

MINORITY BUY-OUT RIGHTS IN THE COMPANIES ACT 1993

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I. INTRODUCTION

The purpose of this article is to review the buy-out, or appraisal, rights available to minority shareholders in the Companies Act 1993. Buy-out rights enable shareholders who dissent to specified special resolutions to exit a company by requiring it to purchase their shares at a fair and reasonable value.¹ The special resolutions that trigger buy-out rights were described by the New Zealand Law Commission as involving “fundamental” changes to the nature of a company or changes to the rights attached to the shares held by a shareholder.² In fact they are special resolutions of a company approving a major transaction, a long form amalgamation, an alteration to a company’s constitution that imposes or removes a restriction on its activities together with a special resolution of an interest group that alters the rights attached to the shares of that group.

This review begins by examining the stated reasons for the introduction of buy-out rights in New Zealand and North America in the light of the actual role such rights have played in North America. The focus then shifts to circumstances in which buy-out rights are triggered, the statutory procedure that dissenting shareholders must follow and issues likely to arise in the context of an assessment of what is a “fair and reasonable” price for the shares of dissenting shareholders.

II. A RATIONALE FOR BUY-OUT RIGHTS.

Buy-out rights, said the New Zealand Law Commission, are:

... designed to ensure that in the case of fundamental change to the nature of the enterprise and to the class rights enjoyed by the shareholder, a dissenting minority shareholder does not inevitably have to accept the majority decision. The shareholder will instead have the option of leaving the company ... The buy-out procedure recognises not only that there is a level of change to which it is unreasonable to require shareholders to submit but also that in many cases the presence of a disgruntled minority shareholder will be of little benefit to the company itself.³

The official explanation given for the introduction of buy-out rights in Canada reflects that given by the New Zealand Law Commission. Buy-out rights have been a feature of Ontario’s company law since 1953,⁴ but they were not incorporated on a national basis until the adoption of the recommendations contained in the Dickerson Report⁵ in 1975.⁶ The authors of this report explained the function of the new rights as:⁷

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1 This right is subject to the exceptions in ss 111(2), 114 and 115 of the Companies Act 1993. See Part IV below.

2 New Zealand Law Commission, *Report No. 9 Company Law Reform and Restatement* (1989) 203.

3 *Ibid*, at 203 and 206.

4 Corporations Act 1953, S.O. 1953, c. 19, s 99.

5 R Dickerson, J Howard & L Getz, *Proposals for a New Business Corporations Law for Canada* (1971).

6 Canada Business Corporations Act 1974-75-76, c. 33, s 184. The current provision is contained in the Canada Business Corporations Act R.S.C. 1985, c. C-44, s 190.

7 Dickerson Report, *op cit*, above n 5, at 347. See also *Canadian Gas & Energy Fund Ltd v Sceptre Resources Ltd* [1985] 5 WWR 43, 50.

... if the majority seeks to change fundamentally the nature of the business in which the shareholder invested, and if the shareholder dissents from the change, he may demand that the corporation pay him the fair value of his shares as determined by an outside appraiser.

The Dickerson Report, unlike its New Zealand equivalent, dealt briefly with the historical background that led to the identified need for buy-out rights. It was suggested that the introduction of such rights compensated shareholders for a right of veto that they once possessed in respect of fundamental corporate changes and for which the common law had been unable to develop a satisfactory replacement.⁸ In Great Britain, whose company law system New Zealand followed until the enactment of the Companies Act 1993, it was true that unanimous shareholder consent was required to amend the deed of settlement of a joint stock company.⁹ However, any consistent right of veto that minority shareholders possessed was removed by the introduction of the first general legislation to regulate joint stock companies – the Joint Stock Companies Act 1856.¹⁰ Section 33 of this Act reserved the right to the company in general meeting by special resolution to alter or add to its articles of association. Section 12 of the Companies Act 1862,¹¹ which introduced the modern form of company, went further and provided that the company by special resolution could modify certain aspects of its memorandum of association.¹² Section 160 of Companies Act 1862 also provided that a company in voluntary liquidation could reconstruct by way of special resolution authorising the liquidator to transfer company property to another company in return for shares in the transferee company.

Minority shareholders were not totally ignored by legislation. Section 161 of the Companies Act 1862 gave a shareholder who dissented to a special resolution that the liquidator of a company in voluntary liquidation transfer company property in return for shares the right to require the liquidator to purchase his or her shares at a price to be determined by agreement or arbitration. This, of course, was a very early form of buy-out right and one which survived in New Zealand in s 278 of the Companies Act 1955. Another early form of buy-out right could be found in s 208(2) of the Companies Act 1955 which allowed a shareholder who dissented from an offer to purchase the shares of a company, or of a class, of which 90% of other shareholders had accepted to require the offeror to purchase his or her shares on the same terms as previously offered or otherwise as agreed or as fixed by the High Court. Further, s 209 of the Companies Act 1955 conferred upon the High Court a discretion to order various forms of relief if it considered it just and equitable to do so once minority shareholders had established that a change or proposed change was oppressive, unfairly discriminatory or unfairly prejudicial.¹³ Minority shareholders could also seek an order that a company be wound up on the ground that it was just and equitable to do so pursuant to s 217(f) of the Companies Act 1955.¹⁴

8 See J.H Farrar and M.W Russell, *Company Law and Securities Regulation in New Zealand* (1985) 80-88.

9 *Natusch v Irving* (1824) 2 Coop. T. Coop 358; 47 E.R 1196.

10 19 & 20 Vict, c. 47 (UK).

11 25 & 26 Vict. c. 89 (UK).

12 For the modern equivalent see ss 17 and 18 of the Companies Act 1955.

13 See now s 174 of the Companies Act 1993.

14 *Re Tivoli Freeholds Ltd* [1972] VR 445. The equivalent provision in the Companies Act 1993 is s 241(4)(d).

Despite the protection described above, few would argue that the combination of a lack of an available market and possible restrictions in a company's constitution on the disposal of its shares could operate to limit the ability of minority shareholders to exit a closely held company and obtain a fair and reasonable price for their shares.¹⁵ This point is reinforced by the attribute of perpetual succession conferred upon a company on incorporation, in other words, there is no end in sight for minority shareholders caught in a closely held company fundamentally different from the one in which they originally invested. Further, even where there is an available market for a company's shares it is another issue entirely as to whether the market price is a fair and reasonable price.¹⁶

A considerable amount of paper has been consumed in the United States of America in an attempt to rationalise the continued existence of buy-out rights and the form that such rights should take. The origins of buy-out rights in the United States can be traced to the process of company incorporation that developed after the American Revolution. After this time the only method of company incorporation was by a grant of a charter – initially by a private Act passed by a state legislature and from the early nineteenth century onwards by general incorporation statutes.¹⁷ A company's charter, whether granted by a private Act or general incorporation statute, was deemed to form a contract to which the company, the state and shareholders were parties.¹⁸ In cases of change categorised as “fundamental” ordinary contractual principles applied, that is, the charter could not be varied without the unanimous consent of all shareholders.¹⁹ As the Supreme Court of Ohio in *Armstrong v Marathon Oil Co* explained:²⁰

...the stockholder has purchased a portion of a going concern, and his approval was necessary to divest him of that which he had purchased.

However, as technology advanced with the industrial revolution it became feasible and then a reality for large companies to exist. A shift in focus then occurred so that it became to be seen as “immoral” for one shareholder to be able to veto a course approved by the majority.²¹ Ultimately the 18th and early 19th century rules²² requiring unanimity in the context of charter amendments involving fundamental change were relaxed in favour of the more familiar concept of majority or supermajority rule – first by the courts and then by a growing number of state legislatures throughout the late 19th and early 20th centuries.²³

15 Farrar & Russell, *op cit*, above n 8, at 248, New Zealand Law Commission, *op cit*, above n 2, at 207; *Canadian Gas and Energy Fund Ltd v Sceptre Resources Ltd* [1985] 5 WWR 43, 51.

16 See Part V below.

17 C.A Cooke, *Corporation Trust and Company* (1950) 93 - 94; B.W King, “The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy and Shareholder Protection” (1996) 21 Del. J Corp. L 895, 900.

18 E.M Dodd, “Dissenting Stockholders and Amendments to Corporate Charters” (1927) 75 U of Pa L. Rev 585, 586; N.D Lattin, “Minority and Dissenting Shareholders’ Rights in Fundamental Changes” (1958) 23 Law & Contemp Prob 307, 307; E.J Weiss, “The Law of Takeout Mergers: A Historical Perspective” (1981) 56 N.Y.U.L. Rev 624, 629; M Siegel, “Back to the Future: Appraisal Rights in the Twenty-First Century” (1995) 32 Harv. J. Legis 79, 86; *Armstrong v Marathon Oil Co* 513 N.E.2d 776, 781 (1987) (Ohio. SC); *Stringer v Car Data Systems Inc* 841 P.2d 1183, 1184 (1992) (Or SC).

19 W.J Carney, “Fundamental Corporate Changes, Minority Shareholders & Business Purposes” (1980) Am. B. Found. Res. J 69, 78; King, *op cit*, above n 17, at 901.

20 513 N.E.2d 776, 782 (1987).

21 Carney, *op cit*, above n 19, at 80-82; King, *op cit*, above n 17, at 909.

22 This was not a uniform development in all areas. Carney, above n 19, at 79 reports a number of instances of the requirement of unanimous consent being enforced by the courts in the early 20th century.

23 Siegel, *op cit*, above n 18, at 86 - 88.

Although there is debate amongst commentators as to whether buy-out rights were a creation of the judiciary²⁴ or of legislation²⁵ there is consensus that their development followed the statutory endorsement of majority rule.²⁶ It seems clear, however, that the development of minority buy-out rights was not an immediate response to the introduction of majority rule. Thompson notes that it was not until the 1920s and 1930s that statutory buy-out rights were common.²⁷ Notably the new statutory provisions did not extend the circumstances in which minority buy-out rights were triggered beyond those situations where unanimous shareholder approval had once been required. Further, the events which triggered these new statutory buy-out rights varied from state to state with some choosing to confer buy-out rights in all circumstances where unanimous shareholder consent was previously required and others in only a limited number of those circumstances.²⁸ Variations between states were documented in the early 1960s²⁹ and again in the 1990s.³⁰ In 1994 the American Law Institute noted that all states conferred buy-out rights in the case of some forms of mergers and consolidations.³¹ At the same time, 46 states conferred buy-out rights when a sale of substantially all of a company's assets occurred and 25 in the case of defined amendments to a company's charter.³²

The conventional view in the United States is that buy-out rights developed as a compromise between recognition of the principle of majority control and the accompanying need to confer some protection on the minority.³³ The solution, it was thought, was to give the minority a right of exit so that they were not forced to remain in a company that was radically different from the one in which they had originally invested.³⁴ Other commentators have sought to explain the continued existence of buy-out rights as being necessary to monitor the conduct of management³⁵ and the majority.³⁶ It has also been observed that buy-out rights are of benefit to the company as it is able to continue with the planned change – unless there are sufficient dissenting shareholders to prevent the change occurring.³⁷ This last point also illustrates the monitoring role buy-out

24 B Manning, "The Shareholders' Appraisal Right: An Essay for Frank Coker" (1962) 72 Yale L.J. 223, 246; Siegel, *op cit*, above n 18, at 89.

25 M.A Eisenberg, *The Structure of the Corporation* (1976) 75; H Kanda & S Levmore, "The Appraisal Remedy and the Goals of Corporate Law" (1985) 32 UCLA L. Rev 429, 430; L.D Solomon, D.E Schwartz, J.D Bauman & E.J Weiss, *Corporations Law and Policy* (3rd edn, 1994) 397.

26 Kanda & Levmore, *op cit*, above n 25, at 430; American Law Institute, *Principles of Corporate Governance. Analysis and Recommendations* (1994) 292-293; R.B Thompson "Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law" (1995) 84 Geo L.J 1 at 14.

27 *Ibid*.

28 I.J Levy, "Rights of Dissenting Shareholders to Appraisal and Payment" (1930) 15 Cornell L.Q 420, 421; E.R Latty, "Some Miscellaneous Novelties in the new Corporation Statutes" (1958) 23 Law & Contemp Prob 363, 389-391; Thompson, *op cit*, above n 26, at 14 - 15.

29 Manning, *op cit*, above n 24, at 262-265.

30 Siegel, *op cit*, above n 18, at 81.

31 In the United States a consolidation is said to occur when two companies amalgamate to form a new company whereas a merger occurs when two companies amalgamate and the newly amalgamated company is one of amalgamating companies.

32 *Op cit*, above n 26, at 301.

33 American Law Institute, *op cit*, above n 26 at 291-292; *Walter J Schloss Assoc v Chesapeake & O Ry* 536 A.2d 147, 152 (1988) (Md Ct Spec App); *Steinberg v Amplica Inc* 729 P.2d 683, 687 (1989) (Cal SC).

34 Levy, *op cit*, above n 28, at 421; Eisenberg, *op cit*, above n 25, at 78; Siegel, *op cit*, above n 18, at 94; Thompson, *op cit*, above n 26, at 3.

35 Eisenberg, *op cit*, above n 25, at 83; F.H Easterbrook, & D.R Fischel, *The Economic Structure of Corporate Law* (1991) 145-47.

36 J.L Weiner, "Payment of Dissenting Shareholders" (1927) Colum L. Rev 547; Easterbrook & Fischel, *op cit*, above n 35, at 145-47.

37 J.D Cox, T.L Hazen & F.H O'Neal, *Corporations* (1995) 22.24.

rights may play – the very existence of such rights may well cause company management to review carefully the plans for change it presents to shareholders.³⁸

However, when one focuses on the practical role that buy-out rights have played in the United States it becomes apparent that they have not worked in quite the way envisaged by those attempting to rationalise their existence. The initial evidence was that buy-out rights were utilised only infrequently.³⁹ The first edition of *Folk on the Delaware General Corporation Law* said that “the right is decreasing in significance, and it would not be surprising to see it eliminated altogether.”⁴⁰ In 1976 buy-out rights were described by Eisenberg as “a remedy of desperation.”⁴¹ On a more concrete basis Seligman cites evidence of 16,479 mergers involving companies incorporated in the United States between 1972 and 1981 but only twenty reported state court decisions involving buy-out rights – not only in mergers but in all other triggering transactions.⁴² It seems that early statutory versions of buy-out rights must take some of the blame for this lack of use. There was criticism of the complicated procedures minority shareholders had to follow, the costs associated with the exercise of such rights, the way in which triggering events were defined and of early legal standards for valuation of shares adopted by the courts.⁴³

In the 1990s a different view has emerged. In 1992 the third edition of *Folk on the Delaware General Corporation Law* reported that “the appraisal right is alive and well.”⁴⁴ Siegel, in 1995, wrote that “[t]here is a resurgence of interest in appraisal rights.”⁴⁵ Further, Thompson in the ten year period from 1984 to 1994 recorded that there were 103 reported appellate decisions involving buy-out rights.⁴⁶ It is fair to note that from the mid 1980s onwards a new approach to valuation of shares was adopted by the courts⁴⁷ and many states adopted the improvements to the statutory procedures that were included in the 1985 Revised Model Business Corporation Act.⁴⁸ However, it seems that these changes do not fully explain the increased use of buy-out rights.

Instead the explanation can be found in the role that buy-out rights now play in the context of what are variously called “freeze-out,” “squeeze-out” or “cash-out” mergers.⁴⁹ Such mergers take various forms but all involve the involuntary elimination of a minority shareholder’s holding in

38 Ibid.

39 American Law Institute, op cit, above n 26, at 302-303; J Seligman, “Reappraising the Appraisal Remedy” (1984) 52 Geo. Wash. L. Rev 829, 830.

40 E.L Folk, *Delaware General Corporation Law* (1972) 373.

41 Op cit, above n 25, at 83.

42 Op cit, above n 39, at 829.

43 Manning, op cit, above n 24, at 233; Eisenberg, op cit, above n 25, at 83; Weiss, op cit, above n 18, at 653; Seligman, op cit, above n 39, at 52; American Law Institute, op cit, above n 26, at 293, 309-311; Siegel, op cit, above n 18, at 124.

44 E.L Folk, R Ward, & E.P Welch, *Folk on the General Corporation Law* (3rd edn, 1992) 262.1

45 Siegel, op cit, above n 18, at 79.

46 Op cit, above n 26, at 25.

47 *Weinberger v UOP Inc* 457 A.2d 701, 712-713 (1983) (Del SC).

48 American Law Institute, op cit, above n 26, at 294; Siegel, op cit, above n 18, at 83.

49 *Stringer v Car Data Sys Inc* 841 P.2d 1183, 1184 (1992) (Or SC).

a company.⁵⁰ Shareholders in such mergers feature with far greater frequency in the reported cases than do shareholders taking the opportunity to voluntarily exit a company undergoing fundamental change.⁵¹ Thompson notes that in the 103 reported appellate decisions between 1984 and 1994 that:⁵²

... [o]f the eighty identified transactions involved in those cases, more than eighty percent involved cash-outs; only six arose in transactions between independent corporations in which shareholders had the opportunity to continue.

Cash-out mergers did not feature in the reported cases on the early statutory versions of buy-out rights for one key reason – they were generally not permitted.⁵³ It was not until the 1960s that the use of cash as consideration in the context of mergers was permitted by statute in most states.⁵⁴ However, it was the Supreme Court of Delaware decision in *Weinberger v UOP Inc*⁵⁵ that gave buy-out rights new prominence. Weinberger brought a class action challenging the elimination of UOP Inc's minority shareholders by way of a cash-out merger between UOP Inc and Signal Companies Inc. Signal held 50.5% of the shares in UOP and the merger was approved by it and the majority of the minority shareholders in UOP. Weinberger did not seek to seek to exercise appraisal or buy-out rights. He instead sought rescissionary damages alleging that the merger did not meet the business purpose test approved by the Supreme Court of Delaware in *Singer v Magnvox Co*,⁵⁶ *Tanzer v International General Industries Inc*⁵⁷ and *Roland International Corp v Najjar*.⁵⁸ This trio of cases had allowed a cause of action against directors who approved a merger that had as its sole purpose the squeezing-out of minority shareholders – such mergers having been held to be “an abuse of the corporate process.”⁵⁹ The Supreme Court in *Weinberger* overruled these earlier cases holding that the business purpose test did not confer any meaningful protection on minority shareholders and was no longer of any force.⁶⁰ The Court indicated that in its opinion the appropriate test for the case before it was whether the merger was fair and that although the concept of “fairness” had two aspects being fair dealing and fair price, “the issue must be examined as a whole since the question is one of entire fairness.”⁶¹ It was ultimately held that there were reversible errors as to both fair dealing and fair price on the given facts and that the appropriate remedy for Weinberger was monetary damages.

50 The most common form of freeze-out transaction involves the amalgamation of one company with another that it controls and where the terms of the amalgamation provide that minority shareholders in the company controlled by the other amalgamating company receive cash for their shares rather than shares in the newly amalgamated company. Another form of freeze-out is a reverse stock split. Here a resolution is passed to reduce the number of shares in the company, for example, for every 20 shares previously held a shareholder will now hold 2 shares, and that all holders of fractions of shares are to receive cash rather than new shares.

51 M.R Schwenk, “Valuation Problems in the Appraisal Remedy” (1994) 16 *Cardozo L. Rev.* 649.

52 *Op cit*, above n 26, at 25-26.

53 Lattin, *op cit*, above n 18, at 664-665; Weiss, *op cit*, above n 18, at 648; Thompson, *op cit*, above n 26, at 21.

54 *Ibid*

55 457 A.2d 701 (1983).

56 380 A.2d 969 (1977).

57 379 A.2d 1121 (1977).

58 407 A.2d 1032 (1979).

59 Schwenk, *op cit*, above n 51, at 663.

60 457 A.2d 701, 704, 715.

61 At 711.

Importantly, for the future, the Supreme Court of Delaware held that a plaintiff's remedy in a cash-out merger, except in circumstances involving "fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching," should be confined to the appraisal, or buy-out, rights conferred by s 262 of the Delaware General Corporation Law.⁶² The Delaware approach has been followed in a number of other states.⁶³ It has been said that the benefit of the Delaware approach is "that it makes more unlikely vexatious law suits by those whose goal is simply to receive more money for their shares."⁶⁴ A further justification is that statute has permitted the freeze out of minority shareholders for cash consideration and the Delaware approach allows corporations to take advantage of such statutory devices.⁶⁵

In practical terms the Canadian experience, like that in the United States, shows that buy-out rights play a dual role and are also used by shareholders who are being involuntarily squeezed out of a company.⁶⁶ Unlike the United States the majority of reported cases do deal with dissenting minority

62 At 714.

63 Thompson, *op cit*, above n 26, at 44. See *Rabkin v Hunt Chem Corp* 498 A.2d 1099 (1985) (Del SC); *Walter J Schloss Assoc v Chesapeake & O Ry* 536 A.2d 147 (1988) (Md Ct Spec App); *Steinberg v Amplica Inc* 729 P.2d 683 (1989) (Cal SC); *Stringer v Car Data Sys Inc* 841 P.2d 1183 (1993) (Or SC); *Rosenstein v CMC Real Estate Cor* 522 N.E.2d 221 (1988) (Ill App Ct); *Green v Santa Fe Indus Inc* 514 N.E.2d 105 (1987) (NY Ct App); *Walter J Schloss Assoc v Arkwin Indus Inc* 460 N.E.2d 1090 (1984) (NY Ct App); *Stepak v Schey* 553 N.E.2d 1072 (1990) (Ohio SC); *Fleming v International Pizza Supply Corp* 676 N.E.2d 1051 (1997) (Ind SC); *Pritchard v Mead* 455 N.W.2d 263 (1990) (Wis Ct App); *Sifferle v Micom Corp* 384 N.W.2d 503 (1986) (Minn Ct App); *In the Matter of Fair Value of Shares of the Bank of Ripley* 399 S.E.2d (1990) (W Va Sup Ct App); *IRA v Brenner Companies Inc* 419 S.E.2d 354 (NC Ct App); *Yeager v Paul Semonin Co* 691 S.W.2d 227 (1985) (Ky Ct App); *American Network Group Inc v Kostyk* 834 S.W.2d 296 (Tenn CA).

64 *Stepak v Schey* 553 N.E.2d 1072, 1075 (1990) (Ohio SC).

65 *Green v Santa Fe Indus Inc* 514 N.E.2d 105, 111 (1987) (NY Ct App).

66 A search of Canadian Case Digests on CD-Rom in November 1997 revealed 33 reported cases on buy-out rights. In fifteen cases an amalgamation triggered buy-out rights and in eight of the amalgamations minority shareholders were frozen out of the amalgamated company: *Wall & Redekop v W & R Properties Ltd* (1975) 50 DLR (3d) 733 (BC SC); *Denischuk v Bonn Energy Corporation* (1983) 29 Sask. R 156; *Lough v Canadian National Resources Ltd* (1983) 45 BCLR 335 (BC SC); *Canadian Gas & Energy Fund Ltd v Sceptre Resources Ltd* (1985) 29 BLR 178; *Jakobson v Agassiz Enterprises Ltd* (1987) 49 Man. L.R. (2d) 270; *Neonex International Ltd v Kolasa* (1978) 84 DLR (3d) 446 (BC SC); *Jepson v Canadian Salt Co* (1979) 7 BLR 181; *Domglas Inc v Jarislowky, Fraser & Co* (1982) 138 DLR 521 (Que CA); *Investissements Mont-Soleil Inc v National Drug Ltd* (1982) 22 BLR 139 (Que CA); *Fraser Inc v Aitken* (1988) 41 BLR 87 (Ont HC); *Lo-Cicero v B.A.C.M Industries Ltd* (1988) 49 DLR (4th) 159 (SCC); *New Quebec Raglan Mines Ltd v Blok-Anderson* (1993) 9 BLR (2d) 93; *Smeenk v Dexeigh Corporation* (1993) 105 DLR (4th) 193 (Ont CA); *Pick v LSI Logic Corporation of Canada* (1995) 131 DLR (4th) 264; *Lake & Co v Calex Resources Ltd* (1996) 139 DLR (4th) 35 (Alta CA). In eight cases sales of assets triggered buy-out rights: *Bradley Resources Corporation v Kelvin Energy Ltd* (1985) 18 DLR (4th) 468 (Alta SC); *Mica Management Centre Inc v Lockett* (1986) 37 BLR 209 (Ont HC); *85956 Holdings Ltd v Fayerman Brothers Ltd* (1986) 32 BLR 204 (Sask CA); *Kelvin Energy Ltd v Bahan* (1987) 52 Alta L.R. (2d) 71; *Martin v F.F Bourgault Industries Air Seeder Division Ltd* (1987) 45 DLR (4th) 296 (Sask CA); *Lindzon v International Sterling Holdings Inc* (1989) 45 BLR 57 (BC SC); *Westmin Resources Ltd v Hamilton* [1991] 3 WWR 716 (BC SC); *Hodge v Pro-Long Technology of Canada Inc* (1996) 67 CPR (3d) 472 (BC SC). In three cases majority approval of a change to the status of the company or the jurisdiction governing the company triggered buy-out rights for the minority: *Bathurst Nominees Ltd (NPL) v Putfield MacKay Ross Ltd* (1984) 24 BLR 252 (BC SC); *Manitoba (Securities Commission) v Versatile Cornat Corporation* (1979) 97 DLR (3d) 45; *National Auto Radiator Manufacturing Co v Warner* (1981) 20 CPC 196 (Ont HC). Alterations to the rights attaching to shares or restrictions on the issue of shares triggered buy-out rights in five cases: *Montgomery v Shell Canada Ltd* (1980) 111 DLR (3d) 116; *Fitch v Churchill Corporation* (1990) 66 DLR (4th) 569 (Alta CA); *Ultramar Canada Inc v Montreal Pipe Line Ltd* (1990) 49 BLR 279; *Brant Investments Ltd v Keeprite Inc* (1991) 80 DLR (4th) 161 (Ont CA); *Xerox Canada Inc v Ontario Municipal Employees Retirement Board* (1991) 3 BLR (2d) 68. In a further two cases the triggering transaction was not disclosed: *Roberts v Canadian Cannery Ltd* (1978) 4 BLR 290 (Ont HC); *Skye Resources Ltd v Camsky Holdings Inc* (1986) 6 CPC 296 (Ont CA).

shareholders who appear to be electing to leave a company undergoing change. However, the role that buy-out rights play in Canada in relation to alternative actions is unclear. A search of *Canadian Case Digests* in November 1997 revealed six times more reported cases dealing with aspects of the remedy for prejudiced shareholders than those dealing with buy-out rights. This, of course, is only the roughest of guides as not only are the circumstances in which shareholders can seek relief pursuant to the prejudiced shareholders remedy far wider than those instances of change that trigger buy-out rights but an application for relief pursuant to the prejudiced shareholders remedy will always involve court proceedings.

So, when the theoretical reasoning for the introduction of buy-out rights into New Zealand company legislation is compared with North American commentary then there are similarities. However, as detailed above, the practical North American experience is that dissenting shareholders do not always utilise buy-out rights in accordance with the conventional explanation for the introduction or retention of such rights – although admittedly this is more the case in the United States than in Canada. It is with this aspect of the North American experience in mind together with the criticisms that were made of way in which early forms of buy-out rights were drafted in the United States that the focus now turns to the manner in which buy-out rights for dissenting shareholders are triggered in the New Zealand legislation.

III. SPECIAL RESOLUTIONS TRIGGERING BUY-OUT RIGHTS

The New Zealand Law Commission described the special resolutions triggering buy-out rights as those involving fundamental change to the nature of a company and it is to these triggering transactions that attention is first directed. As a preliminary point, the ordinary meaning of “fundamental,” according to the *Concise Oxford Dictionary*, is “going to the root of the matter, serving as a base or foundation, essential or primary.” It becomes apparent after one has spent some time speculating on likely examples of fundamental change to the nature of a company that this is a more difficult issue than first appears and that such an issue can only be conclusively resolved on a case by case basis. In the Companies Act 1993 the issue is resolved by categorising as fundamental those changes to a company’s structure or business that historically in the United States required unanimous shareholder approval.

Specifically, “fundamental” change is deemed to occur when a shareholder casts all the votes attached to shares registered in that shareholder’s name and having the same beneficial owner against the special resolutions specified in s 110(a).⁶⁷ These are:

- the alteration of a company’s constitution where the alteration imposes or removes a restriction on the activities of the company.⁶⁸
- the approval of a major transaction.⁶⁹
- the approval of an amalgamation of the company pursuant to s 221 of the Act.⁷⁰

67 Buy-out rights are also triggered if the special resolution was passed by a resolution in lieu of a meeting pursuant to s 122 of the Companies Act 1993 and the shareholder did not sign the resolution: Companies Act 1993, s 110(d).

68 Companies Act 1993, s 110(a)(i).

69 Companies Act 1993, s 110(b)(ii).

70 Companies Act 1993, s 110(b)(ii).

It is apparent from the above description that buy-out rights in the Companies Act 1993 are only available to shareholders entitled to vote and who do in fact vote against the special resolutions specified in s 110.⁷¹ Whilst one has reduced sympathy for those shareholders who do not vote on an issue and then attempt to seek relief in relation to that issue, the position that the Companies Act 1993 takes in respect of shareholders who have no voting rights is in contrast to that in the Canada Business Corporations Act. In the Canadian statute shares that are otherwise non-voting are given voting rights in respect of special resolutions that trigger buy-out rights.⁷² Section 189(6), for example, provides that:

Each share of the corporation carries the right to vote in respect of a sale, lease or exchange referred to in subsec (5) whether or not it otherwise carries the right to vote.

The position in the United States varies from state to state.⁷³ Section 13.02 of the Revised Model Business Corporation Act only extends the right to seek appraisal to those shareholders entitled to vote on a triggering event.⁷⁴ In contrast s 262 of the Delaware General Corporation Law extends buy-out rights in the case of defined mergers and consolidations to both voting and non-voting shareholders. The American Law Institute in s 7.21 of its model company legislation published in 1994 refers to appraisal rights being able to be exercised by an “eligible holder” – defined as a person having a legal or substantial beneficial interest in common or preferred shares that either carry voting rights in respect of the election of directors or who are entitled to a share of the company’s residual earnings.⁷⁵ Such a definition is, of course, likely to include voting and non-voting shares.

The limitation of the availability of buy-out rights in instances of fundamental change to those shareholders who have voting rights is unusual when one considers that the range of other actions set out in Part IX of the Companies Act 1993 do not impose such a restriction. It seems clearly arguable that holders of non-voting shares are even more deserving of an available exit in instances of fundamental change given that they have no voice in respect of the proposed changes. Yet, non-voting shareholders in New Zealand are currently left with the options of finding a buyer for their shares, putting up with the change or seeking to establish the criteria for relief under an overlapping action.⁷⁶

There does not appear to be any American jurisprudence seeking to justify the exclusion of non-voting shares from the exercise of buy-out rights. Indeed very few commentators address this issue. Two who do, one from the 1930s and one from the present, suggest that the limitation of buy-out rights to those shares with voting rights is a historical accident.⁷⁷

71 Section 36(1)(a)(iii),(iv) and (v) of the Companies Act 1993 confers the right to vote on a holder of a share on resolutions involving the alteration of a company’s constitution, the approval of a major transaction and the approval of an amalgamation pursuant to s 221. However, s 36(2) states that these rights may be negated by a company’s constitution. Further, s 37(2)(d) expressly authorises the issue of non-voting shares.

72 See Canada Business Corporations Act, ss 183(3), 188(4).

73 Siegel, *op cit*, above n 18, at 130.

74 American Bar Foundation, *Revised Model Business Corporation Act* (1985).

75 American Law Institute, *op cit*, above n 26, at 310.

76 Of course if non-voting shareholders are successful in establishing the criteria for relief under s 174 (the prejudiced shareholders remedy) then one of the orders the High Court has the discretion to make is an order that the company or other shareholders buy back the shares of the prejudiced shareholders.

77 Levy, *op cit*, above n 28, at 427; Siegel, *op cit*, above n 18, at 130.

The explanation given is that non-voting shares were unknown at the time that the first statutory buy-out rights were being drafted and, hence, statutes which referred to a vote against a defined shareholder resolution as triggering buy-out rights, by default, extended such rights to all shareholders. There appears to be no good reason why the New Zealand statutory provisions adopt this historical anomaly rather than making buy-out rights available to all shareholders.

One possible solution to this difficulty which would not require legislative amendment would be an extension of the circumstances in which buy-out rights are available in a company's constitution. Commentators in both the United States⁷⁸ and Canada⁷⁹ have mooted this possibility and it is directly incorporated in s 13.02(a)(5) of the Revised Model Business Corporation Act and s 7.21(e) of the American Law Institute's model appraisal rights. Such a course in New Zealand would be possible by virtue of s 30(b) of the Companies Act 1993 which provides that a company's constitution may include such matters as the company wishes to include in its constitution.

Restrictions on the activities of a company

The obvious comment that can be made about this triggering transaction is that it is likely to occur only infrequently. The mainstream commentators suggest that only rarely will advantage be taken of s 16(2) of the Companies Act 1993 which allows restrictions on the activities of a company to be included in its company's constitution and the available evidence confirms this.⁸⁰ On a wider note, changes, no matter how great, to a company's activities will not trigger buy-out rights in the vast majority of companies that have no constitutional restrictions on their activities.

Section 110(a) provides that buy-out rights are triggered when a shareholder votes against the exercise of the power set out in "section 106(1)(a) of this Act, and the proposed alteration imposes or removes a restriction on the activities of the company." Section 106(1)(a) refers to the power to adopt a constitution or, if the company has a constitution, the power to alter or revoke that constitution. It seems that despite the reference to "alteration" in s 110(a) it is also intended that buy-out rights will be triggered in situations where a company adopts or revokes a constitution and this has the effect of imposing or removing a restriction on a company's activities.

Major Transactions

A "major transaction" is defined in s 129(2) of the Act as one that involves the acquisition or disposition of assets or the acquiring of rights or the incurring of liabilities, the value of which is more than half of the value of the company's assets before the transaction. "Assets" receives a wide definition in s 129(2) as including property of any kind, whether

⁷⁸ Siegel, *op cit*, above n 18, at 120-121

⁷⁹ J.G McIntosh, "The Shareholders' Appraisal Right in Canada: A Critical Reappraisal (1986) 24 Osgoode Hall L.J 201 at 281-282.

⁸⁰ CCH New Zealand Ltd, *New Zealand Company Law and Practice* (1993) 6-525; Butterworths of New Zealand Ltd, *Morison's Company Law* (1997) 10.2. There have been no cases dealing with the imposition or removal of a restriction on the activities of a company under the Companies Act 1993 in the context of buy-out rights or the prejudiced shareholders remedy. Further, there are no reported cases dealing with the 1980 amendments to the Companies Act 1955 which introduced a similar rule to that in s 16(2) of the Companies Act 1955.

tangible or intangible. Although there are not yet any cases dealing with the definition of “major transaction” in s 129(2) one can find examples of conduct which would fall within this definition in reported cases involving the prejudiced shareholders remedy.⁸¹

The statutory definition of this triggering transaction in the United States varies from state to state with some adopting “quantitative” tests (such as the New Zealand test) and others “qualitative” tests. It appears that the general trend is towards qualitative tests.⁸² The common form of qualitative test in the United States can be found in the Revised Model Business Corporation Act where s 13.02(a)(3) confers buy-out rights in the case of a “sale or exchange of all, or substantially all, of the property of the corporation other than in the usual course of business.”⁸³ The American Law Institute has also proposed a qualitative test in s 7.21(2) of its model form of buy-out rights, being:⁸⁴

A sale, lease, exchange or other disposition of substantial assets by the corporation that . . . (2) Leaves the corporation without a significant continuing business, unless the sale (A) is in the ordinary course of business, or (B) is for cash or cash equivalents that are to be liquidated for cash and used to satisfy corporate obligations, and is pursuant to a plan of complete dissolution by which all or substantially all of the net assets will be distributed to shareholders within one year after the date of such transaction.

A quantitative test has the advantage over a qualitative test in that there will less doubt, unlike in a number of reported Canadian decisions, over whether a triggering event has occurred.⁸⁵ The disadvantage of a quantitative test is that, as it focuses on form rather than substance, a transaction that satisfies the definition of a major transaction may not necessarily involve a fundamental change to the nature of the company. An example of this would be an investment company that sells a major asset but replaces it with an almost identical asset – both the sale and purchase fall within the definition of a major transaction but the nature of the company remains unchanged.

Whatever kind of test is adopted it seems that the question of whether a “major transaction” has occurred may be subject to manipulation. In the case of a quantitative test it is possible to envisage a situation where one particular valuation method is employed over another because it has the effect of avoiding what would otherwise be a major transaction. In the context of both kinds of test a major transaction could be avoided if the assets sold or acquired took the form of several transactions rather than just one so that each fell below the threshold set for a major transaction.⁸⁶ Shareholders in these instances have no buy-out rights but may be able to seek a remedy under the prejudiced shareholders remedy, or possibly, take action against the company’s directors for breach of duty.⁸⁷

81 See *Mellon v Alliance Textiles Ltd* (1987) 3 NZCLC 100,086; *Re Ashby Bergh & Co Ltd* (1988) 4 NZCLC 64,131.

82 American Law Institute, op cit, above n 26, at 305.

83 A similarly phrased triggering transaction can be found in ss 189 and 190 of the Canada Business Corporations Act 1985.

84 Op cit, above n 26, at 300.

85 *Lindzon v International Sterling Holdings Inc* (1989) 49 BLR 57 (BC SC); *Martin v F.P. Bourgault Industries Air Seeder Division Ltd* (1987) 45 DLR (4th) 296 (Sask CA).

86 An example of assets being sold over time which entitled a shareholder to relief pursuant to s 209 of the Companies Act 1955 can be found in *In re Federated Fashions (N.Z) Ltd* (1981) 1 NZCLC 98,109.

87 New Zealand Law Commission, op cit, above n 2, at para 205, Companies Act 1993, s 131.

Amalgamations

The final event which triggers buy-out rights under the “fundamental change” heading is a special resolution in favour of an amalgamation pursuant to s 221 of the Companies Act 1993. Under the Companies Act 1993 there are two methods by which the amalgamation of one company with another can occur. The “short form” of amalgamation described in s 222 does not require shareholder approval and instead proceeds with the approval of the board of each amalgamating company.⁸⁸ The “long form” specified in s 221 requires shareholder approval following the approval of the board of each amalgamating company of an amalgamation proposal. Section 220(g) expressly recognises that the terms of an amalgamation proposal may provide that the holders of shares in one of the amalgamating companies receive consideration for their shares rather than shares in the new amalgamated company. A similar triggering event to that found in the New Zealand legislation can be found in the Canadian legislation.⁸⁹

One of the criticisms of early forms of buy-out rights in the context of mergers and consolidations in the United States was that the focus was on form rather than substance which made it possible for those in control to structure transactions to avoid triggering buy-out rights.⁹⁰ More recent forms of buy-out rights have sought to deal with this problem by extending buy-out rights to other forms of transaction whereby one company in substance merges with another. Section s 13.02(a) of the Revised Model Business Corporation Act, for example, confers buy-out rights not only on those shareholders who dissent from certain kinds of merger but also on dissenting shareholders in a company planning to exchange its shares for cash, property or shares of another company in accordance with a plan of share exchange.⁹¹

The American Law Institute has also sought to deal with this problem and goes further by including as a triggering transaction a “business combination” and defining it in s 7.21(a) as:

A merger, a consolidation, a mandatory share exchange, or an exchange of its stock for substantial assets or equity securities ... of another corporation ..., whether effected directly or by means of a subsidiary ...⁹²

The reference to the business combination being achieved by “means of a subsidiary” includes triangular mergers. Such transactions occur when a company that has a controlling interest in another seeks to merge the company it controls with a wholly owned subsidiary. To retain a wholly owned subsidiary the other shareholders in the “target” firm may be squeezed out by an offer of cash instead of shares in the newly amalgamated company.⁹³ In New Zealand it would then be possible for the newly amalgamated company to merge with its parent by way of a short form

88 Companies Act 1993, s 222. Section 222 further provides that an amalgamation can only take place between a company and one or more other companies that are directly or indirectly wholly owned by that company or between two or more companies that are directly or indirectly wholly owned by the same company.

89 See Canada Business Corporations Act, s 190(1)(c).

90 American Law Institute, *op cit*, above n 26, at 302-303; Thompson, *op cit*, above 26, at 17.

91 Shareholders in the company exchanging its shares for cash, property or shares are required to approve such an agreement: s 11.03 Revised Model Business Corporation Act. Pursuant to a plan of share exchange the company exchanging its shares may end up as a subsidiary of the other party to the plan.

92 American Law Institute, *op cit*, above n 26, at 300.

93 Dissenting shareholders in the target firm would of course trigger buy-out rights pursuant to s 110(1)(ii) of the Companies Act 1993.

amalgamation pursuant to s 222 of the Act. Clearly if this sequence of events occurred then an amalgamation has taken place to which the shareholders of the parent company have not given their approval. Even if a short form amalgamation does not eventuate, for all practical purposes, an amalgamation in substance may have occurred. A judicial solution to problems of this nature in the United States has been the development of what is known as the "de facto merger doctrine" by which buy-out rights are extended to shareholders in situations where in substance one company has merged with another but the transaction is structured so that it avoids triggering buy-out rights.⁹⁴ Such an approach in New Zealand would have some historical support. In the case of the limited right of buy-out available to dissenting shareholders in a voluntary liquidation in the Companies Act 1955 it had been held that if a company sought to reconstruct in this fashion but instead relied on the statutory provisions permitting amalgamation by scheme of arrangement then such a scheme would only be approved if its terms extended buy-out rights to dissenting shareholders.⁹⁵

In New Zealand buy-out rights are extended to all shareholders who are entitled to vote and vote against a special resolution approving an amalgamation. However, if from the perspective of the shareholders in one of the amalgamating companies, the newly amalgamated company carries on the same business under the same management and they make up the majority of shareholders in the new company then it is difficult to argue that a "fundamental change" has occurred. The Revised Model Business Corporations Act⁹⁶ and the Delaware General Corporation Law⁹⁷ seek to deal with this problem by providing that if the number of the surviving company's total shares increases by less than 20 percent then no special resolution of that company's shareholders is required. Section 7.21(a) of the American Law Institute's Model takes a slightly different approach by not extending buy-out rights in business combinations where the shareholders of a company surviving the combination own 60 percent or more of the total voting power of that company in approximately the same proportions as they did before the combination. However, this is not an absolute rule for s 7.21(b) of this model does confer buy-out rights to all shareholders in the case of business combinations, charter amendments and other transactions which have the effect of involuntarily eliminating a shareholder's equity interest in a corporation.⁹⁸

Alteration to class rights

The second situation where buy-out rights are triggered in New Zealand is when a shareholder casts all the votes attached to shares registered in that shareholder's name and having the same beneficial owner against a special resolution passed by the interest group to which the shareholder belongs that approves the taking of action that affects the rights attached to the shares of the group.⁹⁹ An interest group is defined in s 116(1) as a

94 *Applestein v United Board & Carton Corp* 161 A.2d 474 (1960) (New J SC); *Hariton v Arco Electronics, Inc* 188 A.2d 123 (1963) (Del SC); *Morely Brothers v Clark* 361 N.W.2d 763 (1984) (Mich Ct App).

95 See Companies Act 1955, ss 205-207; *Re Tea Corporation Ltd* [1904] 1 Ch 12.

96 Revised Model Business Corporation Act, s 11.03(g).

97 Delaware General Corporation Law, s 251(f).

98 *Op cit*, above n 26, at 300. Such a provision can also be found in s 262 of the Delaware General Corporation Law.

99 Companies Act 1993, s 118.

group of shareholders whose affected rights are identical and whose rights are affected by a proposal in the same way.

Section 117(2) provides that rights that are attached to a share include:

- (a) The rights, privileges, limitations and conditions attached to the share by this Act or the constitution including voting rights and rights to distributions:
- (b) Pre-emptive rights arising under section 45 of this Act:
- (c) The right to have the procedure set out in this section, and any further procedure required by the constitution for the amendment or alteration of rights observed by the company:
- (d) The right that a procedure required by the constitution for the amendment or alteration of rights not be amended or altered.

This triggering transaction reflects the Canadian equivalent in s 190(2) of the Canada Business Corporations Act. However, s 13.02(a)(4) of the Revised Model Business Corporation Act confers buy-out rights in the case of amendments to a company's articles of incorporation that "materially and adversely" affect rights attaching to a dissenter's shares because the amendment alters or abolishes a preferential right, creates, alters or abolishes a right of redemption, alters or abolishes a pre-emptive right, excludes or limits existing voting rights, or reduces the number of shares owned by the shareholder to a fraction if the fractional share is to be acquired for cash.¹⁰⁰ The New Zealand provision, in contrast, extends buy-out rights in the case of all changes, no matter how minimal in effect, to the rights attached to the shares of an interest group.

The exemption

It is apparent from the broad terms in which the triggering events in the New Zealand legislation are defined that there is unlikely to be any question as to whether a triggering event has in fact occurred. Dissenting shareholders in New Zealand will not have to grapple with issues such as whether a sale of company assets is in the ordinary course of business or whether an alteration to the rights attached to shares amounts to a material and adverse change. However, the very breadth with which the triggering transactions dealing with fundamental change are defined may mean that buy-out rights become available in circumstances where in practical terms there has been no fundamental change. This does not accord with the given reasons for the introduction of buy-out rights which make no mention of a wider need to enhance the ability of the minority to quit their investment. Further, if the remedy is freely available in such circumstances then the consequent need to make financial provision for the exit of the dissenting minority could impinge significantly on the power of the majority to select the future direction of company. Although not noting this particular point, the New Zealand Law Commission did recognise the wider issue that there may be circumstances where minority shareholders are legally entitled to exercise buy-out rights but to allow them to do so would be unfair to the majority.¹⁰¹

The Companies Act 1993 seeks to maintain the balance between majority and minority interests by conferring discretion on the High Court to grant a company an exemption from the obligation to purchase the shares of dissenting shareholders.¹⁰² A company seeking an exemption must file

¹⁰⁰ The American Law Institute, see above n 26, at 300-301, in s 7.21(d) of its model also refers to alterations to charter documents that "materially and adversely" affect defined rights attaching to shares.

¹⁰¹ *Op cit*, above n 2, at 207.

¹⁰² Companies Act 1993, s 114.

an application within 20 working days of the company receiving notice from dissenting shareholders that they wish the company to purchase their shares.¹⁰³ This is not the only option open to a company as the board can seek to rescind the resolution that triggered the rights or to arrange for some other person to purchase the shares of the dissenting shareholders.¹⁰⁴ It is also possible that the circumstances surrounding the exercise of buy-out rights could be taken into account when assessing the price to be paid for the shares of dissenting shareholders.¹⁰⁵

To gain an exemption a company must establish one of three grounds. First, that the purchase would be disproportionately damaging to the company.¹⁰⁶ Second, that the company cannot reasonably be required to finance the purchase,¹⁰⁷ or third, that it would not be just and equitable to require the company to purchase the shares.¹⁰⁸ All three exemptions appear to require the same balancing of interests approach undertaken in the context of ss 174 and 241(4)(d) of the Companies Act 1993¹⁰⁹ but, as Jones has suggested, the breadth of the last ground “effectively makes the other exceptions redundant.”¹¹⁰

If the company is successful in establishing one of the above grounds then the High Court is given the discretion not only to make an order exempting the company from the obligation to purchase but any other order it thinks fit but including those set out in s 114(2).¹¹¹ However, the Court is directed by s 114(3) not to make any order on the basis that the purchase would be disproportionately damaging to the company, or that the company cannot be reasonably be required to fund the purchase, unless it is first satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares of dissenting shareholders.

Section 115 allows a company to apply for an exemption if the board has resolved that to purchase the shares would result in the company failing to satisfy the solvency test and that reasonable efforts have been made but have failed to find another person to purchase the shares.

The exemption relating to company solvency also features in s 190(26) of the Canada Business Corporations Act but the grounds for exemption in s 114 are unique to New Zealand. The grounds in s 114 will clearly address the situation where buy-out rights are triggered but in real terms fundamental change has not occurred. Although it seems that the restrictive way in which triggering events are often defined in North America will achieve a similar result, the grounds for exemption in s 114 clearly go further and cover the situation where fundamental change has occurred, or rights attached to shares have been altered, but it is not just and equitable that minority shareholders be allowed to exercise their legal right to a

103 Companies Act 1993, s 112(2)(c).

104 Companies Act 1993, s 111(2).

105 See Part V below.

106 Companies Act 1993, s 114(1)(a).

107 Companies Act 1993, s 114(1)(b).

108 Companies Act 1993, s 114(1)(c).

109 *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 (C.A.). See also ss 209 and 217(f) of the Companies Act 1955.

110 D.O Jones, *Company Law in New Zealand: A Guide to the Companies Act 1993* (1993) 80.

111 That is, an order:

“(a) Setting aside a resolution of 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.”

buy-out.¹¹² What is also different in New Zealand is that the onus is on the company to show that a shareholder should be prevented from exercising buy-out rights rather than being on the shareholder to show that buy-out rights have been triggered.

IV. PROCEDURE

It is the case, that no matter how widely defined the circumstances are in which buy-out rights are triggered, the statutory procedure a dissenting shareholder must follow and the costs associated with this must have a bearing on whether a decision is made to exercise such rights. As has been noted the statutory procedure in North American has been the subject of criticism.¹¹³ Laycraft J, in *Jepson v Canadian Salt Co Ltd*, said of the Canadian procedure that it:

... prescribes a remarkably rigid procedure which, moreover, seems to be slanted in favour of the amalgamated corporation and against a dissenting shareholder. ... I am left to wonder at the legislative policy which produced this procedural morass.¹¹⁴

In the United States the American Law Institute in 1994 said that:

... the procedures surrounding the exercise of the remedy have long been viewed as so cumbersome and time-consuming as to deter all but the largest and most determined shareholders.¹¹⁵

The question is, of course, whether the procedure specified in ss 111-113 of the Companies Act 1993 fares better in a critical analysis.

Notice Requiring Purchase

The first step that a dissenting shareholder must take is to give written notice to the company requiring it to purchase his or her shares.¹¹⁶ The written notice must be given within 10 working days after the passing of the resolution at a meeting of shareholders.¹¹⁷ The point that can be made in respect of the New Zealand provision is that the time frame in which a dissenting shareholder must give notice to the company is short and there is no discretion to extend this time. This raises the issue of whether dissenting shareholders will be aware that buy-out rights are available to them. In the case of amalgamations, s 221(3)(e) of the Companies Act 1993 provides that a statement setting out the rights of shareholders under s 110 must be sent to shareholders along with an amalgamation proposal. There is no such requirement in the case of the other triggering transactions. Clause 2 of the First Schedule to the Act does provide that written notice of the time and place of a meeting of shareholders must be sent to every shareholder entitled to receive notice of the meeting and that the notice must state the business to be transacted at the meeting in sufficient detail to enable a shareholder to form a reasoned judgment in relation to it.

112 But see *China Products of North America Inc v Manewales* 850 P.2d 565 (1993) (Wash Ct App) where buy-out rights were denied in the case of an amalgamation carried out in order to subject a company to Delaware's company law jurisdiction because it was said that this was not the kind of transaction for which the legislation intended to provide buy-out rights.

113 See the above discussion on the practical significance of buy-out rights in the United States of America.

114 (1979) 99 DLR (3d) 513 at 520 (Alta SC)

115 Op cit, above n 26, at 293-294.

116 Companies Act 1993, s 111(1).

117 Companies Act 1993, s 111(1)(a). In the case of a resolution in lieu of a meeting, notice must be given within 10 days after notice of the passing of the shareholder is given to the shareholder: s 111(1)(b).

However, this appears to relate only to a shareholder's decision to vote for or against a resolution and not to encompass the options a shareholder has after he or she has voted. In North America, in contrast, it is common for legislation to provide that shareholders must also be given written notice of the availability of buy-out rights in the case of all triggering transactions¹¹⁸ and a provision of this kind would have been a worthy inclusion in the New Zealand legislation.

Duties of the company on receipt of a notice requiring purchase.

Section 111(2) of the Act provides that within 20 working days of receiving a notice from a shareholder who requires the company to purchase his or her shares, the board must elect to do one of four things and then give written notice of its decision to the shareholder. The board can arrange for the purchase of the shares by the company, arrange for some other person to purchase the shares, apply to the High Court for orders exempting it from purchasing the shares or arrange the rescinding of the shareholder's resolution that triggered the operation of buy-out rights before any action has been taken in respect of that resolution.¹¹⁹

If the board gives written notice to a shareholder that it will purchase the shares in question then it must also at the same time, or within five working days of giving the notice, nominate a fair and reasonable price for the shares and give notice of this to the shareholder.¹²⁰ This same procedure applies if the board elects to arrange for some other person to purchase the shares.¹²¹ From a shareholder perspective it would have been useful had the New Zealand legislation adopted the rule in Canada that a company is required to give notice of the basis on which it has calculated the value of the shares.¹²² Although shareholders generally have the right pursuant to s 178 of the Companies Act 1993 to request information held by a company it is unlikely that this information would be received in sufficient time for it to be taken into account in the decision to accept or object to the offered price. A requirement to disclose the basis on which it fixed the price of shares would not place hardship on the board – if a shareholder objects the board will be in the position of justifying the price it offered in any case. Further, the position in s 112(1) is contrary to other situations in the Act where the board is required to give reasons for the decisions it reaches.¹²³

Purchase or arbitration

If a company has received no objection from the shareholder within 10 working days after the company has served notice on the shareholder nominating a fair and reasonable price for the shares then the company must purchase the shares at a date on which the company and shareholder agree, or if there is no agreement, as soon as practicable.¹²⁴ Jones has

118 See Canada Business Corporations Act, s 190(5) and Delaware General Corporation Law, s 262(d).
119 Companies Act 1993, s 112(a) - (d).

120 Companies Act 1993, s 112(1). Although s 112(1) does not provide for written notice s 391 of the Companies Act 1993 does.

121 Companies Act 1993, s 113(1).

122 Canada Business Corporations Act, s 190(12)(a) provides that the company send to each dissenting shareholder "a written offer for his shares and an amount considered by the directors of the corporation to be the fair value thereof, accompanied by a statement of how the fair value was determined."

123 See, for example, Companies Act 1993, ss 47(2)(c), 49(2)(d) and 52(2).

124 Companies Act 1993, s 112(3).

suggested that a reasonable interpretation of “as soon as practicable” is within 15 working days.¹²⁵ This is calculated on the basis that if the shareholder does object to the price nominated by the board (and the shareholder has 10 working days to do so) then the company is obliged by s 112(4)(a) to pay the amount nominated by the board as the fair and reasonable value of the shares to the shareholders within 5 working days after receiving the notice of objection from the shareholder. Such a suggestion does seem appropriate given that it is difficult to see why a different time period, particularly a longer one, should apply if the shareholder makes no objection to the offered price.¹²⁶ From a company perspective, however, it must be noted that this is only a short time to raise whatever funds might be required to carry out the share purchase. On this point Forsyth J, in *Canadian Gas and Energy Fund Ltd v Sceptre Resources Ltd*,¹²⁷ held that dissenting shareholders are entitled to be paid the price for their shares in cash which, unless the dissenting shareholders consent otherwise, also seems to be a sensible rule.

If a shareholder does object to the price nominated by the company then the shareholder must give notice forthwith.¹²⁸ Although no time period is specified, as was noted above, the obligation is on the company to purchase the shares if no objection is received within 10 working days after receipt of the board’s assessment of the value of the shares. Thus, it seems that for “forthwith” one can read “10 working days.” If the shareholder does object to the price nominated by the board then the board must refer the question of what is a fair and reasonable value to arbitration and within 5 working days after the receipt of the shareholder’s objection pay to the shareholder a provisional price for the shares equal to the price nominated by the board pursuant to s 112(1).¹²⁹

The provision in the New Zealand legislation for reference of a dispute about share valuation to arbitration differs from the position in Canada and the United States where disputes about share valuation are resolved by a court.¹³⁰

The evidence from the United States suggests that the costs of litigation to resolve disputes over share price have been off-putting to shareholders with small shareholdings.

... in the few decisions that have described the size of the plaintiff’s holdings in the corporation, the plaintiff’s investment has only rarely been below \$100,000, and thus the remedy’s contemporary utility for smaller investors seems doubtful.¹³¹

The costs associated with arbitration are unlikely to be any less than those of litigation. The issue then becomes what particular features might work to ensure that minority shareholders do not feel the need to test the price offered to them by the company for their shares. It is suggested that providing shareholders with information about how the company has calculated the offered share price would be one such factor.

125 Jones, *op cit*, above n 111, at 70.

126 *Ibid*.

127 [1985] 5 WWR 43, 53.

128 Companies Act 1993, s 112(2).

129 Companies Act 1993, s 112(4)(a), (b).

130 See, for example, Canada Business Corporations Act, s 190(15), (16) and Delaware General Corporation Law, s 262. In New Zealand recourse to the court system is not totally lost as cl 5 of the Second Schedule to the Arbitration Act 1996 reserves the right for all parties to an arbitration to appeal questions of law arising out of an arbitrator’s award to the High Court.

131 American Law Institute, *op cit*, above n 26, at 295.

Section 112(7) operates once the arbitrator has made his or her award and provides that if the price determined exceeds the provisional price nominated by the company then the company must forthwith pay the balance to the shareholder, and correspondingly, if the price determined is less than the price nominated by the company then the company may recover the excess from the shareholder. Section 112(8) confers upon the arbitrator the power to award interest to be paid by or to the shareholders whose shares are to be purchased on the excess or balance payable and in doing so the arbitrator is to have regard to whether the provisional price paid by the company or reference to arbitration is reasonable. The alternative to leaving matters to the discretion of the arbitrator would be to include a similar provision to the following:

... if the amount so paid is materially less than the amount ultimately determined by the court to constitute fair value, the corporation should be required to pay all costs and expenses of the appraisal proceeding, including such dissenting holder's reasonable attorney's and experts fees. In all other circumstances, the costs and expenses of the action shall be assessed or apportioned as the court deems equitable, except that the corporation's attorney's fees may be assessed or apportioned against a shareholder only when the court finds that the shareholder's action to have been arbitrary, vexatious or not in good faith.¹³²

Such a provision would shift home to the company the risk it faces if it nominates a low purchase price for shares to take advantage of the fact that the costs associated with arbitration are likely to prevent all but those with large and/or valuable shareholdings and/or available resources from disputing its assessment.¹³³

One further factor which may go to reduce the number of objections to the price offered by the company for shares is the development of consistent guidelines for the assessment of share price and this is dealt with in Part V below.

Shareholder status

The Companies Act 1993 makes no provision about the status of dissenting shareholders once they have given notice to the company that they wish their shares to be purchased at a "fair and reasonable" price. This is in contrast to s 190(11) of the Canada Business Corporations Act which provides that once a shareholder gives notice that he or she wishes to exercise buy-out rights that the "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."

In New Zealand it seems that a dissenting shareholder will be subject to the obligations and be able to exercise the rights set out in the Companies Act 1993 and the company's constitution so long as he or she remains on the company's share register.¹³⁴ If, however, a dissenting shareholder also attempts to seek relief pursuant to ss 174 or 226 of the Act then the commencement of the buy-out procedure is certain to be taken into account by the court in exercising its discretion to grant relief under such sections.¹³⁵

132 American Law Institute, *op cit*, above n 26, at 336.

133 Jones, *op cit*, above n 111, at 79.

134 Companies Act 1993, s 96.

135 See *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 (CA), *Virdi v Abbey Leisure Ltd* [1990] BCLC 342 (CA) and *Shadgett v Appellor Fisheries Ltd* (1992) 6 NZCLC 68,166 where the availability of an alternative course of action in a company's articles of association was taken into account in the context of the prejudiced shareholders remedy.

V. SHARE VALUATION

Standard share valuation practice first fixes the value of the company and then allocates this value to shareholdings within the company.¹³⁶ In respect of the first step two related issues arise. First, the method or methods of valuation to be used, and second, the time at which the valuation is to be conducted. Relevant to the second step is the question of whether a minority discount ought to be imposed.

The price that the Companies Act 1993 specifies that shareholders who elect to use the appraisal remedy are entitled to receive for their shares is a "fair and reasonable price."¹³⁷ It does not seem that two measures are intended by the use of both "fair" and "reasonable" in relation to share value. The *Concise Oxford Dictionary* defines "fair" as "just, unbiased, equitable" whilst "reasonable" is defined, inter alia, as "fair." Hence, it is suggested that if the value of shares is fair then it will also be reasonable and vice versa. It is, therefore, likely that principles developed in relation to the prejudiced shareholders remedy may be of use for it is a long standing rule in respect of that remedy that if an order is made that a shareholder's shares be purchased by the company or another then a "fair price" is to be paid for the shares.¹³⁸

Methods of Company Valuation

It is the case in both the United States and Canada that when it comes to selecting an appropriate method of valuing a particular company¹³⁹ that there is only one rule, and that is, that there is no standard test to be applied. Thus, in *In the Matter of Shell Oil Co.*,¹⁴⁰ the Supreme Court of Delaware said:

... the parties to an appraisal action must be afforded the opportunity to present evidence of fair value consisting of "any techniques or methods which are generally acceptable in the financial community and otherwise acceptable in court."

A direction to the use of such methods is now encapsulated in the model appraisal remedy produced by the American Law Institute.¹⁴¹ This flexible approach replaces the more restricted "Delaware Block" method where a weighted average of four valuation methods was used.¹⁴²

136 V Krishna, "Determining the "Fair Value of Corporate Shares" (1987-88) 32 C.B.L.J 132, 135; S Sirianos, "Problems of Share Valuation under section 260 of the Corporations Law" (1995) 13 C&SLJ 88, 89; *Brant Investments Ltd v Keeprite Inc* (1991) 80 DLR (4th) 161, 194 (Ont CA); *RWMD Operations Kelowna Ltd (No 2)* (1991) 80 DLR 134 at 169 (BC SC).

137 Section 190(3) of the Canada Business Corporation Act provides that dissenting shareholders are to receive the "fair value" of their shares whilst in the United States dissenting shareholders variously receive the "value," "fair value," "fair cash value" or "fair market value" of their shares: Cox, Hazen & O'Neal, above note 37, at 22.26.

138 *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 369 (H.L.); *Struthers v Oppenheimer NZ Ltd* [1994] MCLR 156, 183; *Holden v Architectural Finishes Ltd* (1996) 7 NZCLC 260,976, 261,007.

139 Accepted methods of valuation include capitalisation of a company's future earnings, discounted cash flow, net asset value and capitalisation of a company's expected dividends.

140 607 A.2d 1123, 1129 (1992) citing *Weinberger v UOP Inc* 457 A.2d 701, 713 (1983) (Del SC).

141 "... fair value should be determined by using the customary valuation concepts and techniques generally employed in the relevant securities and financial markets for similar businesses in the context of the transaction giving rise to the appraisal." American Law Institute, above n 26, at 315.

142 For an example of the Delaware Block method in operation see *In re Valuation of Common Stock of Libby, McNeill & Libby* 406 A.2d 54 (1979) (Me SC).

The Canadian courts have also adopted a flexible approach when it comes to selecting methods of company valuation in the context of buy-out rights. Thus, in *Re Cyprus Anvil Mining Corporation*, the British Columbia Court of Appeal said:¹⁴³

... the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or to a formula or equation which will produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock.

In New Zealand like views have also been expressed in other contexts and it is difficult to imagine why such an approach would not apply in the case of buy-out rights.¹⁴⁴

Time of Company Valuation

When it comes to considering the time at which a company valuation should take place there are a number of options. The valuation could take place before the occurrence of the event which triggers the availability of buy-out rights, at the time that the dissenting shareholder elects to exercise buy-out rights, at the time the fundamental change is implemented or, if the matter of price goes to arbitration for resolution, then at the date of hearing. The Companies Act 1993 contains no guidance as to the appropriate time. Section 190(3) of the Canada Business Corporations Act, in contrast, provides that the fair value of shares is to be “determined as of the close of business on the day before the resolution was adopted or the order made.” The aim of such a provision is to exclude from consideration any fluctuations in the value of the company brought about by the proposed change.¹⁴⁵ However, it has been noted that unless the proposed change is surrounded by “an impenetrable wall of corporate secrecy” then the market price of the business of the company may well reflect the proposed change before it is approved by the majority.¹⁴⁶ This is more likely to be so in the case of widely held or listed companies. If the market does not view the change with favour then a strict application of the Canadian statutory rule would disadvantage dissenting shareholders.¹⁴⁷ Of course, the reverse would also be true. Thus, the conventional view is that:

... the fair value of ... shares must reflect that value to shareholders of the company in which they had invested before the introduction of a reorganisation which changed somewhat the nature of their investment.¹⁴⁸

More recently it has been recognised by McKinley J, in the Ontario Court of Appeal, that such a rule cannot be absolute given that some shareholders exercising buy-out rights will not be leaving the company of their own volition and in such circumstances it may well be unfair that the dissenting minority are not able to share in the benefits resulting from the proposed change:

143 (1986) 33 DLR (4d) 642, 652.

144 See *Hatrick v Commissioner for Inland Revenue* [1963] NZLR 641, 661 (CA).

145 *Smeenk v Dexeigh Corporation* (1990) 74 O.R. (2d) 385, 401.

146 Sirianos, *op cit*, above n 137, at 100.

147 B.L. Welling, *Corporate Law in Canada* (2nd edn, 1991) 581.

148 *Canadian Gas and Energy Fund Ltd v Sceptre Resources Ltd* [1985] 5 WWR 43, 57-58.

In appropriate cases, particularly where the dissenters have been forced out, the trial judge may exercise his discretion so as to allow the dissenters to participate in the benefits of the transaction. The availability and nature of participation would necessarily depend on the facts of the particular case.¹⁴⁹

The particular fact situation before McKinley J did not involve a squeeze out and he accordingly applied the conventional rule:

In this case I have no hesitation in agreeing with the learned trial judge that the dissenting shareholders were attempting to have their cake and eat it too. Although clearly free to participate in the transaction, they declined to do so, all the while claiming entitlement to reap the potential financial benefits of participation: they hoped to reap the benefits of the proposed transaction without accepting any of its risks. I agree with the learned trial judge that this is not an appropriate case in which to include in the determination of fair value an amount attributable to the transaction involved.¹⁵⁰

The current position in the United States reflects the Canadian approach. Thus, where s 623(h)(4) of the New York Business Corporation Law directed that fair value must be interpreted in the light of the “nature of the transaction” triggering the buy-out rights and “its effect on the corporation” and “all other relevant factors,” the New York Court of Appeals in *Cawley v SCM Corporation* held that “post merger factors enter valuation computations.”¹⁵¹ The Court of Appeals ultimately included in its assessment of company value non-speculative tax benefits that accrued to the newly amalgamated company in a triangular merger where minority shareholders were squeezed out.

The Supreme Court of Delaware came to a similar conclusion in the case of the squeeze-out merger in *Weinberger*:

It is significant that section 262 now mandates determination of “fair value” based upon “all relevant factors.” Only the speculative elements of value that might arise from the “accomplishment or expectation” of the merger are excluded. We take this to be a very narrow exception to the appraisal process, designed to eliminate use of *pro forma* data and projections of speculative variety relating to the completion of a merger. But elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of merger and not the product of speculation may be considered.¹⁵²

The New Zealand courts have experience in choosing the appropriate date to reflect the “fair value” of shares in the context of the prejudiced shareholders remedy¹⁵³ and the lack of statutory detail on this point will allow such an approach to continue in cases of valuations involving dissenting shareholders’ shares.

Allocation of company value to the shares of dissenting shareholders

When it comes to allocating the value of the company to individual shareholders the issue is whether the allocation should be done on a pro-rata basis or whether the particular attributes of the shares and size of the holding ought to be taken into account. If a “willing but not anxious” buyer and seller test is followed then clearly the latter approach will prevail.¹⁵⁴ In such an instance it is common practice for a discount to be

149 *Brant Investments Ltd v KeepRite Inc* (1991) 80 DLR (4th) 161, 198. See also *New Quebec Raglan Mines Ltd v Blok-Andersen* (1993) 9 BLR (2d) 93.

150 *Brant Investments Ltd v KeepRite Inc* (1991) 80 DLR (4th) 161, 198.

151 530 N.E.2d 1264, 1267 (1988).

152 140 A.2d 701, 713 (1983).

153 See *Struthers v Oppenheimer NZ Ltd* [1994] MCLR 156, 183.; *Holden v Architectural Finishes Ltd* (1996) 7 NZCLC 260,976, 261,007, affirmed (unreported) Blanchard, Barker, Doogue JJ, 17 April 1997, CA, CA272/95.

154 *Hatrick v Commissioner of Inland Revenue* [1963] NZLR 641 (CA); *Holt v Holt* (1990) 5 NZCLC 66,620 (PC); *Multiply Ltd v Old Mill Farm Ltd* (1995) 7 NZCLC 260,746.

applied to a minority holding to reflect the fact that a willing buyer and willing seller would view a majority holding as having greater value than a minority holding.

In squeeze-out transactions the general rule in the United States is that minority discounts are inapplicable:

The dissenting shareholder's proportionate interest is determined only after the company as an entity has been valued. In that the Court of Chancery is not required to apply further weighting factors at the shareholder level, such as discounts to minority shares for asserted lack of marketability ... The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a "going concern." ... More important, to fail to accord a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process, by cashing out a dissenting shareholder, a clearly undesirable result.¹⁵⁵

If, however, the dissenting shareholders are electing to leave the company then the case for such a rule weakens. Indeed the American Law Institute has recommended that the rule against the imposition of minority discounts is one that applies in the absence of extraordinary circumstances.¹⁵⁶

The Canadian courts have taken a wider approach and have held that the imposition of a minority discount is inappropriate whatever the kind of triggering transaction. Thus, in *Domglas Inc v Jarislowky, Fraser & Co Ltd*, the Quebec Court of Appeal specifically approved the statement of the lower court that, in the context of buy-out rights, it would "be inimical to the concept of fair value" to impose a minority discount.¹⁵⁷ This approach has been the subject of academic criticism insofar as it allows a dissenting shareholder to receive more via the use of buy-out rights in the case of a "non-oppressive corporate action than he or she would have received if the shares had been sold on the open market."¹⁵⁸ However, earlier Canadian decisions went even further and allowed a forcing out premium in the case of squeeze out transactions.¹⁵⁹ Later cases have moved away from such an approach on the grounds that there is no basis for it in statute and that dissenting shareholders are sufficiently benefited by a pro-rata allocation of company value.¹⁶⁰

Again, in the context of the prejudiced shareholders remedy, New Zealand case law has developed a similar approach. A minority discount has been held to be inappropriate¹⁶¹ where one shareholder has been effectively forced from a closely held company that falls within Lord Wilberforce's definition of a "quasi-partnership."¹⁶² This rule is not absolute. The view of Nourse J in *Re Bird Precision Bellows Ltd*¹⁶³ that a minority discount may be appropriate in the case of a minority shareholder

55 *Cavalier Oil Corporation v Harnett* 564A.2d 1137, 1141 (1989) (Del. SC). See also *In re McLoon Oil Co* 565 A.2d 997, 1004-1005 (Me SC); *Rigel Corp v Cutchell* 511 N.W.2d 519 (1994) (Neb SC).

156 American Law Institute, op cit, above n 26, at 325.

157 (1982) 138 DLR (3d) 521, 525. See also *Lo Cicero v BACM Industries Ltd* [1986] 3 WWR 153, 164 (Man CA); *Brant Investments Ltd v KeepRite Inc* (1991) 138 DLR (4th) 161, 194. (Ont CA).

158 Krishna, op cit, above n 137, at 170.

159 *Domglas Inc v Jarislowky, Fraser & Co* (1982) 138 DLR (3d) 521 (Que CA); *Investissements Mont-Soleil Inc v National Drug Ltd* (1982) 22 BLR 139 (Que CA).

160 *Brant Investments Ltd v KeepRite Inc* (1991) 138 DLR (4th) 161 (Ont CA); *Re LoCicero and BACM Industries* (1989) 49 DLR (4th) 159 (SCC); *New Quebec Raglan v Blok-Andersen* (1993) 9 BLR 2d 93.

161 *Struthers v Oppenheimer NZ Ltd* [1994] MCLR 156, 182.

162 *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, 500 (HL).

163 [1984] 3 All ER 444, 450 affirmed [1985] 3 All ER 523 (CA).

who paid a market price for his or shares, which included a discount, has been approved in New Zealand.¹⁶⁴

It is sensible that the issue of whether or not a minority discount is applied when fixing a price for a dissenting shareholder's shares is dependent on what is fair and reasonable in the particular circumstances before the arbitrator. As a general rule it seems just that a minority discount should not apply when a shareholder is being squeezed out of a company. Further, in a situation where actual fundamental change has occurred it is possible to mount an argument that dissenting shareholders are not willing sellers in the sense that if the change had not occurred then they would not be looking to leave the company. If one takes a step back to consider why a minority shareholder may elect to leave a company undergoing fundamental change then it is likely to be because he or she perceives the change to be detrimental in some way. It may be that the change alters the financial risk, monetary value or time at which a return is expected from an investment. In other situations the risk or value of the investment might be unchanged but for ethical or other personal reasons a dissenting shareholder might not wish to continue to be associated with the company. On the other hand, where a shareholder exercises buy-out rights in circumstances where no fundamental change has occurred then there is no good reason why such shareholders should receive any more than what a willing but not anxious buyer would be prepared to pay for their shares.

VI CONCLUSION

The stated basis for the introduction of buy-out rights in the Companies Act 1993 was to provide minority shareholders with an exit from a company at a fair and reasonable price in instances of fundamental change to the nature of the enterprise or of change to the rights attached to the shares of the interest group to which they belong. This explanation reflects the reasoning behind the introduction of buy-out rights into Canadian company law and their retention in the United States of America but does not accurately reflect the dual role such rights have played in North America. It is apparent that in New Zealand buy-out rights may be exercised in a long form amalgamation where the dissenting minority are being squeezed out of a company. However, the lack of statutory guidance in the Companies Act 1993 as to how a "fair and reasonable" price for shares is to be calculated leaves it open for the circumstances in which dissenting shareholders exercise buy-out rights to be taken into account in New Zealand in an assessment of share price.

The buy-out rights in the Companies Act 1993 are narrower than those in Canada in one important regard and that is that they are only available to shareholders who have the right to vote and who do vote against the special resolutions that trigger such rights. This is a distinction for which there seems to be no justification. However, when the focus turns to the way in which the triggering special resolutions are defined it is apparent that the New Zealand definitions are much broader than those commonly found in North America. Any concern that this might tip the balance too far in favour of the minority is countered by the ability of the company to apply to the High Court for an exemption from the obligation to purchase

¹⁶⁴ *Holden v Architectural Finishes Ltd* (1996) 7 NZCLC 269,976, 261,008, affirmed (unreported) Blanchard, Barker, Doogue JJ, 17 April 1997, CA, CA272/95.

the shares of the minority. Whilst this cure increases the possibility that dissenting shareholders may be embroiled in litigation it must be emphasised that, unlike in North America, dissenting shareholders in New Zealand will not generally have the burden of establishing that buy-out rights have been triggered.

The fact that buy-out rights are triggered without dissenting shareholders having to establish specified criteria for relief through litigation is the main ground of distinction between buy-out rights and other actions available to dissenting shareholders. However, as noted in the previous paragraph, this is not to say that the utilisation of buy-out rights will avoid litigation altogether. Further, by not requiring a company to disclose the basis on which it has calculated share price the current New Zealand statutory procedure encourages the likelihood that a dissenting shareholder will be involved in arbitration to test the share price offered by the company. If this is the case then any saving in time, cost and stress which might otherwise be associated with buy-out rights would be lost. This of course assumes, in the first place, that dissenting shareholders are sufficiently well informed about the availability of buy-out rights to take advantage of them. As there is no obligation on the company to inform dissenting shareholders of the availability of buy-out rights, except in the case of a special resolution approving a long form amalgamation, this cannot be guaranteed.

Thus, overall, it must be said that buy-out rights in the Companies Act 1993 receive a mixed report which may go some way to explaining why some three and a half years after the coming into force of the Companies Act 1993¹⁶⁵ such rights have attracted little comment and have generated no case law. Rather than suggesting that all is working well it seems that a more appropriate explanation is that buy-out rights have, as yet, had little impact in New Zealand.

165 The Companies Act 1993 came into force on 1 July 1994: Companies Act 1993, s 1(2).