

Dissenting Shareholders

If you are a minority shareholder who is dissatisfied with a major decision or a majority shareholder contemplating a major change, you should be aware of a powerful remedy called the right of dissent.

Shareholders resolutions are passed by a majority or two thirds of the voting shareholders of the Corporation. The voting threshold required to pass a resolution is outlined in the Ontario Business Corporations Act (“OBCA”) and changes depending on the subject matter.

Typically, once a resolution is passed, the business is concluded and the shareholders who voted against the resolution have no further recourse.

However, for certain events that involve a fundamental change in the corporations business, the objecting shareholders are not completely powerless and have remedies to ensure their interests are protected, should they choose to exercise them..

Section 185 of the OBCA lists certain decisions, which allows an objecting shareholder to initiate a “dissent process”. A dissent process allows an objecting shareholder, referred to as a ‘dissenting shareholder’, to exit the corporation and be paid the fair value of his or her shares.

The timelines and details regarding the dissent process are strict and technical. This article is only intended to provide a brief overview of the process.

WHAT TRIGGERS A DISSENT PROCESS?

The dissent process under the OBCA is not available every time a shareholder opposes a resolution, but rather, only in prescribed circumstances. For example, Section 185 of the OBCA permits shareholders to exercise their dissent rights in the following situations:

- the sale, lease or exchange of all or substantially all the corporation’s property;
- certain amalgamations with other corporations; and
- certain amendments to the articles of incorporation that add or change restrictions on the issuance, transfer or ownership of shares.

This is only a summary and not an exhaustive list. It is important to note that the resolutions for which dissent rights are available require at least two thirds shareholder approval to be passed, but not

every resolution that requires two thirds shareholder approval triggers the availability of dissent rights.

WHEN DOES A LEASE OR SALE OF ASSETS TRIGGER THE DISSENT PROCESS?

Depending on the nature of the business of the corporation, most leases and sales of assets are done in the ordinary course of the corporation’s business and do not require shareholder approval. If so, leases and sales of corporate assets may be approved by the directors, unless the by-laws of the corporation require shareholder approval. Those shareholders that oppose the transaction will not be entitled to exercise dissent rights. This is true even if the transaction involves a large portion of the corporation’s total assets.

However, a lease or sale of **all or substantially all** of the property of a corporation which is out of the ordinary course of its business must be approved by a special resolution. If shareholders vote against

such a resolution, they are entitled to dissent.

For example, a long term lease may seem like a transaction out of the ordinary course because it binds/restricts up the corporation's assets for an extended period of time. However, if the corporation is in the business of property management and typically enters into leases in its day-to-day affairs, this could be an ordinary transaction. On the other hand, if the bulk of the corporation's inventory is being sold and will not be replaced, this would likely be a sale of substantially all of the assets and out of the ordinary course of business.

A corporation should seek legal counsel to determine if a lease or sale of its assets requires the approval of its shareholders and gives rise to dissent rights. Failing to seek shareholder approval or notify shareholders of their dissent rights may have serious consequences.

HOW SHOULD SHAREHOLDERS EXPRESS THEIR DISSENT?

When a shareholders meeting is called to approve a resolution that could give rise to dissent rights, the notice should contain at least the following:

- (i) the text of the special resolution to be voted on;
- (ii) enough supporting information for shareholders to make an informed decision; and
- (iii) a brief message notifying shareholders of their right to dissent and be paid fair value for their shares.

For more information on notice requirements for meetings, please speak with us.

Note, it is not enough for a shareholder to vote against a resolution. To invoke his or her dissent rights under section 185, a shareholder must send written notice to the corporation. This Notice of Dissent must be given either before or during the meeting at which the resolution is to be voted on. Dissent rights may be exercised whether the shareholder has voted against the resolution or abstained but not if the shareholder voted in favour of the resolution.

WHAT HAPPENS AFTER SHAREHOLDERS FILE A NOTICE OF DISSENT?

(a) Confirmation Notice

Within 10 days after the resolution in question is adopted, the corporation must send a written notice of its adoption (a "*Confirmation Notice*") to all shareholders that have filed and not withdrawn a Notice of Dissent. The Confirmation Notice must set out the rights of the dissenting shareholder and how to exercise those rights.

(b) Demand for Payment & Return of Share Certificate

Upon receiving a Confirmation Notice, the dissenting shareholders are under strict timelines to submit to the corporation a *Demand for Payment* of the fair value of their shares and their share certificates.

The corporation must then mark the respective share certificates to show they represent dissenting shares.

(c) Offer to Pay

Not later than seven days after the later of the day on which the action approved by the resolution is effective and the day the corporation receives the *Demand for Payment*, the corporation must send to each dissenting shareholder a written *Offer to Pay*. The *Offer to Pay* must set out an amount considered by the directors to be the fair value of the shares and be accompanied by a statement showing how the fair value was determined. This determination may require help from a professional valuator.

The *Offer to Pay* remains open for a set period of time. If the *Offer to Pay* is accepted by the dissenting shareholder during this time, the corporation has to make payment within ten days of acceptance. If the *Offer to Pay* lapses and is not accepted or the *Offer to Pay* was never made, the parties may be able to apply to court to fix the fair value of the dissenting shareholders shares.

There may be tax issues regarding the payment for the dissenting shareholders shares. We encourage clients to seek tax advice prior to making or accepting any such offers.

WHAT ARE THE DISSENTER'S RIGHTS?

Once a shareholder sends a *Demand for Payment*, that shareholder loses all rights as a shareholder, including the right to receive dividends, and is only entitled to be paid the fair value of the shares, except where:

- (i) the dissenting shareholder withdraws his or her Demand for Payment prior to the corporation making an *Offer to Pay*;
- (ii) the corporation fails to make an *Offer to Pay* in the prescribed time period and the dissenting shareholder withdraws his or her *Demand for Payment*; or
- (iii) in certain circumstances, the directors revoke the resolution in question.

Dissenting shareholders are permitted to withdraw their dissent before the corporation submits its *Offer to Pay*, or the resolution is revoked (in limited circumstances).

If the dissent is withdrawn in accordance with the OBCA, then all of the shareholder's rights are reinstated as of the date the shareholder sent the *Demand for Payment*.

WHAT ARE THE SOME OF THE PRACTICAL CONSEQUENCES OF DISSENTING?

As stated above, a shareholder who dissents loses all rights as a shareholder other than the right to be paid fair value of his or her shares.

From the date a *Demand for Payment* is made (and not withdrawn in accordance with the OBCA) the shareholder is not entitled to participate in the future profits of the corporation. If the Corporation has a capital dividend account the shareholder should consider whether he or she will lose the benefit of the capital dividend account if he or she dissents.

Conversely, the dissenting shareholder is able to fix the value of his or her shares. If the corporation subsequently declines in value that will not affect the fair value of the dissenting shareholder's shares.

HOW IS BUSINESS TO BE CONDUCTED DURING THE DISSENT PROCESS?

During the dissent process, the corporation may continue with business as usual; this means holding meetings and carrying out the action approved by the special resolution. If the dissenting shareholder has submitted a *Notice of Dissent*, but not a *Demand for Payment*, the shareholder may still retain his or her shareholder rights and be entitled to be included in all shareholder meetings, paid dividends and in every other way treated like other shareholders of the same class.

The OBCA's dissenting shareholder provisions are detailed, time sensitive and technical. The transactions being approved may be controversial. The dissent process can be an expensive process for the corporation. If you are a shareholder looking to exit a corporation or a corporation wishing to protect itself from liability, you should seek out legal advice.

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