

CONTENTIOUS ISSUES AT BOARD MEETINGS – HARTLEY R. NATHAN, Q.C.

CALLING OF MEETINGS OF THE BOARD

1. Notice of Meetings of the Board

In the absence of provisions to the contrary in the governing statute or the constitution, notice of the time and place of a meeting of the board of directors must be given to all directors, otherwise the business transacted thereat is invalid.

2. Calling the Meeting to be *Bona Fide*

Directors must ensure they are acting in the best interests of the corporation in calling meetings.

3. Form of Notice

Subject only to the by-laws or any statutory provisions normally it is not necessary for a notice of a meeting of directors to set out with any particularity the matters to be discussed at a meeting.¹ Counsel would be well advised to review applicable regulatory statutes like the *Insurance Act* or *Bank Act*.

¹ See *Compagnie de Mayville v. Whitley*, [1986] 1 Ch. 788 (C.A.).

Hartley Nathan and Phillip Bevans wish to express their appreciation to Ira Stuchberry, articling student at Minden Gross LLP for her assistance in the preparation of this presentation.

4. Failure to Comply with Notice Requirements

It has been held that notice must be given to a director who has indicated verbally that he cannot attend a meeting on the basis that he or she may change his or her mind.²

5. Meeting Materials

Some companies refer to the meeting materials in the minutes and attach them as appendices, whereas others don't.

CONDUCT OF A DIRECTORS' MEETING

6. Chair - Who is Entitled to Chair Meetings?

Most by-laws provide that the Chair of the board, if present and willing, shall preside at meetings of the board.

² *Re: Portuguese Consolidated Copper Mines Ltd.* (1889), 42 Ch. D. 160 at 168 (C.A.), per Lord Esher M.R.

7. Can Directors Move to Replace the Chair of the Meeting?

If the by-law provides who is to chair, a resolution cannot be passed to remove that person and appoint another as Chair.

8. Role of the Chair

- The Chair is expected to preserve order, conduct proceedings regularly, and ascertain the sense of the meeting with regard to any question before it.
- As the presiding officer of the board, the Chair is authorized to decide in the first instance on questions arising at the meeting.
- In short, the Chair has the duty to settle points of contention even if it means using his or her second or casting vote where authorized to do so.³
- Vouch for the correctness of the minutes by signing them. I will speak to this later.

9. Who is Entitled to Attend?

Subject to the by-laws, only directors and other persons admitted with the consent of the meeting may attend board meetings

³ See also discussion of casting vote below. See also *Nathan and Voore Law of Corporate Meetings in Canada* (Toronto, Carswell) at 2-7 (“*Nathan and Voore*”). If problems are anticipated, it is a good idea to get legal advice on specific by-law or statutory provisions that may come into play or even arrange for the board’s legal counsel to be present.

10. Refusal to Attend Meeting

A court will not easily issue a mandatory injunction to compel attendance by directors.

11. Motions - Do They Require a Seconder?

12. The Right of a Director to Debate

Every director has the right to attend and participate in all meetings of the board of directors. A director cannot be excluded from meetings of the board.

13. Casting Vote

At common law, the Chair did not have a second or casting vote⁴ if directors were equally divided on a question. There is no provision for same in either of the CBCA or the OBCA.

⁴ *Nell v. Longbottom*, [1894] 1 Q.B. 767 (Q.B.D.).

14. The Nature of an Abstention Can be an Issue

An abstention is defined as “the refusal to vote either for or against a motion

15. Secret Ballots

There are no provisions in corporate statutes as to how votes are to be conducted at directors’ meetings. Generally, voting is carried out by show of hands and each director has one vote.

16. In “Camera Meetings”

MINUTES AND NOTES OF MEETINGS

1. General

Minutes are admissible in court as *prima facie* proof:

- (1) That the meeting was held on the date shown;

- (2) That the persons described as being present were actually present; and
- (3) That the transactions described were in fact made at the meeting.

2. Form of Minutes

There is nothing in the corporate statutes that prescribes the form that minutes should take.

Tips:

- Minutes must be clear, accurate and objective.
- Minutes should reflect the directors' thoughtful deliberation and level of discussion for matters reviewed and discussed at the meeting – sufficient to establish a due diligence defence in case of a later dispute.
- Minutes should evidence the extent of challenge and review of important matters before the board. The board's engagement in such matters as reviewing strategy and setting risk appetite should be clear from the minutes.
- Minutes should not reflect all questions asked and the responses given, nor as a general rule should they identify which director asked a particular question unless a director requires same.
- Minutes should capture an objection or abstention expressed by a director.

3. Business Judgment Rule

In fulfilling their duties, boards must spend an adequate time considering the decisions before them, as the courts may scrutinize whether the decisions were given appropriate contemplation.

4. Signing of Minutes

Normally the minutes of directors' meetings are signed by both the Chair and secretary of a meeting.

5. Notes of Directors' Meetings

There are also two views of whether directors should maintain their notes of the meeting after satisfying themselves the minutes reflect what transpired at the meeting - that is, whether to maintain them or destroy them.

6. Notes help in a due diligence defence

As noted previously, notes can be useful to individual directors in establishing a due diligence defence.

7. Advice to directors who keep notes

Directors should be advised to take care when making notes of discussion at meetings to ensure that the will withstand scrutiny if later produced in litigation or to regulators. Comments noted regarding other directors or management may later prove to be embarrassing.

8. Practical Application of Note Taking

The practical reality is that often directors do not take careful notes but rather jot down their thoughts or questions in the margin of their papers without context or follow up which can hurt not only the director but also the corporation in any litigation proceedings.

9. The Lawyer as General Counsel and Secretary

Lawyers acting as general counsel and secretary of a corporation must be aware of their responsibilities under both roles and as a result of recent jurisprudence, the person holding this dual role cannot separate their roles and responsibilities.

ROLE OF THE SUBSIDIARY NOMINEE DIRECTOR – ANTONELLA DEO

10. Minority Shareholders and Nominee Directors

By virtue of recent amendments to the CBCA, shareholders may examine the portions of any minutes of meetings of directors or of committees of directors that contain disclosures under this section, and any other documents that contain those disclosures during the usual business hours of the corporation. See CBCA s.120(6.1).

Presented by:

Hartley R. Nathan Q.C.
Partner, Minden Gross LLP

Phillip G. Bevans
Partner, Minden Gross LLP

Antonella Deo
Head, Subsidiary Governance Office, Royal Bank of Canada



CONTENTIOUS ISSUES AT SHAREHOLDERS' MEETINGS – PHILLIP G. BEVANS

SHAREHOLDER/INVESTOR RELATIONS STRATEGY

Every company needs an overall investor relations and communications strategy, to guide its relations and communications with investors and other stakeholders. A company should have a branding position for all its inward and outward-facing relationships, not only with its customers, but with investors, analysts, brokers, and other market participants.

PREPARATION FOR SHAREHOLDERS' MEETING

11. General

A shareholders' meeting is an opportunity to showcase the company and its shareholder/investor relations strategy. It is important to identify goals and objectives for the meeting, strategic and tactical, and long, medium and short range.

12. Social Media

Large corporations frequently monitor not only traditional media but also social media, not just for customer relations purposes, but also for investor relations purposes.

13. Black Book or Control Book

The Black Book is the central repository for all information regarding the particular meeting and all related events before and after it. It should contain, at a minimum, the date, time, and location of the meeting; contact information for all participants, planners, and suppliers; script or agenda; all speeches and other presentations; motions; press releases and other public communications; formal documentation relating to the meeting, including notice, form of proxy and management information circular (and similar documents from any dissidents); proxy arrangements; contract with suppliers; and task assignments.

14. Task List

Create a task list, showing all task assignments in a timeline and a check-off or matrix format, showing deadlines and the person or persons responsible for completion.

15. Select and Brief Presenters.

Determine who will make presentations to the meeting and outline the subjects to be covered.

16. Place of Meetings.

In determining where to hold such meeting, the governing statute, and the corporation's articles and bylaws have to be considered.

17. Meeting Room

Ensure that shareholders and others arriving at the address concerned are immediately provided with precise directions and maps to the meeting room, powder rooms, hospitality rooms, WiFi “hotspots” and other conveniences. Ensure all facilities, including sound systems are fully operational. Ensure there is adequate time to correct problems.

18. Accommodation of all Shareholders

Care should be taken to ensure that the location chosen for the shareholders’ meeting is adequate to accommodate all shareholders who may wish to attend.

19. Electronic Participation in Meetings.

Sections 132(5) of the CBCA and 94(2) of the OBCA permit meetings to be held entirely electronically.

20. Reception of Attendants

Plans should be developed for the reception of shareholders, guests, press, and others.

21. Detailed Guest Lists

Consider what persons, other than shareholders and meeting participants, should be invited to the meeting and to any special events.

22. Media Interest

Whether or not the media should be admitted to the actual meeting should be considered in the light of the overall shareholder/investor relations strategy and the issues to be brought before the meeting.

23. Rehearsal

It is often considered advisable for all participants to rehearse the meeting together at least once to ensure that each participant understands his or her role and the timing of their participation

24. Contingency Plans

It is unwise to anticipate that all aspects of the meeting will proceed as planned. Backup arrangements

should be made for equipment failures, absence of presenters due to illness or other reasons, disruption of the meeting by fire alarms, fire or other emergencies, loss of power, heating or air conditions, and other eventualities.

25. Script and Agenda

The objective is to ensure that the company's goals for the meeting are attained, that control of the meeting is maintained, and that the meeting is conducted efficiently, in an organized fashion, and within appropriate time parameters.

26. Q&A

Prepare a list of questions that are likely to, or may possibly, be raised. Prepare suitable responses.

27. Other

ATTENDANCE, QUORUM AND PROXIES AT THE MEETING

28. Electronic Participation

As previously noted, in certain circumstances, shareholders may participate in a meeting by electronic means.

29. Quorum

The number of shareholders that constitute a quorum is determined by the governing statute, the by-law, and by any unanimous shareholder agreement.

30. Special Quorum Requirements

In some cases, the articles or bylaws impose a quorum higher than the general one prescribed for most matters in respect of certain matters that are considered to be of special importance.

31. Method of Solicitation of Proxies

Proxies are regulated by corporate and securities law in Canada, including National Instruments 51-102 and 54-101, and their companion policies and, in effect, by the standards for acceptance of proxies established by the Securities Transfer Association of Canada in its STAC Protocol.

32. Verification Procedure

This procedure was considered in a BC case decided August 2012, *International Energy and Mineral Resources Investment (Hong Kong) Co. v. Mosquito Consolidated Gold Mines Ltd.*

33. Conduct of Proxy Contests

The way in which dissidents and management comport themselves in the proxy contest may be expected to have some significance when the issues come before the court.

CONDUCT OF THE MEETING

34. Nominations

Normally, subject to provisions of corporate and securities law relating to the solicitation of proxies, nominations for the election of directors may be made at any time until the vote on such election is called, even from the floor of the shareholders' meeting.

35. Advance Notice Policies

Subject to provisions of corporate and securities law relating to the solicitation of proxies, nominations for the election of directors may be made at any time until the vote on such election is called, even from the floor of the shareholders' meeting.

36. Conduct of Contestants

The decision may have been influenced by the conduct of the parties to the proxy contest.

37. Authority of Chair of the Meeting

The Chair must enforce designated rules of order and must preserve and maintain order and do all things necessary for the proper conduct of the meeting. The Chair may call the speakers, regulate the length of the speeches, deal with points of order and control the arrangements for any vote that may be taken. He or she may judiciously attempt to regulate interruptions from the floor. The Chair must combine fairness with tact.

38. Appeals from the Chair's Rulings

The rulings of the Chair related to procedural matters may be appealed to the meeting.

39. Removal of Chair

If the Chair refuses to put proper questions to the meeting, or otherwise persists in clogging the proceedings, the Chair may be removed.

40. Liability of Chair of the Meeting

The Chair does not incur any liability in relation to his or her conduct of the meeting provided that the Chair acts in good faith and without malice. A Chair who acts with malice, however, may incur liability.

41. Independent Chair

Where the person required or entitled by the bylaws of the corporation is a management nominee for election as a director, where a proxy contest is being conducted for control of the board, the court will not appoint another chair.

42. Advance Agreement on Protocols for Contested Meetings

Where a proxy contest arises, it may be useful for the parties to agree on certain protocols for the conduct

of the meeting. This may include appointing an agreed upon independent chair.

43. Dealing with Difficult Shareholders

In order to maintain order, where a shareholder refuses to yield the floor or persists in otherwise disrupting the meeting, the chair can call a speaker who persists in speaking “to order”; if the person persists, issue a warning and give the person the opportunity to leave; and get the support of the meeting, if appropriate, to require the person to leave .If a non-shareholder engages in disorderly conduct, the chair may require the person to leave.

SUMMING UP

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Presented by:

Hartley R. Nathan Q.C.
Partner, Minden Gross LLP

Phillip G. Bevans
Partner, Minden Gross LLP

Antonella Deo
Head, Subsidiary Governance Office, Royal Bank of Canada

