

MAINE STATE LEGISLATURE

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1 FIRST REGULAR SESSION
2

3 ONE HUNDRED AND TWELFTH LEGISLATURE
4

5 Legislative Document

No. 965

6
7 H.P. 678

House of Representatives, March 8, 1985

8 Referred to the Committee on Business and Commerce. Sent up for
9 concurrence and ordered printed.

10 EDWIN H. PERT, Clerk

Presented by Representative Brannigan of Portland.

11
12 STATE OF MAINE
13

14 IN THE YEAR OF OUR LORD
15 NINETEEN HUNDRED AND EIGHTY-FIVE
16

17 AN ACT to Protect Shareholders in Maine
18 Corporations.
19

20 Be it enacted by the People of the State of Maine as
21 follows:

22 Sec. 1. 13-A MRSA §603, sub-§4, ¶D, as enacted
23 by PL 1971, c. 439, §1, is repealed and the following
24 enacted in its place:

25 D. The holders of not less than such percentage
26 of the shares entitled to vote at the meeting as
27 may be provided in the articles of incorporation
28 or bylaws; or

29 Sec. 2. 13-A MRSA §716, as enacted by PL 1971,
30 c. 439, §1, is amended by adding after the first par-
31 agraph a new paragraph to read:

32 In discharging their duties, the directors and
33 officers may, in considering the best interests of
34 the corporation and of its shareholders, consider the

1 effects of any action upon employees, suppliers and
2 customers of the corporation, communities in which
3 offices or other establishments of the corporation
4 are located and all other pertinent factors.

5 Sec. 3. 13-A MRSA §910 is enacted to read:

6 §910. Right of shareholders to receive payment for
7 shares following a control transaction

8 1. Shareholders controlled to rights; excep-
9 tions. Any holder of the voting shares of a corpora-
10 tion that becomes the subject of a control transac-
11 tion described in subsection 2 shall be entitled to
12 the rights and remedies provided in this section, un-
13 less:

14 A. The bylaws, by amendment adopted within 90
15 days of the effective date of this Act and not
16 subsequently rescinded by an amendment of the ar-
17 ticles of incorporation, provide that this sec-
18 tion shall not be applicable to the corporation;
19 or

20 B. The articles of incorporation provide that
21 this section shall not be applicable to the cor-
22 poration.

23 2. Definitions. As used in this section, unless
24 the context indicates otherwise, the following terms
25 have the following meanings.

26 A. A "controlling person" means:

27 (1) A person who has, or a group of persons
28 acting in concert that has, voting power
29 over voting shares of the corporation that
30 would entitle the holders of those shares to
31 cast at least 25% of the votes that all
32 shareholders would be entitled to cast in an
33 election of the directors of the corpora-
34 tion; or

35 (2) A person who has, or a group of persons
36 acting in concert that has, voting power
37 over at least 25% of the shares in any class
38 of shares entitled to elect all the direc-
39 tors, or any specified number of them.

1 A "person" includes any individual, firm, corpo-
2 ration or other entity.

3 B. Notwithstanding paragraph A, a person or
4 group of persons which would otherwise be a con-
5 trolling person within the meaning of this sec-
6 tion shall not be deemed a controlling person un-
7 less, subsequent to the effective date of this
8 section, that person or group increases the per-
9 centage of outstanding voting shares of the cor-
10 poration over which it has voting power to a per-
11 centage in excess of the percentage of outstand-
12 ing voting shares of the corporation over which
13 that person or group had voting power on the ef-
14 fective date of this section, and to at least the
15 amount specified in paragraph A.

16 C. For the purposes of this section:

17 (1) A person shall not be a controlling
18 person under paragraph A if that person
19 holds voting power, in good faith and not
20 for the purpose of circumventing this sec-
21 tion, as an agent, bank, broker, nominee or
22 trustee for one or more beneficial owners
23 who do not individually or, if they are a
24 group acting in concert, as a group have the
25 voting power specified in paragraph A or who
26 are not deemed a controlling person under
27 paragraph B; and

28 (2) A person has voting power over a voting
29 share if that person has or shares, directly
30 or indirectly, through any option, contract,
31 arrangement, understanding, voting trust,
32 conversion right or relationship, or by act-
33 ing jointly or in concert or otherwise, the
34 power to vote, or to direct the voting of,
35 that voting share.

36 D. A "control transaction" means the acquisition
37 by a person or group of the status of a control-
38 ling person.

39 E. The "control transaction date" means the date
40 on which a controlling person becomes a control-
41 ling person.

1 3. Notice of control transaction to be given to
2 shareholders. Within 15 days of the control transac-
3 tion date, notice that a control transaction has oc-
4 curring shall be given by the controlling person to
5 each shareholder of record of the corporation holding
6 voting shares. If the controlling person so re-
7 quests, the corporation shall, at the option of the
8 corporation and at the expense of the controlling
9 person, either furnish a list of all such sharehold-
10 ers to the person or group or mail the notice to all
11 such shareholders. There shall be included in, or
12 enclosed with, the notice a copy of this section. Any
13 list provided by the corporation to a controlling
14 person pursuant to this subsection shall be used only
15 for the purpose of giving the notice required by this
16 subsection.

17 4. Shareholder demand for payment. After the
18 control transaction date, any holder of voting shares
19 of the corporation may, prior to or within 30 days
20 after the notice required by subsection 3 is given,
21 which time period shall be specified in the notice,
22 make written demand on the controlling person for
23 payment of the amount provided in subsection 5 with
24 respect to the voting shares of the corporation held
25 by the shareholder, and the controlling person shall
26 pay that amount to the shareholder. The demand of
27 the shareholder shall state the number and class or
28 series, if any, of the shares owned by him with re-
29 spect to which the demand is made.

30 5. Shareholder entitled to receive payment for
31 shares. A shareholder making written demand under
32 subsection 4 shall be entitled to receive cash for
33 each of his shares in an amount equal to the fair
34 value of each voting share as of the day prior to the
35 control transaction date, taking into account all
36 relevant factors, including an increment representing
37 a proportion of any value payable for acquisition of
38 control of the corporation.

39 6. Submission of certificates; notation. At the
40 time of filing his demand for payment for his shares
41 pursuant to subsection 4, or within 20 days thereaf-
42 ter, each shareholder demanding payment shall submit
43 the certificate or certificates representing his
44 shares to the corporation or its transfer agent for

1 notation thereon that such demand has been made; such
2 certificates shall promptly be returned after entry
3 thereon of such notation. A shareholder's failure to
4 do so shall, at the option of the controlling person,
5 terminate his rights under this section, unless a
6 court of competent jurisdiction, for good and suffi-
7 cient cause shown, shall otherwise direct. If shares
8 represented by a certificate on which notation has
9 been so made shall be transferred, each new certifi-
10 cate issued for those shares shall bear a similar no-
11 tation, together with the name of the original holder
12 of the shares who made the written demand, and a
13 transferee of the shares shall acquire by the trans-
14 fer no rights in the corporation other than those
15 which the original demanding shareholder had after
16 making demand for payment of the fair value of the
17 shares.

18 7. Written offer; balance sheet. Within 10 days
19 after the expiration of the period provided in sub-
20 section 4 for making demand, the controlling person
21 shall make a written offer to each demanding share-
22 holder to pay for those shares at a specified price
23 deemed by the controlling person to be the fair value
24 of those shares. The offer shall be made at the same
25 price per share to all demanding shareholders of the
26 same class. The notice and offer shall be accompa-
27 nied by a balance sheet of the corporation as of the
28 latest available date and not more than 12 months
29 prior to the making of the offer, and a profit and
30 loss statement of the corporation for the 12 months'
31 period ended on the date of the balance sheet.

32 8. Agreement on fair value; payment. If, within
33 30 days after the expiration of the period provided
34 in subsection 4 for making demand, the fair value of
35 the shares is agreed upon between any demanding
36 shareholder and the controlling person, payment for
37 those shares shall be made within 90 days after the
38 date on which the written offer required by subsec-
39 tion 7 was made, upon surrender of the certificate or
40 certificates representing those shares. Upon payment
41 of the agreed value, the demanding shareholder shall
42 cease to have any interest in the shares.

43 9. Failure to reach agreement on fair value of
44 shares. If, within the additional 30-day period pre-

1 scribed by subsection 8, one or more demanding share-
2 holders and the controlling person have failed to
3 agree as to the fair value of shares:

4 A. The controlling person may, or shall, if it
5 receives a demand as provided in subparagraph
6 (1), bring an action in the Superior Court in the
7 county in this State where the registered office
8 of the corporation is located praying that the
9 fair value of those shares be found and deter-
10 mined. This action:

11 (1) Shall be brought by the controlling
12 person, if it receives a written demand for
13 suit from any demanding shareholder, which
14 demand is made within 60 days after the date
15 on which the written offer required by sub-
16 section 7 was made; and if it receives a de-
17 mand for suit, the controlling person shall
18 bring the action within 30 days after re-
19 ceipt of the written demand; or

20 (2) In the absence of a demand for suit,
21 may at the election of the controlling per-
22 son be brought by the controlling person at
23 any time from the expiration of the addi-
24 tional 30-day period prescribed by subsec-
25 tion 8 until the expiration of 60 days after
26 the date on which the written offer required
27 by subsection 7 was made;

28 B. If the controlling person fails to institute
29 the action within the period specified in para-
30 graph A, any demanding shareholder may thereafter
31 bring such an action in the name of the control-
32 ling person;

33 C. No such action may be brought, either by the
34 controlling person or by a demanding shareholder,
35 more than 6 months after the date on which the
36 written offer required by subsection 7 was made;

37 D. In any such action, whether initiated by the
38 controlling person or by a demanding shareholder,
39 all demanding shareholders, wherever residing,
40 except those who have agreed with the controlling
41 person upon the price to pay for their shares,

1 shall be made parties to the proceeding as an ac-
2 tion against their shares quasi in rem. A copy
3 of the complaint shall be served on each demand-
4 ing shareholder who is a resident of this State
5 as in other civil actions, and shall be served by
6 registered or certified mail, or by personal ser-
7 vice without the State, on each demanding share-
8 holder who is a nonresident. The jurisdiction of
9 the court shall be plenary and exclusive;

10 E. The court shall determine whether each de-
11 manding shareholder, as to whom the controlling
12 person requests the court to make such determina-
13 tion, has satisfied the requirements of this sec-
14 tion and is entitled to receive payment for his
15 shares; as to any demanding shareholder with re-
16 spect to whom the controlling person makes such a
17 request, the burden is on the shareholder to
18 prove that he is entitled to receive payment.
19 The court shall then proceed to fix the fair val-
20 ue of the shares. The court may, if it so
21 elects, appoint one or more persons as appraisers
22 to receive evidence and recommend a decision on
23 the question of fair value. The appraisers shall
24 have such power and authority as shall be speci-
25 fied in the order of their appointment or an
26 amendment to the order of appointment;

27 F. All shareholders who are parties to the pro-
28 ceedings shall be entitled to judgment against
29 the controlling person for the amount of the fair
30 value of their shares, except for any shareholder
31 whom the court shall have determined not to be
32 entitled to receive payment for his shares. The
33 judgment shall be payable only upon and concu-
34 rrently with the surrender to the controlling per-
35 son of the certificate or certificates represent-
36 ing those shares. Upon payment of the judgment,
37 the demanding shareholder shall cease to have any
38 interest in those shares;

39 G. The judgment shall include an allowance for
40 interest at such rate as the court may find to be
41 fair and equitable in all the circumstances, from
42 the control transaction date to the date of pay-
43 ment. If the court finds that the refusal of any
44 shareholder to accept the controlling person's

1 offer of payment for his shares was arbitrary,
2 vexatious or not in good faith, it may in its
3 discretion refuse to allow interest to him;

4 H. The costs and expenses of any such proceeding
5 shall be determined by the court and shall be as-
6 essed against the controlling person, but all or
7 any part of those costs and expenses may be ap-
8 portioned and assessed as the court may deem eq-
9 uitable against any or all of the demanding
10 shareholders who are parties to the proceeding to
11 whom the controlling person shall have made an
12 offer to pay for the shares, if the court finds
13 that the action of those shareholders in failing
14 to accept that offer was arbitrary or vexatious
15 or not in good faith. Those expenses shall in-
16 clude reasonable compensation for and reasonable
17 expenses of the appraisers, but shall exclude the
18 fees and expenses of counsel for any party and
19 shall exclude the fees and expenses of experts
20 employed by any party, unless the court otherwise
21 orders for good cause. The court shall award
22 each shareholder who is a party to the proceeding
23 reasonable compensation for any expert or experts
24 employed by the shareholder in the proceeding and
25 the shareholder's reasonable attorney's fees and
26 expenses, if:

27 (1) No offer was made;

28 (2) The fair value of the shares as deter-
29 mined materially exceeds the amount which
30 the controlling person offered to pay there-
31 for; or

32 (3) The amount which the controlling person
33 offered to pay, on a per share basis, is
34 less than the highest price per share paid
35 by the controlling person in the 2 years im-
36 mediately preceding the date of the com-
37 plaint; and

38 I. At all times during the pendency of any such
39 proceeding, the court may make any and all orders
40 which may be necessary to protect the corpora-
41 tion, the controlling person or the demanding
42 shareholders, or which are otherwise just and eq-

1 uitable. Those orders may include, without limi-
2 tation, orders:

3 (1) Requiring the controlling person to pay
4 into court, or post security for, the amount
5 of the judgment or its estimated amount, ei-
6 ther before final judgment or pending ap-
7 peal;

8 (2) Requiring the deposit with the court of
9 certificates representing shares held by the
10 demanding shareholders;

11 (3) Imposing a lien on the property of the
12 controlling person to secure the payment of
13 the judgment, which lien may be given prior-
14 ity over liens and incumbrances contracted
15 by the controlling person after the control
16 transaction date; and

17 (4) Staying the action pending the determi-
18 nation of any similar action pending in an-
19 other court having jurisdiction.

20 10. Holding and disposal of shares have acquired
21 by payment. Shares acquired by a controlling person
22 pursuant to payment of the agreed value therefor or
23 to payment of the judgment entered therefor, as pro-
24 vided in this section, may be held and disposed of as
25 authorized and issued shares.

26 11. Minors. The demand required by subsection 4
27 may be made, in the case of a shareholder who is a
28 minor or otherwise legally incapacitated, either by
29 the shareholder, notwithstanding his legal incapaci-
30 ty, or by his guardian, or by any person acting for
31 him as next friend. The shareholder shall be bound
32 by the time limitations set forth in this section,
33 notwithstanding his legal incapacity.

34 12. Appeals. Appeals shall lie from judgments
35 in actions brought under this section as in other
36 civil actions in which equitable relief is sought.

37 13. Compliance; shareholder rights. If a person
38 or group of persons proposing to engage in a control
39 transaction complies with the requirements of this

1 section in connection with the control transaction,
2 the effectiveness of the rights afforded in this sec-
3 tion to shareholders may be conditioned upon the con-
4 summation of the control transaction.

5 The person or group of persons shall give prompt
6 written notice of the satisfaction of any such condi-
7 tion to each shareholder who has made demand as pro-
8 vided in this section.

9 14. Application. This section does not apply
10 to:

11 A. Any corporation that does not have a class of
12 voting shares:

13 (1) Registered or traded on a national se-
14 curities exchange; or

15 (2) Registered with the Securities and Ex-
16 change Commission pursuant to Section 12(g)
17 of the United States the Securities Exchange
18 Act of 1934, as the same has been or may
19 hereafter be amended, United States Code An-
20 notated, Title 15, Section 78a et seq.;

21 B. Any person or group that inadvertently be-
22 comes a controlling person if that controlling
23 person, as soon as practicable, divests itself of
24 a sufficient amount of its voting shares so that
25 it is no longer a controlling person, or to any
26 corporation that on the effective date of this
27 section is a subsidiary of any other corporation.
28 For purposes of this paragraph, "subsidiary"
29 shall mean any corporation as to which any other
30 corporation has acquired or has the right to ac-
31 quire, directly or indirectly, through the exer-
32 cise of warrants, options and rights and the con-
33 version of all convertible securities, whether
34 issued or granted by the subsidiary or otherwise,
35 voting power over voting shares of the subsidiary
36 that would entitle the holders thereof to cast in
37 excess of 50% of the votes that all shareholders
38 would be entitled to cast in the election of di-
39 rectors of that subsidiary; provided that a sub-
40 subsidiary will not be deemed to cease being a sub-
41 subsidiary so long as such corporation remains a

1 controlling person within the meaning of subsec-
2 tion 2; or

3 C. Any person or group that becomes a control-
4 ling person solely as a result of the corpora-
5 tion's purchase or redemption of its own voting
6 shares.

7 STATEMENT OF FACT

8 The purpose of this bill is to provide protection
9 to minority shareholders in publicly-held Maine cor-
10 porations. This bill establishes a procedure to re-
11 quire a person or group of persons who gain control
12 of a Maine corporation to pay to minority and other
13 shareholders a fair price for their shares. The bill
14 also clarifies the rights and duties of officers and
15 directors by allowing them to consider the effects of
16 corporate decisions upon employees, suppliers and
17 customers of the corporation, as well as communities
18 in which the corporation may be located. In addi-
19 tion, the bill removes the existing provision allow-
20 ing 10% of the shareholders to call special meetings
21 and provides that the articles of incorporation or
22 bylaws may specify the percentage of shares entitled
23 to call such meetings.

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