Saskatchewan CPLED Program
Corporate Commercial Section 7

Fundamental Changes

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Introduction

At common law, in the absence of specific statutory authority, a corporate charter could only be amended by the unanimous consent of the shareholders. Shareholders had a "vested right" from which the majority of the shareholders could not derogate.

Gradually, corporate law has grown more flexible, permitting a corporation to amend its articles of association, and in certain cases, its memorandum of association. As a consequence, the "vested rights" doctrine has been abandoned, recognizing that any shareholders’ rights acquired by a shareholder under the contract evidenced by a share certificate can be modified.

Although the courts struggled to refine the general policy permitting these amendments and to arrive at a workable standard to govern the conduct of majority shareholders, the law remained ambiguous. The rule was that majority shareholders could not derogate from the rights of the minority shareholder, unless the proposed amendment was "bona fide for the benefit of the corporation as a whole". In this context "corporation" means all the shareholders, implying that the majority of the shareholders could not make fundamental changes that discriminate against minority shareholders.

A change was required, ultimately introduced by the Business Corporations Act (Canada), R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes like The Business Corporations Act (Saskatchewan), R.S.S.1978, c.B-10, c. B-9 ("SBCA"). These changes are represented in the "fundamental change" provisions set out in Division XIV of the SBCA.

Generally speaking, an active corporation can make changes without resorting to the courts. It can usually do so by a "special resolution" -- adopted by two-thirds of the votes cast or assigned by all shareholders entitled to vote.

In certain cases of particular importance, a shareholder can require a corporation to buy him/her out where a change is made to which he or she objects. This is probably the most important change to the law in existence before the introduction of the CBCA and the SBCA. This is called the shareholders’ appraisal and dissent right ("A & DR").

A voting shareholder can make a proposal to amend a corporation’s articles of incorporation (section 169).

In certain circumstance, non-voting shareholders have the right to vote (section 170).
What is a "Fundamental Change"?

Under the _SBCA_, fundamental changes include:

- change to the name of a corporation (section 167(1)(a), subject to section 167(3));
- add, change or remove the restrictions, if any, imposed on the business the corporation may carry on or the powers the corporation may exercise (section 167(1)(c));
- important changes to capital structure and rights of shareholders (section 167(1)(d) to (k));
- add, change or remove restrictions on the issue, transfer or ownership of shares (section 167(1)(m)) (for constraints see section 168));
- changes in the number of directors (section 167(1)(l)) or to the minimum or maximum directors (subject to sections 102 and 107);
- any other changes in the articles of incorporation (section 167(1)(n));
- amalgamation (sections 175 to 180);
- reorganizations and arrangements (sections 185, 186 and 186.1);
- transfer of registration to another jurisdiction (section 182);
- "continuance" of an existing company under the _SBCA_ (section 181 and section 258(1)); and
- sale, lease or exchange of substantially all of a corporation’s property (section 183(2)).

Detailed Examination of Fundamental Changes

Change of Name (section 167(1)(a))

- Rules for selecting a name are found in sections 10 to 12.1 of the _SBCA_ and _The Business Corporations Regulations_, c.B-10, Reg.1, beginning at section 18.
- A change from a number to a name can be made by directors’ resolution. No shareholders’ resolution is necessary (section 167(3)).
- A name change does not trigger A & DR.
Change in Business Restriction
(section 167(1)(c))

- A corporation has the capacity, rights, powers and privileges of a natural person unless there are restrictions in the articles or Unanimous Shareholders Agreement (“USA”) (sections 15(1), 16(2) – the doctrine of limited corporate powers is abolished).

- A corporation can add, change, or remove a restriction on the business that the corporation may carry on by special shareholders’ resolution, but this type of change triggers the A & DR. A dissenting shareholder has the right to require the corporation to buy him or her out at fair value.

Change in Share Capital
(section 167(1)(d) to (k))

- Change in the maximum number of shares that a corporation is authorized to issue.

- Creating new classes of shares.

- Changing the designation of all or any of a corporation’s shares, and adding, changing or removing any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued.

- Changing the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

- Dividing a class of shares, whether issued or unissued, into a series and fixing the number of shares in each series and the rights, privileges, restrictions and conditions of that series.

- Authorizing the directors to divide any class of unissued shares into series and fixing the number of shares into each series and the rights, privileges, restrictions and conditions of that series.

- Authorizing the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series.

- Revoking, diminishing or enlarging authority given to directors to divide classes of unissued shares into different series or to change rights and restrictions of unissued shares of any series.
Change in Number of Directors (section 167(1)(l))

- This change does not trigger the A & DR.
- A corporation can change the number of its directors and the minimum or maximum number of directors required, except where the articles provide for cumulative voting. In that case, there must be a fixed number of directors (section 102). Any decrease to the number of directors cannot shorten the term of an incumbent director (section 107).

Other Changes (section 167(1)(n))

- This section allows change to any other provisions permitted under the SBCA, to be set out in a corporation’s articles.

Amalgamation (sections 175 to 180)

- Two or more corporations, including holding and subsidiary corporations, can amalgamate and continue as one corporation (section 175).
  - Amalgamation between unrelated corporations (sections 167, 177).
  - Short form vertical amalgamation (section 178(1)).
  - Short form horizontal amalgamation (section 178(2)).
- The corporations proposing to amalgamate must enter into an agreement setting out the terms and means of effecting the amalgamation, including specified details (section 176). The amalgamation agreement is a vital step in the amalgamation process. The courts find it inappropriate to impose key terms on the parties. (See Maxwell Taylor’s Restaurants Inc. v. Carcasole (1990), 108 A.R. 105 (AB C.A.).
- The shareholders of each amalgamating corporation must approve the agreement by special resolution (section 177(5)). Every share carries the right to vote, whether or not it otherwise would (section 177(3)). The holders of a class or series of shares are entitled to vote separately if they would be so entitled under the proposed agreement (section 177(4)).
Import and Export Continuances  
(sections 181, 182)

• A continuance into Saskatchewan is effected by:
  ◊ filing Articles of Continuance, a Notice of Registered Office (section 19) and Notice of Directors (section 101);
  ◊ and paying the prescribed fee.

Once the items listed above have been filed, the Registrar will issue a Certificate of Continuance. The date shown on that Certificate is the date the extra-provincial corporation effectively becomes a corporation under the *SBCA* "as if it had been incorporated under this Act" (section 181 (5)(a)). The property, liabilities, causes of action, criminal, civil and administrative actions or convictions are unaffected by the continuance (section 181(7)).

• By special resolution, a corporation’s shareholders can authorize its application in another jurisdiction for continuance as if it had been incorporated under the laws of that other jurisdiction. The Registrar must approve the proposed continuance in another jurisdiction (which it will do if it is satisfied that the continuance will not adversely affect creditors or shareholders (section 182)).

• A corporation cannot be continued as a body corporate under the laws of another jurisdiction unless those laws provide that:
  ◊ the property of the corporation continues to be the property of the body corporate;
  ◊ the body corporate continues to be liable for the obligations of the corporation;
  ◊ any existing cause of action, claim or liability to prosecution is unaffected and any pending civil, criminal or administrative action or proceeding can be continued against the body corporate; and
  ◊ any conviction, ruling, order or judgment against or in favour of the corporation can be enforced against or by the body corporate (section 182(9)).
Disposition of Property (section 183)

- Under section 183(2) of the SBCA, "a sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation" requires shareholder approval by special resolution." (Martin v. F.P. Bourgault Industries Air Seeder Division Ltd. (1987), 45 D.L.R. (4th) 296 (Sask C.A.); 85956 Holdings Ltd. v. Fayerman Brothers Ltd. (1986), 25 D.L.R. (4th) 119 (Sask. C.A.); and GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div.). All of these cases discuss when the proposed transfer is a transfer of "all or substantially all of the property of a corporation").

- A notice of meeting of shareholders must include a copy or summary of the agreement of sale, lease or exchange and must state that a dissenting shareholder is entitled to be paid fair value for his or her shares (section 183(3)).

- Each share (whether voting or not) carries a right to vote in respect of the proposed sale, lease or exchange (section 183(5)); and class votes are authorized if the classes are so entitled (section 183(6)).

- A mortgage or pledge of substantially all of a corporation’s property is not a disposition of the property within the meaning of this provision (section 183(1)).

Appraisal and Dissent Rights (section 184)

The SBCA provides that infringement on certain of a shareholders’ fundamental rights triggers an opting out at fair value.

Only some fundamental changes trigger the A & DR (section 184(1)). These include:

- changing the provisions concerning issue or transfer of shares of a class under section 167 or section 168 (section 184(1)(a));
- changing business restrictions under section 167 (section 184(1)(b));
- amalgamating with another corporation (not including short form vertical and horizontal amalgamation (section 184(1)(c)):
• continuing in another jurisdiction under section 184(1)(d); and

• the sale, lease or exchange of all or substantially all of the property of the corporation under section 183 (2) (section 184 (1)(e)).

The articles of a corporation may provide that the holders of any class or series of shares entitled to vote under section 170, other than holders of shares of a distributing corporation may dissent on a proposal to amend the articles as above (section 184(2)).

A & DR are triggered if a change is made under an order for reorganization under section 185 or an order under section 234.

On application under section 184, the Court may make an order fixing fair market value of a shareholder’s shares, and give judgment in that amount against the corporation and in favour of the dissenting shareholder.

In connection with an application to fix fair value, the Court may:

• join all dissenting shareholders whose shares have not been purchased as parties. (section 184(19));

• direct the appointment of one or more appraisers to assist the court to fix a fair value for the shares of the dissenting shareholders (section 184(21)); or

• allow a reasonable rate of interest on the amount payable to each dissenting shareholder (section 184 (23)).

### Procedure for Dissenting Shareholders

A notice of shareholders’ meeting must be sent between 21 to 50 days before it is to be held (section 129(1)). The notice must set out the text of the special resolution and the nature of the special business in sufficient detail to allow a shareholder to make a reasoned judgment (section 129(6)). It must also advise of the shareholders’ right of dissent.

Generally, an individual must be a "registered shareholder" to dissent. A dissenting shareholder must send to the corporation, at or before any meeting of shareholders at which the resolution he objects to is to be voted on, a written objection to the resolution (unless the corporation did not give notice as to the purpose of the meeting or his right to dissent) (section 184(5)).
If the resolution is adopted, the corporation is required to notify the dissenting shareholders that it has been adopted within 10 days (section 184(6)).

The shareholder then has 20 days from the date he receives the notice (or if he does not receive the notice, 20 days after he learns the resolution has been adopted) to send to the corporation a notice demanding payment for his shares at fair market value (section 184(7)).

The dissenting share certificates must be sent to the corporation or its transfer agent within 30 days of the sending of this notice (section 184(8)). The corporation or transfer agent will then endorse the share certificate that the holder is dissenting shareholder and return the certificates (section 184(10)).

Within seven days after the resolution was approved or the day on which the corporation received the shareholder’s notice of dissent (whichever is later), the corporation must send a written offer, on the same terms as all other shares of the same class or shares, to pay for the shareholders shares in an amount considered by the directors to be fair market value, together with a statement showing how fair value was determined (section 184(12), section 184(13)). If the offer is accepted, the corporation must pay for the shares within 10 days of acceptance. The offer will lapse if not accepted within 30 days (section 184(14)).

If the corporation fails to make a written offer, or the dissenting shareholder fails to accept an offer, the corporation may, within 50 days after the action approved by the resolution is effective (or at a later date with the court’s permission), apply to the court to fix a fair value for the shares of any dissenting shareholder (section 184(15)). If the corporation does not make this application, the dissenting shareholder can make it within the following 20 days (or at a later date with the court’s permission) (section 184(16)). These applications are to be made to a court having jurisdiction in the place where the corporation has its registered office, or where the dissenting shareholder resides, if the corporation carries on business in that province (section 184(17)).

When an application is made, all dissenting shareholders whose shares have not been purchased by the corporation are joined as parties (the corporation must send notice of the application and the shareholder’s rights at the hearing), and they will all be bound by the court’s decision (section 184(19)).

The Court is entitled to appoint appraisers to assist in determining the fair value of the dissenting shareholder’s shares (section 184(21)). Once the Court has fixed a fair value for the shares, it will render a judgment against the corporation for the amount of the shares in
favour of each dissenting shareholder (section 184(22)). The Court can also allow a reasonable rate of interest from the date the action was approved by resolution until the date of payment (section 184(23)).

There is a limitation on the requirement that the corporation make a payment to the dissenting shareholder. If there are reasonable grounds to believe:

(i) that the corporation is or would after the payment, be unable to pay its liabilities as they become due, or

(ii) the realizable value of the corporation’s assets would thereby be less than the aggregate of its liabilities,

the corporation is required, within 10 days of the court order, to send a notice to each dissenting shareholder that is unable to lawfully pay the dissenting shareholders for their shares (section 184(26), section 184(24)). The dissenting shareholder then has 30 days to either withdraw his notice of dissent and reinstate himself to his full rights as a shareholder, or, retain his status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to, or in a liquidation, to be ranked subordinate to creditors but in priority to shareholders (section 184(25)).

It should also be noted that shareholders exercising their right of dissent do not lose status to bring an action based on oppressive conduct, since a complainant in such an action can include a former security holder.

Fair Value

Fair value is a range, within which the Court must fix an amount which is “just and equitable and contains within itself the concept of adequate compensation”: 85956 Holdings Ltd. v. Fayerman Brothers Ltd. (1987), 57 Sask R 141 at para. 11 (“Fayerman Brothers”).

The Saskatchewan Court of Queen’s Bench in Fayerman Brothers accepted the proposition that there are at least four ways of valuing shares in a company:

(a) market valuation - uses quotes from the stock exchange;
(b) net asset valuation - takes into account the current value of the company’s assets and not just the book value;
(c) investment valuation - relates to the earning capacity of the company; and
(d) a combination of the above three.
The Alberta Court of Queen’s Bench and Ontario Court of Justice have suggested that in determining whether to apply a market approach to valuation, the court should consider the trading volume of the company, the ease of asset valuation, the likelihood of liquidation, and possible imperfections in the market: *Deer Creek Energy Limited v. Paulson & Co. Inc.*, 2008 ABQB 326 at para. 508 ("Deer Creek"); *Silber v. BGR Precious Metals Inc.* (1998), 41 O.R. (3d) 147 (C.J.) at 152.

The market value approach was applied in *Montgomery v. Shell Canada Ltd.* (1980), 3 Sask. R. 19 (Q.B.). In that case, two-thirds of the shares were held by one entity, but the remaining shares were widely and actively traded, and the Court found that the control block had not affected the price of the shares on the stock exchanges. The Court found that the market value approach was appropriate.

The net asset approach (sometimes known as the liquidation or breakup approach) may be inappropriate in cases of a "going concern", because it values assets in a breakup or liquidation scenario and not on the basis of an ongoing business. The asset approach is, fundamentally, an examination of a corporation’s assets minus its liabilities, however, it may also consider other factors such as similar recent transactions or the market price of the shares ("Deer Creek" at para. 445).

The investment valuation approach looks at the question of what rate of return or return on investment an investor requires in order to purchase property. This method of valuation is also known by other names including "earn outs", "earn out periods", "pay outs" and "capitalization rates."

Subsection 184(3) requires that fair value be established “as of the close of business on the day before the resolution was adopted or the order was made”.

The process of who bears the burden of proof in fixing fair value is discussed in *Fayerman Brothers*. Hrabinsky J. held that the applicant (dissenting shareholder) would have to adduce evidence as to the fair value of the shares first. The defendant corporation would then have an opportunity to adduce its own evidence as to the value of the shares. Overall, however, “there is no real onus of proof on either of the parties”. It is for the court to determine the fair value of shares, with the assistance of appraisers, if necessary.
This issue is also discussed in *Ford Motor Co. of Canada v. Ontario Municipal Employees Board*, (1997), 36 O.R. (3d) 384 at para. 19:

*Although either the company or the dissenting shareholders may be the applicant in the statutory application to fix fair value, neither bears the burden of proof. In particular, the dissenting shareholders do not have to establish that the corporation's offer is too low.* See *Ultramar Canada Inc. v. Montreal Pipe Line Ltd.* (1990), 70 O.R. (2d) 136 (Ont. H.C.), additional reasons at (1990), 75 O.R. (2d) 498 (Ont. Gen. Div.); *Smeek v. Dexleigh Corp.*, (1990), 72 D.L.R. (4th) 609 (Ont. H.C.). Similarly, there is no onus on the corporation to establish that its offer represents fair value. In the end, the court must determine fair value on the evidence, the pleadings and in the exercise of its judgment. Section 185(25) permits the court to appoint one or more appraisers to assist in that determination.

Thus, there is no true “burden of proof” in these valuation cases.
# Summary of Shareholders’ Remedies

<table>
<thead>
<tr>
<th>Fundamental Change</th>
<th>Section</th>
<th>Voting Shares Only Have Right to Vote</th>
<th>All Shares Have Right to Vote</th>
<th>Separate Class or Series Vote</th>
<th>Dissent and Appraisal Right</th>
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<tr>
<td>Change of Name</td>
<td>167(1)(a)</td>
<td>Yes</td>
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<td>Changes in capital structure</td>
<td>167(1)(d) to (k)</td>
<td>Subject to section 170</td>
<td>Subject to section 170</td>
<td>Subject to section 170</td>
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<td>Any other change to articles</td>
<td>167(1)(n)</td>
<td>Yes</td>
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<td>Constraints on transfer</td>
<td>168</td>
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<td>Number of directors</td>
<td>167(1)(l)</td>
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<td>Amalgamations</td>
<td>175 to 180</td>
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<td>No *</td>
<td>Yes – unless it is a vertical or horizontal amalgamation</td>
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<td>Reorganizations and arrangements</td>
<td>185 to 186.1</td>
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<td>Export of corporation</td>
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<td>Continuance of Import **</td>
<td>181 and 258</td>
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<td>No</td>
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<td>Sale or lease of substantially all property</td>
<td>183</td>
<td>No</td>
<td>Yes</td>
<td>No *</td>
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* Unless specially affected

** Subject to law of original jurisdiction on import