

DIRECTORS' BRIEFING

THE IMPORTANCE OF THE CASTING VOTE AT DIRECTORS' MEETINGS



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Common Law Position and Statutory Position

At common law, a chair does not have a second or casting vote if the directors are equally divided on a question.¹ The *Canada Business Corporations Act* and the *Ontario Business Corporations Act* are both silent on the issue. Accordingly, if the chair is to have a casting vote, it is to be provided for in the by-laws. Here is a standard provision seen in most by-laws:

In the case of an equality of votes on any question at a meeting of the board, the Chairperson of the meeting shall [not] have a second or casting vote.

The drafter of the by-law would be expected to specify whether the chairperson is to have the casting vote.

No Unlimited Right to Use Casting Vote

If the chair is to have a casting vote, however, he or she does not have unfettered discretion to use the second vote. He or she must act in good faith in this regard. It is to be used to resolve disputes and not to promote the personal interests of the chair. In *Bondi Better Bananas Ltd., Re*,² for example, the chair sought to use his casting vote as means of giving himself control of the company. The case involved a deadlock between directors regarding the wind-up of the company. Counsel for the chair proposed that a meeting be held to remove the two dissenting directors. Anticipating a tie between the directors, counsel suggested that the chair use his casting vote to carry the motion and take control of the board. The court rejected this route, holding that it would be a “breach of duty” for a director to use his casting vote to give himself control. This point was upheld on appeal, where the court noted that this course of action “would completely destroy the arrangement for equality of control underlying the formation of the company and carried into its constitution.”

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

² [1951] O.R. 410, [1951] 3 D.L.R. 522 (Ont. Sup. Ct.); rev'd on other grounds in *Bondi Better Bananas Ltd., Re*, [1952] 1 D.L.R. 277 (Ont. C.A.).

Similarly, in *Daniels v. Fielder*,³ the court struck two articles from the company by-laws which provided the chair with a casting vote. In that case, a 50 percent shareholder was using his casting vote to take complete control of the company, virtually excluding the other 50 percent shareholder, who had inherited her shares from her deceased husband. The court found that the existence of a casting vote in this circumstance was “inconsistent with the partnership basis” upon which the company was established.

In a more recent Newfoundland and Labrador decision, however, the court encountered similar facts but reached a contrary conclusion. In *Alacoque v. Alacoque*,⁴ the case involved estranged spouses who had equal control of a company. The company by-laws provided that the chair would have a casting vote; however, in the absence of the chair, a second vote could be cast by the president. At this time the wife was the president and the husband was purportedly the chairman of the board. A special meeting was called by the wife to remove her husband as director. There was an equality of votes regarding the motion. The wife, as president of the company, used her casting vote to break the tie and carry the motion. The resolution was disputed by the husband who claimed that the casting vote was rightfully his as the chair. The court ultimately found that the husband was never properly elected as chair because the meeting at which he was originally elected occurred before the business was incorporated. In light of this, the court held that the wife, by virtue of her position as president, was entitled to use her casting vote to carry the motion and take control of the board.

Unlike *Bondi* and *Daniels*, where the courts focused on the intended equality of control between the directors, the court in *Alacoque* strictly interpreted the legislation and company by-laws as permitting (or, perhaps more accurately, as not prohibiting) the use of a casting vote to take control of the company. The court did not turn its mind to the arrangement for equality of control or whether such action was a breach of duty.

Is the Chair Required to Use the Casting Vote?

As to whether the chair is required to cast a vote at board meetings, a chair’s role is to try and achieve consensus on an issue, failing which if put to a vote he or she may abstain from voting as any other director may do. Where the chair has a casting vote on a tie, he or she may not be compelled to cast it. A chair must act in good faith in casting a tie-breaking vote.

The Casting Vote and Income Tax Considerations

The Supreme Court of Canada has held that the right to exercise a casting vote at a shareholders’ meeting does not constitute “control” for income tax purposes.⁵

Conclusion

Although jurisprudence on this point is scarce, the case law generally holds that it is improper for a chair to use a casting vote to promote his or her personal interests. Rather,

³ [1988] 65 O.R. (2d) 629 (Ont. Ct. Jus.).

⁴ 2010 NLTD(G) 146, 74 B.L.R. (4th) 40 (NLTD).

⁵ *Alpine Drywall & Decorating Ltd. v. Minister of National Revenue*, [1967] S.C.R. 223, 67 D.T.C. 5035 (S.C.C.).

the role of the chair is to resolve disputes and attempt to achieve consensus. The casting vote may be used to break the occasional tie vote, which can be expected to happen from time to time, but it should not be used to deal with continuous or repeated deadlock.⁶

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⁶ *Citizen's Coal & Forwarding Co., Ltd., Re*, [1927] 4 D.L.R. 275 (Ont. Co. Ct.).