15 We think that the general rule for adjustment of the valuation, to leave out of account the effect of the triggering event that we propose in paragraph 11, should not apply where the dissenting shareholder cannot be said to be electing to exercise a right to jump ship, but is, on the contrary, being pushed overboard. The justification for the rule that we propose is that dissenting shareholders should not be permitted to have their cake and eat it by taking advantage of the exit regime to opt out of a proposal yet share in its benefit. This consideration does not apply where the dissenting shareholder is being eliminated as a shareholder against the shareholder's will. There can be such a squeeze out in an amalgamation (section 220(1)(g)). The North American authorities in those circumstances permit taking the assessment of post-merger factors into account in the valuation, and this seems to us to be fair.²²

16 Some (including the New Zealand Law Society) urged that the minority buy-out provisions should apply only to unlisted shares. It is, of course, correct that one rationale for the existence of the rules is to avoid dissenting shareholders being locked, as holders of illiquid stock, into companies that have been subjected to fundamental change since the shareholders made their investment. It can be fairly said that there may be little or no risk of this if the shares are listed. This is no doubt the reason that a shrinking number of comparable North American provisions have excluded listed shares.²³ But while the fact that shares are listed may make a statutory exit mechanism unnecessary, listing does not provide a remedy for loss as a consequence of the company adopting one of the latecomer terms referred to in section 106(1)(a)–(c).²⁴ It is noteworthy that the “market exception” added in 1969 was eliminated in 1978 from the MBCA for reasons officially expressed in part as follows:

The 1970s have demonstrated again the possibility of a demoralized market in which fair prices are not available, and in which many companies publicly offer to buy their own shares because the market grossly under values them. Under these circumstances, access to market value is not a reasonable alternative for a dissenting shareholder. Moreover, a shareholder may be disqualified by state or federal securities laws from

²² The North American cases discussed by Taylor, above n 12, 569 are to this effect. For a contrary view see Siegel, above n 1, 139–140.

²³ See, for example, Delaware General Corporation Law s 262(b)(1) (Appendix B). Twenty-four States have a market exception. The trend is away from such an exception. See Siegel, above n 1, 96 n 85; and Wertheimer, above n 1, n 101.

²⁴ Wertheimer, above n 1, 704–708.

using the market because his shares are “restricted”, because he is an “insider” who has acquired shares within six months, or because he possesses “inside information”. Even if the dissenter is free to use the market, he may find it impractical to do so because his holdings are large and the market is thin. In any event, the market cannot reflect the value of the shares “excluding any appreciation or depreciation in anticipation” of the corporate change which gives rise to the dissenters’ rights.

In the 1999 version the market exception was restored, but with complex exclusions designed to preserve the remedy where, under the arrangement, the shareholder was to receive securities that were not readily tradable or where there was scope for insider manipulation.²⁵ We think it simpler and better that in New Zealand the remedy should continue without a market exception.

- 17 Much the same considerations apply to the suggestion that the sections should continue to apply to listed shares, but with special valuation rules. We agree with the view of McHugh J of the High Court of Australia, expressed in the context of an expropriation, that:

The market price of shares on a security exchange is cogent evidence of value particularly when the shares have traded in a fairly narrow band over an extended period. But the market price or even a price above the market price is not decisive of the fair value of the shares for the purpose of an expropriation . . . Sharemarkets are driven by many factors, not all of them rational or fair. Even the share prices of long established and profitable companies may fluctuate by as much as 50 per cent in the space of a year. A share is an interest, however small, in an underlying business. Outside the context of the stockmarket, it would not occur to the owner of a business to think that the fair value of his or her business could move up and down, sometimes violently, not only from week to week or day to day but during the course of a day. No doubt in the long term the share price of a company will reflect its fundamental earning capacity or value. But the histories of stockmarkets are overrun by examples of companies whose intrinsic value remained unnoticed by the market for long periods of time. The “herd mentality” exists in the stock market as in other areas of life. Judges cannot delegate to the market the duties of courts to fix a fair price for shares.²⁶

Moreover, market prices are particularly unreliable when a control block of stock resides in the hands of a controlling shareholder, and indeed such a controlling shareholder may well have timed the triggering event to his own advantage.²⁷ We do not agree that the statute should provide for special valuation rules applying to listed shares.

²⁵ Section 13.02(b) set out in Appendix E.

²⁶ *Gambotto v WCP Ltd* (1995) 182 CLR 432, 457–458.

²⁷ Wertheimer, above n 1, 635–640.

- 18 Summarising our recommendation on this point, it is that the statute should provide that the shares be valued as at the date the company gives notice pursuant to section 112(1)(a) that it agrees to buy the shares, but with the valuation adjusted to exclude any element of value arising from the accomplishment or expectation of the event authorised by the triggering resolution (except where the triggering special resolution is one approving an amalgamation under section 221 under which the shareholder's shares are not to be converted into shares in the amalgamated company). The statute should expressly state that where the exception applies, the valuation may take into account any benefit of the amalgamation. The basis of the valuation must be a pro rata share of the value of the whole company without minority discount or strategic uplift.

CONTRACT AND CONVEYANCE

- 19 The scheme of the Canadian section set out in Appendix D is that on the dissenting shareholder communicating his election to have his shares bought, there is a conversion of his right to the ownership of his shares to a right to be paid for the shares the price determined as provided by the statute.²⁸ The same position applies under the New York statute set out in Appendix C.²⁹ Under those statutes, 80 per cent of the corporation's proposed price must be paid on communication of the corporation's offer, subject to the shareholder submitting his share certificate. The Delaware statute set out in Appendix B provides that a dissenting shareholder who has elected payment loses his voting rights.³⁰
- 20 The issue in the *Natural Gas Corporation* case was whether the dissenting shareholder was required to transfer its shares at the stage of payment of the Board's estimate of their value. Doogue J's view was that "in the statutory vacuum that exists the company cannot be required to pay the provisional price unless it receives title to the shares involved".³¹ It can, without disrespect, be suggested that the Court's decision will have been influenced by the fact that the amount payable was the not insubstantial sum of \$34 556 514.20. The decision has been criticised by Peter Watts.³² His view is, in effect, that the normal rule that conveyance and payment of the

²⁸ Section 190(11).

²⁹ Section 623(e).

³⁰ Section 262(k).

³¹ *Natural Gas Corporation*, above n 8, 739.

³² In a review of company law at [2000] NZ Law Rev 287, 288–290.

full price (being the performance of dependent promises) must occur concurrently applies to the contract created by the sections, so that there is no obligation on the shareholder to transfer its shares until paid in full. By further analogy with normal property law rules, the company acquires a beneficial interest in the shares (as the Canadian statute expressly provides) but with the buyer not having any right to direct how the seller votes.³³ The Law Commission is attracted by Watts' analysis. Doogue J's observation that "the dissenting shareholder cannot expect to retain its interest as a shareholder as well as have the advantage of its new interest as a creditor"³⁴ arguably gives insufficient weight to the consideration that this is the right of an unpaid seller under the general law. We disagree with an alternative analysis put to us, that the prospect of the price being adjusted does not prevent the initial payment being categorised as a performance of the requirement to pay the price, entitling the purchaser to call for a conveyance.

- 21 As to what the law ought to be, of those whom we consulted some believed that (subject to protection of the buyer's equitable interest against the risks of fraudulent disposition by the seller or the seller's insolvency) the seller should retain legal title and voting rights; primarily because so long as the seller remains on the register and retains voting rights, there is a powerful inducement to the buyer not to drag its feet in relation to the arbitration process. This was also seen as partially redressing the informational imbalance in favour of the buyer and the tactical advantage to the buyer of having the right to nominate the price. The opposing view advanced by, among others, the New Zealand Law Society is that the seller is sufficiently protected (not least by the proposal we make in paragraph 23 in relation to compensation for delay) if legal title passes to the buyer on payment of the provisional price assessed by the seller.
- 22 In considering these two alternatives, it is necessary to have regard to the effect of adopting each of them on the incidence of risk. There is no risk to the seller of loss caused by the buyer's insolvency resulting from the seller's rights being converted to those of an unsecured creditor in relation to any unpaid price balance: partly because if that is the buyer's financial position there is unlikely to be a balance awarded, and partly because as an unsecured creditor the seller will in fact rank ahead of what would have been the seller's ranking

³³ Citing *Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964; *Donselaar v Donselaar* (1981) 1 NZCLC 98100, 98105 per Cooke J, 98107, 98108 per Somers J; and *Michaels v Harley (Marylebone) Ltd* [2000] Ch 104.

³⁴ *Natural Gas Corporation*, above n 8, 738.

had it remained a shareholder. The risk to the buyer of the seller being unable to pay any refund of the provisional price that may be ordered by the arbitrator seems to be the same whichever alternative is adopted. The risk to the buyer of the seller's intervening insolvency or of a fraudulent disposition by the seller would be slight. The buyer would have an equitable interest in the shares that would certainly prevail on insolvency and which would be prior in time to that of any donee. We conclude that in determining this issue there is not much weight that should be placed on where under each of the two alternative regimes the risk would lie.

23 We do not think it to be a particularly sound argument in favour of the buyer's obtaining legal title on payment of the provisional price, that the buyer might need the title to fund the purchase either by borrowing or onselling. If that is the buyer's financial position, it can either apply to the court under section 114 or procure the rescission of the triggering resolution.

24 After weighing all these factors, we have concluded that legal title and voting rights should remain with the shareholder until the price is ascertained and fully paid. The dominant factor leading us to this conclusion is that so long as the shareholder remains on the register and retains voting rights, the company has a reason to ensure that the arbitration process is not delayed. An additional advantage of this solution is that if Watts' analysis is correct, it is consistent with the general law. Because there is disagreement as to the legal position, the statute should spell out the rule. The statute should also provide that any purported disposition by the seller between payment of the provisional price and completion is of no effect. Should there be a dividend during this interim period, the seller would be under an obligation to account for it to the purchaser; and this is sufficiently clear as a matter of law to make it unnecessary for the statute to say so.

COMPENSATION FOR DELAY

25 The provision in section 112(5) (making the reference to arbitration a submission for the purpose of the Arbitration Act 1908) translates, with the assistance of section 20 of the Arbitration Act 1996 and of the Interpretation Act 1999 section 22(2), to an arbitration agreement under the Arbitration Act 1996. If the Companies Act provisions are to be amended, it would be sensible to substitute a reference to the 1996 Act for the reference to the 1908 Act. There is in any arbitration opportunity for delay on the part of a party wanting to dawdle; perhaps in the present context a company that has nominated under section 112(1) a price that it knows to be

unreasonably low. Obvious methods of strategic delay are haggling over the appointment of the sole arbitrator and obstruction in providing the details the dissenting shareholder's valuation expert needs. There are processes available under the Arbitration Act 1996 to bring matters to a head,³⁵ but their availability cannot eliminate delay entirely. The question then becomes whether in the present context there should be rules, special to this group of sections, aimed at reducing delay, or whether the better course is to enlarge the arbitrator's powers, beyond the present power under section 112(8), to award interest to compensate for delay. To the extent that the initial payment is less than the price ultimately fixed by the arbitrator, there is effectively a loan of the shortfall by the dissenting shareholder to the company.³⁶ There could be a power where the provisional price paid is less than the price determined by the arbitrator to recognise the time value of money and allow damages for loss (whether foreseeable or not) attributable to non-payment of the shortfall. This would be a wider power than the power to award interest that an arbitrator already has under the Arbitration Act 1996 section 12(6). This should discourage both procedural dilly-dallying and the nomination of a patently inadequate initial price. All our consultants agreed with this proposal.

COSTS

- 26 As an additional disincentive to the company making an excessively low offer or indulging in unreasonable litigation tactics, there should be express power to the arbitrator to require the company to pay the reasonable legal costs, on a solicitor-and-client basis, and expert witness costs of a dissenting shareholder who recovers a price greater than the amount of the provisional payment. All our consultants agreed with this proposal. The simplest way of achieving this result is by spelling out that clause 6 of the Second Schedule to the Arbitration Act 1996 may not be excluded from the arbitration agreement.

³⁵ First Schedule Article 11(3)(b), application to the High Court to avoid impasse in appointment of sole arbitrator; Article 19(2) as to discovery.

³⁶ This issue is discussed by Khutorsky, above n 2, 160.

ANCILLARY ORDERS

27 Doogue J took the view that the arbitrator lacks power “to make orders in respect of the completion of the transaction following the arbitration”.³⁷ Under the Arbitration Act 1996 section 12(1)(a), an arbitration agreement:

- ... is deemed to provide that an arbitral tribunal—
- (a) May award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court:

Section 111(2)(a), in its use of the word “agree”, contemplates an executory contract, which an arbitrator has power to order to be specifically performed. But the only dispute referred by section 112(4) to arbitration is as to price. So it would seem sensible to add to the definition of the question referred to the arbitrator under section 112(4) “the entitlement of the shareholder and the company to remedies arising out of the agreement for the purchase of the shares by the company”. All our consultants agreed with this proposal.

SUMMARY OF RECOMMENDATIONS

28 Accordingly we recommend:

- that a new paragraph (c) be added to clause 2(2) of the First Schedule to the Companies Act 1993 to the following effect:
 - (c) If the special resolution is required by section 106(1)(a), (b) or (c) a statement setting out the rights of shareholders under section 110 of this Act unless such statement has already been sent under section 221(3)(e).³⁸
- that there be substituted for section 112 of the Companies Act 1993 a new section to the following effect:

112 Purchase by company—

- (1) Where the board agrees under section 111(2) of this Act to the purchase of the shares by the company, it must, on giving notice under that subsection or within 5 working days thereafter give notice to the holder of the shares of the price it offers to pay for the shares to be acquired.
- (2) That price must be an honest estimate of the value of the shares as at the date of such notice, adjusted, except where subsection

³⁷ See para 4 above.

³⁸ See para 6.

- (3) applies, to exclude any element of value arising from the accomplishment or expectation of the event authorised by the resolution entitling the shareholder to require the company to purchase the shares in accordance with section 111 of this Act³⁹ and must be calculated by first assessing the value of the class of shares of which the shares in question form part and then allocating that value pro rata among all shareholders.
- (3) If the resolution entitling the shareholder to require the company to purchase the shares is one approving an amalgamation of the company under section 221 of this Act under which all the shares of the shareholder are not to be converted into shares of the amalgamated company, the valuation must take into account any benefit of the amalgamation to the company, its shareholders and directors.⁴⁰
- (4) The notice required by subsection (1) must be accompanied by a statement of how the price was calculated.⁴¹
- (5) If, within 10 working days of giving notice to a shareholder under subsection (1) of this section, no objection to the price has been received by the company, the company must, on such date as the company and the shareholder agree or, in the absence of agreement, as soon as practicable, purchase all the shares at the nominated price.
- (6) If, within 10 working days of giving notice to a shareholder under subsection (1) of this section, an objection to the price has been received by the company, the company must—
- (a) Refer to arbitration—
- (i) the determination of the value of the shares on the basis particularised in subsections (2) and (3) of this section; and
- (ii) the entitlement of the shareholder and the company to remedies arising out of the agreement for the purchase of the shares at that price by the company.⁴²
- (b) Within 5 working days, pay a provisional price in respect of each share equal to the price nominated by the board.
- (7) A reference to arbitration under this section is an arbitration agreement for the purposes of the Arbitration Act 1996.

³⁹ See para 15.

⁴⁰ See para 15.

⁴¹ See para 7.

⁴² See para 27.

- (8) If the price determined—
- (a) Exceeds the provisional price, the company must forthwith pay the balance owing to the shareholder:
 - (b) Is less than the provisional price paid, the company may recover the excess paid from the shareholder.
- (9) An arbitral tribunal may award interest on any balance payable or excess to be repaid under subsection (8) of this section and in exercising its discretion to award interest on any balance payable must take into account whether the price offered under subsection (1) of this section was a reasonable and honest estimate of value on the basis particularised in subsections (2) and (3) of this section.
- (10) If a balance is payable to the shareholder an arbitral tribunal may award to the shareholder in addition to or in lieu of an award of interest, damages for loss (whether foreseeable or not) attributable to the shortfall in the initial payment.⁴³
- (11) Clause 6 of the Second Schedule to the Arbitration Act 1996 may not be excluded from the arbitration agreement, and it is expressly declared that the term “costs and expenses of an arbitration” in that clause includes, where a balance is payable to the shareholder, the reasonable legal costs of the shareholder on a solicitor-and-client basis and the actual costs of expert witnesses.⁴⁴
- (12) If the determination of the value of the shares is referred to arbitration the shares will remain registered in the name of the shareholder and his voting rights will remain unaffected until the price is determined and any balance due from the company paid, but from the time that the payment required by subsection 6(b) is made any purported disposition of the shares by the shareholder except in favour of the company will be of no effect.⁴⁵
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⁴³ See para 25

⁴⁴ See para 26.

⁴⁵ See para 24.

APPENDIX A

Companies Act 1993, sections 106 and 110–115

106 Powers exercised by special resolution—

- (1) Notwithstanding the constitution of a company, when shareholders exercise a power to—
 - (a) Adopt a constitution or, if it has one, alter or revoke the company's constitution:
 - (b) Approve a major transaction:
 - (c) Approve an amalgamation of the company under section 221 of this Act:
 - (d) Put the company into liquidation,—
the power must be exercised by special resolution.
- (2) A special resolution pursuant to paragraph (a) or paragraph (b) or paragraph (c) of subsection (1) of this section can be rescinded only by a special resolution.
- (3) A special resolution pursuant to paragraph (d) of subsection (1) of this section cannot be rescinded in any circumstances.

110 Shareholder may require company to purchase shares—

Where—

- (a) A shareholder is entitled to vote on the exercise of one or more of the powers set out in—
 - (i) Section 106(1)(a) of this Act, and the proposed alteration imposes or removes a restriction on the activities of the company; or
 - (ii) Section 106(1)(b) or (c) of this Act; and
- (b) The shareholders resolved, pursuant to section 106 of this Act, to exercise the power; and
- (c) The shareholder cast all the votes attached to shares registered in the shareholder's name and having the same beneficial owner against the exercise of the power; or
- (d) Where the resolution to exercise the power was passed under section 122 of this Act, the shareholder did not sign the resolution,—

that shareholder is entitled to require the company to purchase those shares in accordance with section 111 of this Act.

111 Notice requiring purchase—

- (1) A shareholder of a company who is entitled to require the company to purchase shares by virtue of section 110 or section 118 of this Act may,—
 - (a) Within 10 working days of the passing of the resolution at a meeting of shareholders; or
 - (b) Where the resolution was passed under section 122 of this Act, before the expiration of 10 working days after the date on which notice of the passing of the resolution is given to the shareholder,—

give a written notice to the company requiring the company to purchase those shares.
- (2) Within 20 working days of receiving a notice under subsection (1) of this section, the board must—
 - (a) Agree to the purchase of the shares by the company; or
 - (b) Arrange for some other person to agree to purchase the shares; or
 - (c) Apply to the Court for an order under section 114 or section 115 of this Act; or
 - (d) Arrange, before taking the action concerned, for the resolution to be rescinded in accordance with section 106 of this Act or decide in the appropriate manner not to take the action concerned, as the case may be; and
 - (e) Give written notice to the shareholder of the board's decision under this subsection.

112 Purchase by company—

- (1) Where the board agrees under section 111(2)(a) of this Act to the purchase of the shares by the company, it must, on giving notice under that subsection or within 5 working days thereafter,—
 - (a) Nominate a fair and reasonable price for the shares to be acquired; and
 - (b) Give notice of the price to the holder of those shares.
- (2) A shareholder who considers that the price nominated by the board is not fair or reasonable, must forthwith give notice of objection to the company.
- (3) If, within 10 working days of giving notice to a shareholder under subsection (1) of this section, no objection to the price has been received by the company, the company must, on such date as the company and the shareholder agree or, in the absence of agreement, as soon as practicable, purchase all the shares at the nominated price.
- (4) If, within 10 working days of giving notice to a shareholder under subsection (1) of this section, an objection to the price has been received by the company, the company must—
 - (a) Refer the question of what is a fair and reasonable price to arbitration; and
 - (b) Within 5 working days, pay a provisional price in respect of each share equal to the price nominated by the board.

- (5) A reference to arbitration under this section is deemed to be a “submission” for the purpose of the Arbitration Act 1908.
- (6) The arbitrator must expeditiously determine a fair and reasonable price for the shares to be purchased.
- (7) If the price determined—
 - (a) Exceeds the provisional price, the company must forthwith pay the balance owing to the shareholder:
 - (b) Is less than the provisional price paid, the company may recover the excess paid from the shareholder.
- (8) The arbitrator may—
 - (a) Award interest on any balance payable or excess to be repaid under subsection (7) of this section at such rate as he or she thinks fit having regard to whether the provisional price paid or the reference to arbitration, as the case may be, was reasonable; and
 - (b) Provide for interest to be paid to or by the shareholder whose shares are to be purchased.

113 Purchase of shares by third party—

- (1) Section 112 of this Act applies to the purchase of shares by a person with whom the company has entered into an arrangement for purchase in accordance with section 111(2)(b) of this Act subject to such modifications as may be necessary, and, in particular, as if references in that section to the board and the company were references to that person.
- (2) Every holder of shares that are to be purchased in accordance with the arrangement is indemnified by the company in respect of loss suffered by reason of the failure by the person who has agreed to purchase the shares to purchase them at the price nominated or fixed by arbitration, as the case may be.

114 Court may grant exemption—

- (1) A company to which a notice has been given under section 111 of this Act may apply to the Court for an order exempting it from the obligation to purchase the shares to which the notice relates on the grounds that—
 - (a) The purchase would be disproportionately damaging to the company; or
 - (b) The company cannot reasonably be required to finance the purchase; or
 - (c) It would not be just and equitable to require the company to purchase the shares.
- (2) On an application under this section, the Court may make an order exempting the company from the obligation to purchase the shares, and may make any other order it thinks fit, including an order—
 - (a) Setting aside a resolution of the shareholders:
 - (b) Directing the company to take, or refrain from taking, any action specified in the order:
 - (c) Requiring the company to pay compensation to the shareholders affected:

- (d) That the company be put into liquidation.
- (3) The Court shall not make an order under subsection (2) of this section on either of the grounds set out in paragraph (a) or paragraph (b) of subsection (1) of this section unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares in accordance with section 111(2)(b) of this Act.

115 Court may grant exemption if company insolvent—

- (1) If—
 - (a) A notice is given to a company under section 111 of this Act; and
 - (b) The board has resolved that the purchase by the company of the shares to which the notice relates would result in it failing to satisfy the solvency test; and
 - (c) The company has, having made reasonable efforts to do so, been unable to arrange for the shares to be purchased by another person in accordance with section 111(2)(b) of this Act,—
the company must apply to the Court for an order exempting it from the obligation to purchase the shares.
- (2) The Court may, on an application under subsection (1) of this section, if it is satisfied that—
 - (a) The purchase of the shares would result in the company failing to satisfy the solvency test; and
 - (b) The company has made reasonable efforts to arrange for the shares to be purchased by another person in accordance with section 111(2)(b) of this Act,—
make—
 - (c) An order exempting the company from the obligation to purchase the shares:
 - (d) An order suspending the obligation to purchase the shares:
 - (e) Such other order as it thinks fit, including any order referred to in section 114(2) of this Act.



APPENDIX B
The Delaware General
Corporation Law,
section 262

- (a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favour of the merger or consolidation nor consented thereto in writing pursuant to s 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in one or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.
- (b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger or consolidation to be effected pursuant to s 251 (other than a merger effected pursuant to s 251(g) of this title), s 252, s 254, s 257, s 258, s 263 or s 264 of this title:
- (1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any

shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of s 251 of this title.

- (2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to ss 251, 252, 254, 257, 258, 263 and 264 of this title to accept for such stock anything except:
 - a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;
 - b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or held of record by more than 2,000 holders;
 - c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a. and b. of this paragraph; or
 - d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a., b. and c. of this paragraph.
 - (3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under s 253 of this title is not owned by the parent corporation immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.
- (c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.
- (d) Appraisal rights shall be perfected as follows:
- (1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20

days prior to the meeting, shall notify each of its stockholders who was such on the record date for such meeting with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) hereof that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favour of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

- (2) If the merger or consolidation was approved pursuant to s 228 or s 253 of this title, each constituent corporation, either before the effective date of the merger or consolidation or within ten days thereafter, shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section; provided that, if the notice is given on or after the effective date of the merger or consolidation, such notice shall be given by the surviving or resulting corporation to all such holders of any class or series of stock of a constituent corporation that are entitled to appraisal rights. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before

the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

- (e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) hereof and who is otherwise entitled to appraisal rights, may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favour of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder's written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) hereof, whichever is later.

- (f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.
- (g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.
- (h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, permit discovery or other pretrial proceedings and may proceed to trial upon the appraisal prior to the final determination of the stockholder entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the

Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

- (i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Interest may be simple or compound, as the Court may direct. Payment shall be so made to each such stockholder, in the case of holders of uncertificated stock forthwith, and the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.
- (j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.
- (k) From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of such stockholder's demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.

- (1) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.
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APPENDIX C
The New York Business
Corporation Law,
section 623

- (a) A shareholder intending to enforce his right under a section of this chapter to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation, before the meeting of shareholders at which the action is submitted to a vote, or at such meeting but before the vote, written objection to the action. The objection shall include a notice of his election to dissent, his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares if the action is taken. Such objection is not required from any shareholder to whom the corporation did not give notice of such meeting in accordance with this chapter or where the proposed action is authorized by written consent of shareholders without a meeting.
- (b) Within ten days after the shareholders' authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite shareholders, the corporation shall give written notice of such authorization or consent by registered mail to each shareholder who filed written objection or from whom written objection was not required, excepting any shareholder who voted for or consented in writing to the proposed action and who thereby is deemed to have elected not to enforce his right to receive payment for his shares.
- (c) Within twenty days after the giving of notice to him, any shareholder from whom written objection was not required and who elects to dissent shall file with the corporation a written notice of such election, stating his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares. Any shareholder who elects to dissent from a merger under section 905 (Merger of subsidiary corporation) or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations) or from a share exchange under paragraph (g) of section 913 (Share exchanges) shall file a written notice of such election to dissent within twenty days after the giving to him of a copy of the plan of merger or exchange or an outline of the material features thereof under section 905 or 913.

- (d) A shareholder may not dissent as to less than all of the shares, as to which he has a right to dissent, held by him of record, that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner, as to which such nominee or fiduciary has a right to dissent, held of record by such nominee or fiduciary.
- (e) Upon consummation of the corporate action, the shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section. A notice of election may be withdrawn by the shareholder at any time prior to his acceptance in writing of an offer made by the corporation, as provided in paragraph (g), but in no case later than sixty days from the date of consummation of the corporate action except that if the corporation fails to make a timely offer, as provided in paragraph (g), the time for withdrawing a notice of election shall be extended until sixty days from the date an offer is made. Upon expiration of such time, withdrawal of a notice of election shall require the written consent of the corporation. In order to be effective, withdrawal of a notice of election must be accompanied by the return to the corporation of any advance payment made to the shareholder as provided in paragraph (g). If a notice of election is withdrawn, or the corporate action is rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenter's rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action, including any intervening preemptive rights and the right to payment of any intervening dividend or other distribution or, if any such rights have expired or any such dividend or distribution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion, but without prejudice otherwise to any corporate proceedings that may have been taken in the interim.
- (f) At the time of filing the notice of election to dissent or within one month thereafter the shareholder of shares represented by certificates shall submit the certificates representing his shares to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf. Any shareholder of shares represented by certificates who fails to submit his certificates for such notation as herein specified shall, at the option of the corporation exercised by written notice to him within forty-five days from the date of filing of such notice of election to dissent, lose his dissenter's rights unless a court, for good cause shown, shall otherwise direct. Upon transfer of a certificate bearing such notation, each new certificate issued

therefor shall bear a similar notation together with the name of the original dissenting holder of the shares and a transferee shall acquire no rights in the corporation except those which the original dissenting shareholder had at the time of transfer.

- (g) Within fifteen days after the expiration of the period within which shareholders may file their notices of election to dissent, or within fifteen days after the proposed corporate action is consummated, whichever is later (but in no case later than ninety days from the shareholders' authorization date), the corporation or, in the case of a merger or consolidation, the surviving or new corporation, shall make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the corporation considers to be their fair value. Such offer shall be accompanied by a statement setting forth the aggregate number of shares with respect to which notices of election to dissent have been received and the aggregate number of holders of such shares. If the corporate action has been consummated, such offer shall also be accompanied by (1) advance payment to each such shareholder who has submitted the certificates representing his shares to the corporation, as provided in paragraph (f), of an amount equal to eighty percent of the amount of such offer, or (2) as to each shareholder who has not yet submitted his certificates a statement that advance payment to him of an amount equal to eighty percent of the amount of such offer will be made by the corporation promptly upon submission of his certificates. If the corporate action has not been consummated at the time of the making of the offer, such advance payment or statement as to advance payment shall be sent to each shareholder entitled thereto forthwith upon consummation of the corporate action. Every advance payment or statement as to advance payment shall include advice to the shareholder to the effect that acceptance of such payment does not constitute a waiver of any dissenters' rights. If the corporate action has not been consummated upon the expiration of the ninety day period after the shareholders' authorization date, the offer may be conditioned upon the consummation of such action. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or if divided into series, of the same series and shall be accompanied by a balance sheet of the corporation whose shares the dissenting shareholder holds as of the latest available date, which shall not be earlier than twelve months before the making of such offer, and a profit and loss statement or statements for not less than a twelve month period ended on the date of such balance sheet or, if the corporation was not in existence throughout such twelve month period, for the portion thereof during which it was in existence. Notwithstanding the foregoing, the corporation shall not be required to furnish a balance sheet or profit and loss statement or statements to any shareholder to whom such balance sheet or profit and loss statement or statements were previously furnished, nor if in

connection with obtaining the shareholders' authorization for or consent to the proposed corporate action the shareholders were furnished with a proxy or information statement, which included financial statements, pursuant to Regulation 14A or Regulation 14C of the United States Securities and Exchange Commission. If within thirty days after the making of such offer, the corporation making the offer and any shareholder agree upon the price to be paid for his shares, payment therefor shall be made within sixty days after the making of such offer or the consummation of the proposed corporate action, whichever is later, upon the surrender of the certificates for any such shares represented by certificates.

- (h) The following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares:
 - (1) The corporation shall, within twenty days after the expiration of whichever is applicable of the two periods last mentioned, institute a special proceeding in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without an office in this state, such proceeding shall be brought in the county where the office of the domestic corporation, whose shares are to be valued, was located.
 - (2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct.
 - (3) All dissenting shareholders, excepting those who, as provided in paragraph (g), have agreed with the corporation upon the price to be paid for their shares, shall be made parties to such proceeding, which shall have the effect of an action quasi in rem against their shares. The corporation shall serve a copy of the petition in such proceeding upon each dissenting shareholder who is a resident of this state in the manner provided by law for the service of a summons, and upon each nonresident dissenting shareholder either by registered mail and publication, or in such other manner as is permitted by law. The jurisdiction of the court shall be plenary and exclusive.
 - (4) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if

the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date. In fixing the fair value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder's right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and all other relevant factors. The court shall determine the fair value of the shares without a jury and without referral to an appraiser or referee. Upon application by the corporation or by any shareholder who is a party to the proceeding, the court may, in its discretion, permit pretrial disclosure, including, but not limited to, disclosure of any expert's reports relating to the fair value of the shares whether or not intended for use at the trial in the proceeding and notwithstanding subdivision (d) of section 3101 of the civil practice law and rules.

- (5) The final order in the proceeding shall be entered against the corporation in favour of each dissenting shareholder who is a party to the proceeding and is entitled thereto for the value of his shares so determined.
- (6) The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the date the corporate action was consummated to the date of payment. In determining the rate of interest, the court shall consider all relevant factors, including the rate of interest which the corporation would have had to pay to borrow money during the pendency of the proceeding. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.
- (7) Each party to such proceeding shall bear its own costs and expenses, including the fees and expenses of its counsel and of any experts employed by it. Notwithstanding the foregoing, the court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by the corporation against any or all of the dissenting shareholders who are parties to the proceeding, including any who have withdrawn their notices of election as provided in paragraph (e), if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith. The court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by any or all of the dissenting shareholders who are parties to the proceeding against the

corporation if the court finds any of the following: (A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer or required advance payment was made by the corporation; (C) that the corporation failed to institute the special proceeding within the period specified therefor; or (D) that the action of the corporation in complying with its obligations as provided in this section was arbitrary, vexatious or otherwise not in good faith. In making any determination as provided in clause (A), the court may consider the dollar amount or the percentage, or both, by which the fair value of the shares as determined exceeds the corporate offer.

- (8) Within sixty days after final determination of the proceeding, the corporation shall pay to each dissenting shareholder the amount found to be due him, upon surrender of the certificates for any such shares represented by certificates.
- (i) Shares acquired by the corporation upon the payment of the agreed value therefor or of the amount due under the final order, as provided in this section, shall become treasury shares or be cancelled as provided in section 515 (Reacquired shares), except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.
- (j) No payment shall be made to a dissenting shareholder under this section at a time when the corporation is insolvent or when such payment would make it insolvent. In such event, the dissenting shareholder shall, at his option:
 - (1) Withdraw his notice of election, which shall in such event be deemed withdrawn with the written consent of the corporation; or
 - (2) Retain his status as a claimant against the corporation and, if it is liquidated, be subordinated to the rights of creditors of the corporation, but have rights superior to the non-dissenting shareholders, and if it is not liquidated, retain his right to be paid for his shares, which right the corporation shall be obliged to satisfy when the restrictions of this paragraph do not apply.
 - (3) The dissenting shareholder shall exercise such option under subparagraph (1) or (2) by written notice filed with the corporation within thirty days after the corporation has given him written notice that payment for his shares cannot be made because of the restrictions of this paragraph. If the dissenting shareholder fails to exercise such option as provided, the corporation shall exercise the option by written notice given to him within twenty days after the expiration of such period of thirty days.
- (k) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except

as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

- (l) Except as otherwise expressly provided in this section, any notice to be given by a corporation to a shareholder under this section shall be given in the manner provided in section 605 (Notice of meetings of shareholders).
 - (m) This section shall not apply to foreign corporations except as provided in subparagraph (e)(2) of section 907 (Merger or consolidation of domestic and foreign corporations).
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APPENDIX D
The Canadian Business
Corporations Act 1985,
c.C-44, section 190

Right to dissent	190. (1) Subject to sections 191 and 241, a holder of shares of any class of a corporation may dissent if the corporation is subject to an order under paragraph 192(4)(d) that affects the holder or if the corporation resolves to (a) amend its articles under section 173 or 174 to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class; (b) amend its articles under section 173 to add, change or remove any restriction on the business or businesses that the corporation may carry on; (c) amalgamate otherwise than under section 184; (d) be continued under section 188; or (e) sell, lease or exchange all or substantially all its property under subsection 189(3).
Further right	(2) A holder of shares of any class or series of shares entitled to vote under section 176 may dissent if the corporation resolves to amend its articles in a manner described in that section.
Payment for shares	(3) In addition to any other right he may have, but subject to subsection (26), a shareholder who complies with this section is entitled, when the action approved by the resolution from which he dissents or an order made under subsection 192(4) becomes effective, to be paid by the corporation the fair value of the shares held by him in respect of which he dissents, determined as of the close of business on the day before the resolution was adopted or the order was made.

No partial dissent	(4) A dissenting shareholder may only claim under this section with respect to all the shares of a class held by him on behalf of any one beneficial owner and registered in the name of the dissenting shareholder.
Objection	(5) A dissenting shareholder shall send to the corporation, at or before any meeting of shareholders at which a resolution referred to in subsection (1) or (2) is to be voted on, a written objection to the resolution, unless the corporation did not give notice to the shareholder of the purpose of the meeting and of his right to dissent.
Notice of resolution	(6) The corporation shall, within ten days after the shareholders adopt the resolution, send to each shareholder who has filed the objection referred to in subsection (5) notice that the resolution has been adopted, but such notice is not required to be sent to any shareholder who voted for the resolution or who has withdrawn his objection.
Demand for payment	(7) A dissenting shareholder shall, within twenty days after he receives a notice under subsection (6) or, if he does not receive such notice, within twenty days after he learns that the resolution has been adopted, send to the corporation a written notice containing <ul style="list-style-type: none"> (a) his name and address; (b) the number and class of shares in respect of which he dissents; and (c) a demand for payment of the fair value of such shares.
Share certificate	(8) A dissenting shareholder shall, within thirty days after sending a notice under subsection (7), send the certificates representing the shares in respect of which he dissents to the corporation or its transfer agent.
Forfeiture	(9) A dissenting shareholder who fails to comply with subsection (8) has no right to make a claim under this section.
Endorsing certificate	(10) A corporation or its transfer agent shall endorse on any share certificate received under subsection (8) a notice that the holder is a dissenting shareholder under this section and shall forthwith return the share certificates to the dissenting shareholder.

Suspension of rights	(11) On sending a notice under subsection (7), a dissenting shareholder ceases to have any rights as a shareholder other than the right to be paid the fair value of his shares as determined under this section except where (a) the dissenting shareholder withdraws his notice before the corporation makes an offer under subsection (12), (b) the corporation fails to make an offer in accordance with subsection (12) and the dissenting shareholder withdraws his notice, or (c) the directors revoke a resolution to amend the articles under subsection 173(2) or 174(5), terminate an amalgamation agreement under subsection 183(6) or an application for continuance under subsection 188(6), or abandon a sale, lease or exchange under subsection 189(9), in which case his rights as a shareholder are reinstated as of the date he sent the notice referred to in subsection (7).
Offer to pay	(12) A corporation shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the corporation received the notice referred to in subsection (7), send to each dissenting shareholder who has sent such notice <ul style="list-style-type: none"> (a) a written offer to pay for his shares in an amount considered by the directors of the corporation to be the fair value thereof, accompanied by a statement showing how the fair value was determined; or (b) if subsection (26) applies, a notification that it is unable lawfully to pay dissenting shareholders for their shares.
Same terms	(13) Every offer made under subsection (12) for shares of the same class or series shall be on the same terms.
Payment	(14) Subject to subsection (26), a corporation shall pay for the shares of a dissenting shareholder within ten days after an offer made under subsection (12) has been accepted, but any such offer lapses if the corporation does not receive an acceptance thereof within thirty days after the offer has been made.

Corporation may apply to court	(15) Where a corporation fails to make an offer under subsection (12), or if a dissenting shareholder fails to accept an offer, the corporation may, within fifty days after the action approved by the resolution is effective or within such further period as a court may allow, apply to a court to fix a fair value for the shares of any dissenting shareholder.
Shareholder application to court	(16) If a corporation fails to apply to a court under subsection (15), a dissenting shareholder may apply to a court for the same purpose within a further period of twenty days or within such further period as a court may allow.
Venue	(17) An application under subsection (15) or (16) shall be made to a court having jurisdiction in the place where the corporation has its registered office or in the province where the dissenting shareholder resides if the corporation carries on business in that province.
No security for costs	(18) A dissenting shareholder is not required to give security for costs in an application made under subsection (15) or (16).
Parties	(19) On an application to a court under subsection (15) or (16), (a) all dissenting shareholders whose shares have not been purchased by the corporation shall be joined as parties and are bound by the decision of the court; and (b) the corporation shall notify each affected dissenting shareholder of the date, place and consequences of the application and of his right to appear and be heard in person or by counsel.
Powers of court	(20) On an application to a court under subsection (15) or (16), the court may determine whether any other person is a dissenting shareholder who should be joined as a party, and the court shall then fix a fair value for the shares of all dissenting shareholders.
Appraisers	(21) A court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the shares of the dissenting shareholders.
Final order	(22) The final order of a court shall be rendered against the corporation in favour of each

Interest	<p>dissenting shareholder and for the amount of the shares as fixed by the court.</p> <p>(23) A court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective until the date of payment.</p>
Notice that subsection (26) applies	<p>(24) If subsection (26) applies, the corporation shall, within ten days after the pronouncement of an order under subsection (22), notify each dissenting shareholder that it is unable lawfully to pay dissenting shareholders for their shares.</p>
Effect where subsection (26) applies	<p>(25) If subsection (26) applies, a dissenting shareholder, by written notice delivered to the corporation within thirty days after receiving a notice under subsection (24), may</p> <p>(a) withdraw his notice of dissent, in which case the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to his full rights as a shareholder; or</p> <p>(b) retain a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.</p>
Limitation	<p>(26) A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that</p> <p>(a) the corporation is or would after the payment be unable to pay its liabilities as they become due; or</p> <p>(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.</p>

APPENDIX E
American Bar Association's
Model Business Corporation
Act, section 13

SUBCHAPTER A.

RIGHT TO APPRAISAL AND PAYMENT FOR SHARES

13.01 DEFINITIONS

In this chapter:

- (1) "Affiliate" means a person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with another person or is a senior executive thereof. For purposes of section 13.02(b)(4), a person is deemed to be an affiliate of its senior executives.
- (2) "Beneficial shareholder" means a person who is the beneficial owner of shares held in a voting trust or by a nominee on the beneficial owner's behalf.
- (3) "Corporation" means the issuer of the shares held by a shareholder demanding appraisal and, for matters covered in sections 13.22–13.31, includes the surviving entity in a merger.
- (4) "Fair value" means the value of the corporation's shares determined:
 - (i) immediately before the effectuation of the corporate action to which the shareholder objects;
 - (ii) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and
 - (iii) without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to section 13.02(a)(5).
- (5) "Interest" means interest from the effective date of the corporate action until the date of payment, at the rate of interest on judgments in this state on the effective date of the corporate action.
- (6) "Preferred shares" means a class or series of shares whose holders have preference over any other class or series with respect to distributions.
- (7) "Record shareholder" means the person in whose name shares are registered in the records of the corporation or the beneficial

owner of shares to the extent of the rights granted by a nominee certificate on file with the corporation.

- (8) “Senior executive” means the chief executive officer, chief operating officer, chief financial officer, and anyone in charge of a principal business unit or function.
- (9) “Shareholder” means both a record shareholder and a beneficial shareholder;

13.02 RIGHT TO APPRAISAL

- (a) A shareholder is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder’s shares, in the event of any of the following corporate actions:
 - (1) consummation of a merger to which the corporation is a party (i) if shareholder approval is required for the merger by section 11.04 and the shareholder is entitled to vote on the merger, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series that remain outstanding after consummation of the merger; or (ii) if the corporation is a subsidiary and the merger is governed by section 11.05;
 - (2) consummation of a share exchange to which the corporation is a party as the corporation whose shares will be acquired if the shareholder is entitled to vote on the exchange, except that appraisal rights shall not be available to any shareholder of the corporation with respect to any class or series of shares of the corporation that is not exchanged;
 - (3) consummation of a disposition of assets pursuant to section 12.02 if the shareholder is entitled to vote on the disposition;
 - (4) an amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the corporation has the obligation or right to repurchase the fractional share so created; or
 - (5) any other amendment to the articles of incorporation, merger, share exchange or disposition of assets to the extent provided by the articles of incorporation, bylaws or a resolution of the board of directors.
- (b) Notwithstanding subsection (a), the availability of appraisal rights under subsections (a)(1), (2), (3) and (4) shall be limited in accordance with the following provisions:
 - (1) Appraisal rights shall not be available for the holders of shares of any class or series of shares which is:
 - (i) listed on the New York Stock Exchange or the American Stock Exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.; or
 - (ii) not so listed or designated, but has at least 2,000 shareholders and the outstanding shares of such class or series has a market value of at least \$20 million (exclusive of the

value record and beneficial shareholders to take advantage of the provisions of this chapter subject to their fulfilling the applicable requirements of this chapter of such shares held by its subsidiaries, senior executives, directors and beneficial shareholders owning more than 10 percent of such shares).

- (2) The applicability of subsection (b)(1) shall be determined as of:
 - (i) the record date fixed to determine the shareholders entitled to receive notice of, and to vote at, the meeting of shareholders to act upon the corporate action requiring appraisal rights; or
 - (ii) the day before the effective date of such corporate action if there is no meeting of shareholders.
- (3) Subsection (b)(1) shall not be applicable and appraisal rights shall be available pursuant to subsection (a) for the holders of any class or series of shares who are required by the terms of the corporate action requiring appraisal rights to accept for such shares anything other than cash or shares of any class or any series of shares of any corporation, or any other proprietary interest of any other entity that satisfies the standards set forth in subsection (b)(1) at the time the corporate action becomes effective.
- (4) Subsection (b)(1) shall not be applicable and appraisal rights shall be available pursuant to subsection (a) for the holders of any class or series of shares where:
 - (i) any of the shares or assets of the corporation are being acquired or converted, whether by merges share exchange or otherwise, pursuant to the corporate action by a person, or by an affiliate of a person, who:
 - (A) is, or at any time in the one-year period immediately preceding approval by the board of directors of the corporate action requiring appraisal rights was, the beneficial owner of 20 percent or more of the voting power of the corporation, excluding any shares acquired pursuant to an offer for all shares having voting power if such offer was made within one year prior to the corporate action requiring appraisal rights for consideration of the same kind and of a value equal to or less than that paid in connection with the corporate action; or
 - (B) directly or indirectly has, or at any time in the one-year period immediately preceding approval by the board of directors of the corporation of the corporate action requiring appraisal rights had, the power,

- contractually or otherwise, to cause the appointment or election of 25 percent or more of the directors to the board of directors of the corporation; or
- (ii) any of the shares or assets of the corporation are being acquired or converted, whether by merger, share exchange or otherwise, pursuant to such corporate action by a person, or by an affiliate of a person, who is, or at any time in the one-year period immediately preceding approval by the board of directors of the corporate action requiring appraisal rights was, a senior executive or director of the corporation or a senior executive of any affiliate thereof, and that senior executive or director will receive, as a result of the corporate action, a financial benefit not generally available to other shareholders as such, other than:
 - (A) employment, consulting, retirement or similar benefits established separately and not as part of or in contemplation of the corporate action; or
 - (B) employment, consulting, retirement or similar benefits established in contemplation of, or as part of, the corporate action that are not more favourable than those existing before the corporate action or, if more favourable, that have been approved on behalf of the corporation in the same manner as is provided in section 8.62; or
 - (C) in the case of a director of the corporation who will, in the corporate action, become a director of the acquiring entity in the corporate action or one of its affiliates, rights and benefits as a director that are provided on the same basis as those afforded by the acquiring entity generally to other directors of such entity or such affiliate.
- (5) For the purposes of paragraph (4) only, the term “beneficial owner” means any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or to direct the voting of, shares, provided that a member of a national securities exchange shall not be deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities if the member is precluded by the rules of such exchange from voting without instruction on contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted. When two or more persons agree to act together for the purpose of voting their shares of the corporation, each member of the group

formed thereby shall be deemed to have acquired beneficial ownership, as of the date of such agreement, of all voting shares of the corporation beneficially owned by any member of the group.

- (c) Notwithstanding any other provision of section 13.02, the articles of incorporation as originally filed or any amendment thereto may limit or eliminate appraisal rights for any class or series of preferred shares, but any such limitation or elimination contained in an amendment to the articles of incorporation that limits or eliminates appraisal rights for any of such shares that are outstanding immediately prior to the effective date of such amendment or that the corporation is or may be required to issue or sell thereafter pursuant to any conversion, exchange or other right existing immediately before the effective date of such amendment shall not apply to any corporate action that becomes effective within one year of that date if such action would otherwise afford appraisal rights.
- (d) A shareholder entitled to appraisal rights under this chapter may not challenge a completed corporate action for which appraisal rights are available unless such corporate action:
 - (1) was not effectuated in accordance with the applicable provisions of chapters 10, 11 or 12 or the corporation's articles of incorporation, bylaws or board of directors' resolution authorising the corporate action; or
 - (2) was procured as a result of fraud or material misrepresentation.

13.03 ASSERTION OF RIGHTS BY NOMINEES AND BENEFICIAL OWNERS

- (a) A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder only if the record shareholder objects with respect to all shares of the class or series owned by the beneficial shareholder and notifies the corporation in writing of the name and address of each beneficial shareholder on whose behalf appraisal rights are being asserted. The rights of a record shareholder who asserts appraisal rights for only part of the shares held of record in the record shareholder's name under this subsection shall be determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.
- (b) A beneficial shareholder may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder:
 - (1) submits to the corporation the record shareholder's written consent to the assertion of such rights no later than the date referred to in section 13.22(b)(2)(ii); and
 - (2) does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder.

SUBCHAPTER B.

PROCEDURE FOR EXERCISE OF APPRAISAL RIGHTS

13.20 NOTICE OF APPRAISAL RIGHTS

- (a) If proposed corporate action described in section 13.02(a) is to be submitted to a vote at a shareholders' meeting, the meeting notice must state that the corporation has concluded that shareholders are, are not or may be entitled to assert appraisal rights under this chapter. If the corporation concludes that appraisal rights are or may be available, a copy of this chapter must accompany the meeting notice sent to those record shareholders entitled to exercise appraisal rights.
- (b) In a merger pursuant to section 11.05, the parent corporation must notify in writing all record shareholders of the subsidiary who are entitled to assert appraisal rights that the corporate action became effective. Such notice must be sent within ten days after the corporate action became effective and include the materials described in section 13.22.

13.21 NOTICE OF INTENT TO DEMAND PAYMENT

- (a) If proposed corporate action requiring appraisal rights under section 13.02 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares:
 - (1) must deliver to the corporation before the vote is taken written notice of the shareholder's intent to demand payment if the proposed action is effectuated; and
 - (2) must not vote, or cause or permit to be voted, any shares of such class or series in favour of the proposed action.
- (b) A shareholder who does not satisfy the requirements of subsection (a) is not entitled to payment under this chapter.

13.22 APPRAISAL NOTICE AND FORM

- (a) If proposed corporate action requiring appraisal rights under section 13.02(a) becomes effective, the corporation must deliver a written appraisal notice and form required by subsection (b)(1) to all shareholders who satisfied the requirements of section 13.21. In the case of a merger under section 11.05, the parent must deliver a written appraisal notice and form to all record shareholders who may be entitled to assert appraisal rights.
- (b) The appraisal notice must be sent no earlier than the date the corporate action became effective and no later than ten days after such date and must:
 - (1) supply a form that specifies the date of the first announcement to shareholders of the principal terms of the proposed corporate action and requires the shareholder asserting appraisal rights to certify (i) whether or not beneficial ownership of those

shares for which appraisal rights are asserted was acquired before that date and (ii) that the shareholder did not vote for the transaction;

- (2) state:
 - (i) where the form must be sent and where certificates for certificated shares must be deposited and the date by which those certificates must be deposited, which date may not be earlier than the date for receiving the required form under subsection (2)(ii);
 - (ii) a date by which the corporation must receive the form which date may not be fewer than 40 nor more than 60 days after the date the subsection (a) appraisal notice and form are sent, and state that the shareholder shall have waived the right to demand appraisal with respect to the shares unless the form is received by the corporation by such specified date;
 - (iii) the corporation's estimate of the fair value of the shares;
 - (iv) that, if requested in writing, the corporation will provide, to the shareholder so requesting, within ten days after the date specified in subsection (2)(ii) the number of shareholders who return the forms by the specified date and the total number of shares owned by them; and
 - (v) the date by which the notice to withdraw under section 13.23 must be received, which date must be within 20 days after the date specified in subsection (2)(ii); and
- (3) be accompanied by a copy of this chapter.

13.23 PERFECTION OF RIGHTS; RIGHT TO WITHDRAW

- (a) A shareholder who receives notice pursuant to section 13.22 and who wishes to exercise appraisal rights must certify on the form sent by the corporation whether the beneficial owner of such shares acquired beneficial ownership of the shares before the date required to be set forth in the notice pursuant to section 13.22(b)(1). If a shareholder fails to make this certification, the corporation may elect to treat the shareholder's shares as after-acquired shares under section 13.25. In addition, a shareholder who wishes to exercise appraisal rights must execute and return the form and, in the case of certificated shares, deposit the shareholder's certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to section 13.22(b)(2)(ii). Once a shareholder deposits that shareholder's certificates or, in the case of uncertificated shares, returns the executed forms, that shareholder loses all rights as a shareholder, unless the shareholder withdraws pursuant to subsection (b).
- (b) A shareholder who has complied with subsection (a) may nevertheless decline to exercise appraisal rights and withdraw from the appraisal process by so notifying the corporation in writing by the date set forth in the appraisal notice pursuant to

section 13.22(b)(2)(v). A shareholder who fails to so withdraw from the appraisal process may not thereafter withdraw without the corporation's written consent.

- (c) A shareholder who does not execute and return the form and, in the case of certificated shares, deposit that shareholder's share certificates where required, each by the date set forth in the notice described in section 13.22(b), shall not be entitled to payment under this chapter.

13.24 PAYMENT

- (a) Except as provided in section 13.25, within 30 days after the form required by section 13.22(b)(2)(ii) is due, the corporation shall pay in cash to those shareholders who complied with section 13.23(a) the amount the corporation estimates to be the fair value of their shares, plus interest.
- (b) The payment to each shareholder pursuant to subsection (a) must be accompanied by:
 - (1) financial statements of the corporation that issued the shares to be appraised, consisting of a balance sheet as of the end of a fiscal year ending not more than 16 months before the date of payment, an income statement for that year, a statement of changes in shareholders' equity for that year, and the latest available interim financial statements, if any;
 - (2) a statement of the corporation's estimate of the fair value of the shares, which estimate must equal or exceed the corporation's estimate given pursuant to section 13.22(b)(2)(iii);
 - (3) a statement that shareholders described in subsection (a) have the right to demand further payment under section 13.26 and that if any such shareholder does not do so within the time period specified therein, such shareholder shall be deemed to have accepted such payment in full satisfaction of the corporation's obligations under this chapter.

13.25 AFTER-ACQUIRED SHARES

- (a) A corporation may elect to withhold payment required by section 13.24 from any shareholder who did not certify that beneficial ownership of all of the shareholder's shares for which appraisal rights are asserted was acquired before the date set forth in the appraisal notice sent pursuant to section 13.22(b)(1).
- (b) If the corporation elected to withhold payment under subsection (a), it must, within 30 days after the form required by section 13.22(b)(2)(ii) is due, notify all shareholders who are described in subsection (a):
 - (1) of the information required by section 13.24(b)(1);
 - (2) of the corporation's estimate of fair value pursuant to section 13.24(b)(2);
 - (3) that they may accept the corporation's estimate of fair value, plus interest, in full satisfaction of their demands or demand appraisal under section 13.26;

- (4) that those shareholders who wish to accept such offer must so notify the corporation of their acceptance of the corporation's offer within 30 days after receiving the offer; and
 - (5) that those shareholders who do not satisfy the requirements for demanding appraisal under section 13.26 shall be deemed to have accepted the corporation's offer.
- (c) Within ten days after receiving the shareholder's acceptance pursuant to subsection (b), the corporation must pay in cash the amount it offered under subsection (b)(2) to each shareholder who agreed to accept the corporation's offer in full satisfaction of the shareholder's demand.
 - (d) Within 40 days after sending the notice described in subsection (b), the corporation must pay in cash the amount it offered to pay under subsection (b)(2) to each shareholder described in subsection (b)(5).

13.26 PROCEDURE IF SHAREHOLDER DISSATISFIED WITH PAYMENT OR OFFER

- (a) A shareholder paid pursuant to section 13.24 who is dissatisfied with the amount of the payment must notify the corporation in writing of that shareholder's estimate of the fair value of the shares and demand payment of that estimate plus interest (less any payment under section 13.24). A shareholder offered payment under section 13.25 who is dissatisfied with that offer must reject the offer and demand payment of the shareholder's stated estimate of the fair value of the shares plus interest.
- (b) A shareholder who fails to notify the corporation in writing of that shareholder's demand to be paid the shareholder's stated estimate of the fair value plus interest under subsection (a) within 30 days after receiving the corporation's payment or offer of payment under section 13.24 or section 13.25, respectively, waives the right to demand payment under this section and shall be entitled only to the payment made or offered pursuant to those respective sections.

SUBCHAPTER C.

JUDICIAL APPRAISAL OF SHARES

13.30 COURT ACTION

- (a) If a shareholder makes demand for payment under section 13.26 which remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the 60-day period, it shall pay in cash to each shareholder the amount the shareholder demanded pursuant to section 13.26 plus interest.

- (b) The corporation shall commence the proceeding in the appropriate court of the county where the corporation's principal office (or, if none, its registered office) in this state is located. If the corporation is a foreign corporation without a registered office in this state, it shall commence the proceeding in the county in this state where the principal office or registered office of the domestic corporation merged with the foreign corporation was located at the time of the transaction.
- (c) The corporation shall make all shareholders (whether or not residents of this state) whose demands remain unsettled parties to the proceeding as in an action against their shares, and all parties must be served with a copy of the petition. Non residents may be served by registered or certified mail or by publication as provided by law.
- (d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have the powers described in the order appointing them, or in any amendment to it. The shareholders demanding appraisal rights are entitled to the same discovery rights as parties in other civil proceedings. There shall be no right to a jury trial.
- (e) Each shareholder made a party to the proceeding is entitled to judgment (i) for the amount, if any, by which the court finds the fair value of the shareholder's shares, plus interest, exceeds the amount paid by the corporation to the shareholder for such shares or (ii) for the fair value, plus interest, of the shareholder's shares for which the corporation elected to withhold payment under section 13.25.

13.31 COURT COSTS AND COUNSEL FEES

- (a) The court in an appraisal proceeding commenced under section 13.30 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess costs against all or some of the shareholders demanding appraisal, in amounts the court finds equitable, to the extent the court finds such shareholders acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.
- (b) The court in an appraisal proceeding may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:
 - (1) against the corporation and in favour of any or all shareholders demanding appraisal if the court finds the corporation did not substantially comply with the requirements of sections 13.20, 13.22, 13.24 or 13.25; or
 - (2) against either the corporation or a shareholder demanding appraisal, in favour of any other party, if the court finds that

the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

- (c) If the court in an appraisal proceeding finds that the services of counsel for any shareholder were of substantial benefit to other shareholders similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to such counsel reasonable fees to be paid out of the amounts awarded the shareholders who were benefited.
 - (d) To the extent the corporation fails to make a required payment pursuant to sections 13.24, 13.25, or 13.26, the shareholder may sue directly for the amount owed and, to the extent successful, shall be entitled to recover from the corporation all costs and expenses of the suit, including counsel fees.
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