ASSOCIATION OF CORPORATE COUNSEL

November 3, 2010

THE PREPARATION FOR AND CONDUCT OF BOARD MEETINGS

Presented by:

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I. INTRODUCTION

The manner of giving notice, conduct of a board meeting and the issues that can arise at a meeting will vary in accordance with a number of factors. These include:

(a) The size and nature of a corporation, whether it is a family owned corporation which may conduct meetings in a less formal manner to regulated entities that are closely supervised such as Banks or Insurance Companies;

(b) Whether the corporation has numerous unrelated shareholders;

(c) Whether there are dissident shareholders in a corporation, whether it be public or private corporation and who might seek to gain a seat or seats on the board and might try to change the direction of the corporation;

(d) Whether the corporation has subsidiaries that are not wholly owned;

(e) Whether the corporation is of a size that can justify in house counsel that often serve also as the company secretary, and so on.

Problems for the Chair, the directors and those who advise them can arise at any stage during the calling or conduct of board meetings. The problems can often be of a contentious nature. This paper attempts to set out some principles of general application that may or may not apply to every corporation regarding the preparation and conduct of board meetings. It also suggests some strategies to try and deal with contentious issues that may arise at any stage. Our presentation today will try and focus on the broader issues that pertain to the larger corporations that would be more likely to have corporate

counsel to assist them with corporate governance issues. Carol McNamara will deal with the preparation of minutes of board meetings.

Let us make some preliminary comments:

(a) Meetings of directors are governed by the same democratic principles that apply to parliamentary bodies. These principles embody fairness, reasonableness, and good faith towards all who are entitled to take part. Rules of order are framed towards this end. It is the obligation of the directors to insist that meetings of directors are conducted in an organized and efficient manner in adherence to the principles of rules of order. It is the duty of the Chair to ensure that such principles are enforced.

(b) Difficulties arise for corporations which lack a formal process governing the calling and conduct of board meetings. By-laws should (but rarely do) provide that all meetings be governed by specific Rules of Order such as Robert's *Rules of Order*[1] or Nathan's *Company Meetings Including Rules of Order*.[2] A group of individuals who, for some reason, wish to discredit a corporation, can, if the corporate records are in disarray, easily challenge the board, the officers and the senior managers. They can allege that the board was not duly constituted by duly qualified people at a meeting of the shareholders properly called with a quorum present, or that the officers were not duly appointed by a validly elected board at a properly called board meeting, or that the Chief Executive Officer was, in fact, not validly appointed to his or her position by a duly constituted board at a duly called board meeting.

(c) The solution is a better understanding of the legal structures, a raised level of importance given to what some people consider to be boring legal

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[1] (9th Ed) (Reading, Mass: Addison-Wesley, 1997) ("*Robert's*") People have told us that *Roberts* is not particularly helpful for incorporated organizations. It is somewhat complex and often ambiguous.

[2] (8th Ed) by H. R. Nathan, Q.C. (Don Mills, Ont.: CCH Canadian Ltd., 2009) CCH Canadian Ltd. (Toronto, 2009) ("*Nathan's*").

technicalities, the retaining of duly-qualified professional legal assistance and a dogged determination to keep the corporate records current.

(d) Attached to this paper as Appendices "A" and "B" are standard forms of By-law No. 1 for corporations incorporated pursuant to the *Canada Business Corporations Act* ("CBCA") and *Ontario Business Corporations Act* ("OBCA") respectively.

(e) As a general rule, the form of By-law will vary depending on the nature of the corporation.

Strategy Tip #1

Do not automatically adopt a "form" or pre-printed By-law or any amendment for the sake of expediency.

II. CALLING MEETINGS OF THE BOARD

1. By-law requirements

The By-laws of the corporation normally include directives as to the calling and holding of meetings, provisions for quorum and other provisions relating to the operations o the corporation.

2. Who to send notice to?

Sometimes boards forget to give formal notice of meetings or to obtain waivers from absent directors and often quorum requirements are not satisfied.

Every director of a corporation who validly holds office has the right, as well as the duty, to attend and be heard at all board meetings and to participate in the management of the corporation. This right is not qualified. It is not open to a corporation to exclude any director from a board meeting on the basis that the director is unfit, has allegedly engaged in misconduct or also sits on the board of a competitor.

Both the CBCA[3] and the OBCA[4] require corporations to have up-to-date registers for shareholders, directors and officers. The corporations are also required to keep filings current with the governmental jurisdiction under which they are incorporated with respect to head office, directors and officers.

The secretary when sending the notice should go by the register to determine to whom to send notice.

What if a director or directors are not validly elected or appointed?

S. 116 of the CBCA and S.128 of the OBCA provide that the acts of a director or of an officer are valid despite any defect that may afterwards be discovered in his or her appointment or qualification.

In the *Sikh Spiritual Centre Case*[5] Pattillo J. stated in reference to the equivalent section in the B.C. Companies Act (at par 92):

> In my view, the purpose of S. 292 of the Act is to protect third parties from situations where a corporation raises internal procedural defects to avoid liability to third parties. It does not apply in circumstances such as the present where there is an internal dispute between the members of the corporation concerning whether a director has been validly appointed or not. (see the discussion by Melnick J. in *G. Elmitt Construction Ltd. v Kaplan*, [1992] B.C.J. No. 428 (Supr. Ct.) at pp 227-233 in respect of an analogous section to 292 in the *Company Act,* R.S.B.C…)

3. Length of Notice

While directors are permitted to pass By-laws with respect to the time, place and notice to be given for board meetings, neither of the CBCA or OBCA set out any minimum requirements save and except when a quorum of directors calls a meeting under S. 126(8) of the OBCA on 10 days' notice. This is dealt with later.

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[3] R.S.C. 1985, c. C-44.
[4] R.S.C. 1990, c. B-16.
[5] (2008) CANLII 44699 (Ont. S.C.J.).

The CBCA By-law in paragraph 3.3 (paragraph 3.3 OBCA By-law) provides in part as follows:

> Calling Meetings
>
> Notice of every meeting so called shall be given to each director not less than 48 hours (excluding any part of a Sunday and of a holiday as defined by the *Interpretation Act*) before the time when the meeting is to be held….

What, if nothing is said in the By-laws with respect to length of notice or if the organizational By-law was never properly enacted?

In the circumstances where there are no valid By-law provisions for length of notice, it is submitted that the common law rules would apply, in which case the notice must be given a reasonable time prior to each meeting of the board.[6] What constitutes "reasonable" notice is a matter of fact. The Court will take into account the practice of the corporation.[7]

4. Authority to Call Meetings

The provisions relating to the calling of meetings of directors are normally contained in the By-laws. It is unusual to see any provision of this nature in the Articles.

For an OBCA corporation, should there fail to be any clear specifications in either the corporation's Articles or By-laws or, if the organizational By-law has not been properly enacted[8], S. 126(8) of the OBCA provides that a quorum of directors may call a directors' meeting. There are no equivalent sections in the CBCA. The calling of directors' and shareholders' meetings is a duty of the secretary, when properly directed to do so under the By-laws of the corporation. However, where the secretary refuses to send notice of a meeting, another officer of the corporation may do so.[9] Courts have held that proceedings conducted at a meeting called by an unauthorized person are null and void.

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[6] *Re Homer District Consolidated Mines; Ex Parte Smith* (1888), 39 Ch. D. 546.
[7] *Toole v. Flexihire Pty. Ltd*. (1992), 10 A.C.L.C. 190 (S.C. of Queensland).
[8] See *D'Amore v. McDonald,* [1973] 1 O.R. 845 (H.C.J.).
[9] See *Whipple v. Christie* (1913) 141 N.W. 1107 (Minn. Sup. Ct.)

In Re *State of Wyoming Syndicate*,[10] it was held that the meeting at issue could only have been called by the board of directors and not by the secretary of the corporation on his own. As a result, a winding-up resolution passed at the meeting was invalid.

Strategy Tip #2

Where the notice is being given by a person other than one who is duly authorized, a notice should set out by whose authority it has been given and should be signed by the empowered officer. Therefore, where the secretary signs a notice given by order of the directors, it is good practice to have it so state.

5. Calling the Meeting to be *Bona Fide*

Directors must ensure they are acting in the best interests of the corporation in calling meetings. For example in *Glace Bay Printing Co. v. Harrington*[11] the court intervened where the actions of a bare majority of directors in purposely calling directors' meetings at times advantageous to themselves to the exclusion of the other board members resulted in shares being held to have been improperly issued to themselves through such actions. Today, with conference call abilities this case may not be as relevant but the possibility of abuse still exists.

6. Form of Notice

Subject only to the By-laws or any statutory provisions such as subsection 126(8) of the OBCA 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 of the directors.[12]

Subsection 126(8) of the OBCA provides:

> (8) In addition to any other provision in the articles or by-laws of a corporation for calling meetings of directors, a quorum of the directors may, at any time, call a

[10] [1901] 2 Ch. 431, 84 L.T. 868 (C.A.).
[11] (1910), 45 N.S.R. 268 (T.D.) See also *BCE Inc. v. 1976 Debentureholders* 2008 SCC 69.
[12] See *Compagnie de Mayville v. Whitley,* [1986] 1 Ch. 788 (C.A.). Here was held that a notice calling a directors' meeting need not specify the nature of the business to be considered at the meeting. Were it to hold otherwise, the Court reasoned, it would put a great burden on directors in the discharge of their duty to manage corporations efficiently. Directors are bound to attend each meeting, whatever the business, and do not need the same degree of explicitness as shareholders do in the description of a meeting's subject matter for the purposes of deciding whether to attend.

> meeting of the directors for the transaction of any business the general nature of which is specified in the notice calling the meeting.

Subsection 114(5) of the CBCA has a different provision which specifies when a notice must set out particulars in certain situations. Subsection 114(5) reads as follows:

> (5) A notice of a meeting of directors shall specify any matter referred to in subsection 115(3) that is to be dealt with at the meeting but, unless the by-laws otherwise provide, need not specify the purpose of or the business to be transacted at the meeting.
>
> Subsection 115(3) includes a number of items such as issuance of securities, purchase of shares etc.
>
> **Strategy Tip #3**
>
> **If one is assisting in the preparation a notice of a meeting of directors, it is essential to review the By-laws to determine whether any matters must be specified in the notice. Whether or not it is required to specify matters to be discussed at the meeting, it is imperative that there be no surprises at a meeting. The desirable practice is that an agenda should be circulated along with the notice to advise directors of the matters to be dealt with at the meeting.**

If there is such a requirement for notice, it is likely that the degree of disclosure in the notice will be subject to the same standards as notices of shareholders', namely to ensure that the person receiving the notice is able to form a reasoned judgment relative to the matters to be discussed.[13]

The failure to give proper notice, subject to any waiver, could invalidate the business transacted at the meeting. In *Wills v. Murray,*[14] the Charter provided that special notice was to be given for any extraordinary meeting of the board and the notice was to specify the purpose for calling the meeting. The Exchequer Court considered inadequate a notice

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[13] *Jenashare Pty Ltd v. Heven Holdings Pty Ltd*. (1993) 11 A.C.L.C. 738 (S.C.N.S.W.)

[14] (1850) 4 Exch. 863. There are more recent cases on this point. *Can-Ohio Motor Car Co v. Cochrane* (1915), 89 O.W.N. 242 (C.A.): Re: *Homer District Consolidated Gold Mines* (1888), 39 Ch. D. 456; *OA of Motion v NZ Sero-Vaccines Ltd.* [1935] N.Z.L.R. 856; *Societa Caruso v Tosolini* (2006), 7 B.L.R. (4th) 222 (Ont. S.C.J.). See also H. R. Nathan and M.E. Voore, *Corporate Meetings Law and Practice*, looseleaf (Scarborough Ont: Thomson Carswell, 1995) ("*Nathan and Voore*") at 13-8.

stating the meeting was to be held to consider "special business" where it was intended to make a call on shareholders. The Court invalidated the call.

If, however, a notice of a directors' meeting sets out particulars of the nature of the business to be transacted, a recent case out of Australia demonstrates the possible adverse consequences of doing so in a tightly held corporation.

In *Dhami v. Martin,*[15] the Court held that where a notice of meeting of directors sets out the nature of the business to be transacted, even when not required to do so, only those items can be validly attended to. The notice given was to appoint two new directors to replace ones who resigned or were disqualified. Because the other directors failed to show, Dhami alone was constituted the quorum and went on to pass other resolutions.

The Court held that where there is a requirement that the notice convening a meeting state the purpose of the meeting or the business proposed to be transacted, the position is as stated in *McLure v. Mitchell* (1974), 24 FLR 115 at 140:

> The purpose of a notice of a meeting is to enable persons to know what is proposed to be done at the meeting so that they can make up their minds whether or not to attend. The notice should be so drafted that ordinary minds can fairly understand its meaning.

The Court further stated where the person summoning the meeting chooses to set out what is proposed to be dealt with even though there is no requirement to do so, the position was the same as stated in *McLure*.

The Court did note that there was no provision of the constitution that required the notice to state the business proposed to be transacted, and that there is no general law requirement to that effect. The general principle is that directors should come together whenever called on with notice of reasonable length and without any expectation of being told why they are being summoned to a meeting.

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[15] [2010] N.S.W.S.C. 770

The Court went on to say that a statement of purpose for a meeting, whether or not required, is put forward in order that those entitled to attend can decide whether or not to attend. In the context of a board of directors, where there is no requirement that the proposed business be stated, the implied message conveyed by the statement of purpose and its inclusion is that the meeting is being summoned, not to do anything, and everything that the board of directors has power to do, and may decide to do, but for the particularly defined and limited purpose noticed. Finally, if it had been intended that the meeting would potentially range over the whole of the company's affairs and deal with anything and everything that might be brought up, the notice would either have stated no proposed business or concluded with words such as: "To transact such other business as may be lawfully brought forward." (our emphasis)

There are some commentators who feel this latter suggestion by the Court might be too broad. It has been stated this way:

> Only non-substantive or informal matters should be dealt with under the heading of "other business." Otherwise, it can be argued that the notice calling the meeting was defective. Even though the notice of a meeting of directors need not set out details of the business to be conducted, surprise items can provide a basis for complaint by a dissident director. (See *Nathan and Voore* at 11-15)

7. Failure to Comply with Notice Requirements

One should be careful about relying upon old law which held that a court will not interfere where the irregularity complained of could be rectified[16] or, where the directors were abroad and out of reach of notices, a meeting was not invalidated.[17] Modern communication facilities would make the director reachable almost anywhere in the world. 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.[18]

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[16] See *Southern Counties Deposit Bank Ltd. v. Rider & Kirkwood* (1895) 11 T.L.R. 563.
[17] *Halifax Sugar Co. v. Francklyn* (1890), 62 L.T. 563 at 564; *Windsor v Windsor* (1912), 3 D.L.R. 456 (B.C.C.A.).
[18] *Re*: *Portuguese Consolidated Copper Mines Ltd*. (1889), 42 Ch. D. 160 at 168 (C.A.), per Lord Esher M.R.

III. CONDUCT OF A DIRECTORS' MEETING

1. Chair - who is entitled to chair meetings?

The Chair of the board, if present and willing, presides at meetings of the board. In the absence or refusal of the Chair to preside, or to continue presiding, the president shall preside, unless the constitution provides otherwise. If the Chair is disqualified from voting or disqualifies himself or herself by his or her actions, a remaining quorum of the board may elect a new Chair from amongst the directors.[19]

Every meeting must have a presiding officer, the Chair, to ensure that proceedings are conducted in an orderly fashion and in accordance with statutory requirements, requirements set out in the corporation's constating documents and generally in accordance with common law. The Chair acts as facilitator and keeps the meeting going.

2. Can directors move to replace the Chair of the meeting?

If the By-laws are silent as to who is to serve as the Chair for directors' meetings and the Chair is appointed by the meeting, that individual can be replaced by 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.

A Court may set aside a meeting for the failure of a Chair to preside at the meeting in a proper manner and allow questions to be put or to allow questions to be answered, but such conduct must be such as to affect the outcome of the meeting itself. [20]

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[19] *Nathan's* Rule 28.

[20] See *Re: Canadian Pacific Ltd.* (1997), 30 B.L.R. (2d) 297 (Ont. Ct. Gen. Div.). As to a Chair acting in bad faith, See *Portnoy v Cryo Cell International, Inc. et al Supra,* footnote 29. Here the Chair kept the polls open for voting for an inordinate period of time and had numerous management reports delivered while trolling for votes to keep management directors from being voted out. The Court ordered a new meeting at management's cost.

3. Role of the Chair

It is not possible to give a fulsome dissertation on the role of the Chair. Here are just some thoughts to assist a Chair in the conducting of a meeting of directors that may well become contentious at some point.

(a) The conduct of a meeting is largely in the hands of the Chair, who derives his or her authority from the meeting. The point is amplified in *Carruth v. ICI*. Here is what Lord Russell of Killowen said in the case:

> There are many matters relating to the conduct of a meeting which lie entirely in the hands of those persons who are present and constitute the meeting. Thus, it rests with the meeting to decide whether notices, resolutions, minutes, accounts, and such like, shall be read to the meeting or be taken as read; whether representatives of the Press, or any other persons not qualified to be summoned to the meeting, shall be permitted to be present, or, if present, shall be permitted to remain; whether and when discussion shall be terminated and a vote taken; whether the meeting shall be adjourned. In all these matters, and they are only instances, the meeting decides, and, if necessary, a vote must be taken to ascertain the wishes of the majority. If no objection is taken by any constituent of the meeting, the meeting must be taken to be assenting to the course adopted.[21]

(b) The Chair is expected to preserve order, conduct proceedings regularly and take care that the sense of the meeting is properly ascertained with regard to any question before it. He or she is also responsible for the manner of conducting votes, and granting adjournments. That said, a Chair cannot stop or adjourn any meeting at his or her own will, but may do so in circumstances described later in this paper. The Chair must act impartially in good faith, and with a view to the orderly conduct of the meeting. In doing so, the Chair must act in accordance with the will of the members of the board and the Chair must not act in an oppressive manner. The following is a quotation from *Nathan and Voore* (at 2-15):

[21] [1937] 2 All E R 422 at page 445.

> The Chair must not act to frustrate the expression of the wishes of the meeting by leaving the Chair, refusing to put proper motions to a vote, acting in an oppressive manner to end discussion or refusing to have votes counted. In *American Aberdeen-Angus Breeders' Ass'n v. Fullerton* [22], it was stated:
>
> > The right of the majority of the members to control the action of the meeting cannot be questioned. A presiding officer cannot arbitrarily defeat the will of the majority by refusing to entertain or put motions, by wrongfully declaring the result of a vote or by refusing to permit the expression by the majority of its will. He is the representative of the body over which he presides. His will is not binding on it, but its will, legally expressed by a majority of its members is binding.
> >
> > The Chair is not authorized to obstruct the meeting by refusing to call it to order, nor can a Chair announce the existence or non-existence of a sense of the meeting upon the matter before them; in other words, it is a power directed towards enabling him to carry on the meeting for the purpose for which it is convened (footnotes omitted).

In that case, because the Chair failed in his duty, the resolutions were not properly carried.

As to acting impartially, in one case a dissident group sought to have an independent chairman appointed. The Court granted the application in order to create perception of fairness. At the centre of controversy between company's management and dissidents was the issue of a bonus program which the Chair had a role in recommending**.**[23]

(c) As the presiding officer of the board, the Chair is authorized to decide in the first instance on questions arising at the meeting. The Chair has the power to disallow certain comments as well as to disallow certain votes. The Chair is also allowed, by virtue of his or her office, to determine who is entitled to vote and whether any resolutions are conclusive or not.

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[22] (1927), 156 N.E. 314 at 316 (Ill. Sup. Ct). See the *Portnoy* case, *Supra*, footnote 20.
[23] See *Shopplex.com Corporation v. Brown* (2010) A.B.Q.B. 365 (Q.B.).

(d) Some commonly fumbled parliamentary plays include tabling of motions and calling for the question. If the Chair is weak on his or her rules of order, all can be mishandled. The effective Chair needs to bone up on parliamentary procedure, or find an expert on the topic for help. The effective Chair needs to show both tact and leadership skills when it comes to discussion. Formally, no one speaks unless the Chair recognizes the speaker, but that may be difficult to control for most corporate boards. On the other hand, the savvy Type-A's on many boards can dominate, wander off into a general bull sessions, or form side conversations. The effective Chair steers between these extremes, keeping discussion on track and taking the lead.

(e) 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.[24]

4. Who is entitled to attend?

Unless the By-laws otherwise provide, only directors and other persons admitted with the consent of the meeting may attend.[25]

Suppose there are factions in the organization?

Strategy Tip #4

Consider an independent Chair, and/or consider counsel for each faction being present to help calm tensions. This should be by agreement of the disputing parties, if possible.

5. Quorum Issues

If a quorum is not present at a board meeting, the meeting cannot transact business.

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[24] See also discussion of casting vote below. See also *Nathan and Voore* at 2-7. 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.

[25] *Nathan's* Rule 10.

The CBCA By-law provides in paragraph 3.6 as follows:

> Quorum
>
> The quorum for the transaction of business of any meeting of the board shall consist of a majority of the number of directors; provided that where the Corporation has two directors both directors of the Corporation must be present at any meeting of the board to constitute a quorum.

The OBCA By-law provides is much to the same effect.

What if a director(s) refuses to attend a meeting and this prevents the formation of a quorum?

A concerted plan by a director to absent himself or herself from meetings may be improper under some circumstances, but a Court will not easily issue a mandatory injunction to compel attendance by directors. In a Delaware case, *Campbell v. Lowe's Inc.*[26] a shareholder sought a mandatory injunction to compel individual directors to attend directors' meetings on the grounds that they were unlawfully attempting to prevent the board from exercising its power by ensuring that no quorum could be obtained. The court held that the directors' action was not such a breach of fiduciary duty as to require an injunction. One Court has stated:

> There is no legal process by which a director of a private business corporation can be forced to attend a meeting, and he cannot lawfully be compelled by physical force to attend, nor can he be trapped into attendance against his will.[27]

In Canada, when directors refuse to attend meetings and thereby frustrate a quorum, the available remedies are limited.

(a) A special meeting of shareholders could be convened to remove the "dissident" directors by an ordinary resolution and to replace them with more compatible ones.

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[26] (1957), 134 A. 2d 852 (Del.Ch.).
[27] *Trendley v. Illinois Traction Co*. (1912), 145 S.W. 1, at 6-7 (Mo.Sup.Ct.) See also *Nathan and Voore* at 11-14ff.

(b) Where appropriate, proceedings might be brought by the corporation, claiming damages occasioned by the director's absence and any resultant breach of fiduciary duty.[28]

Strategy Tip # 5

Provide in the By-laws that if a person fails to attend two (or whatever is the appropriate number of) board meetings without a reasonable excuse, he or she will be deemed to have resigned and the vacancy may be filled or alternatively provide that if a quorum is not constituted by the absence of a director the second meeting can be called and can proceed with the balance of the directors constituting a quorum.[29]

6. Voting By Directors

Each director is authorized to exercise one vote at a meeting of directors.

Once there is a quorum established, in the absence of provision to the contrary in the By-laws, an act or motion must be approved by a majority of those voting on the matter.[30]

By way of illustration, if the charter documents provide for a board of seven directors with four being the number required for a quorum and only a bare quorum is present, a vote of three of those four in favour of a motion is sufficient to decide the matter.

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[28] *Gearing v. Kelly* (1962), 182 N.E. 2d 391 (N.Y. Ct. App.) and see Comment on *Bearing v. Kelly* in (1962) 62 Col. L. Rev. 1518).

[29] See the *Dhami* case *(Supra)*, footnote 15. One thing the corporation should not do is attempt to reduce the number of directors and thus disenfranchise any sitting directors. See *Portnoy v. Cryo-Cell International, Inc. et al* C.A. No. 3142-Ves (Del Ch January 2008). See also *Wells v. Melnyk* (2008), 92 O.R. (3d) 121 where the board attempted to reduce the quorum requirements for a shareholders' meeting to avoid a major shareholder being able to cause the meeting to become inquorate.

[30] *Mayor, Constables & Co. of Merchants of the Staple of England v. Governor & Co. of Bank of England* (1888), 21 Q.B.D. 160 at 165 (C.A.). But see *Perrott & Perrott Ltd. v. Stephenson,* [1934] 1 CH. 171 (Eng. Ch. Div.) which stated that all three directors were required to approve a matter. It may be distinguishable based on the wording of the Articles. Under s.141(d) of the Delaware General Corporation Law the number of votes a director elected by a class or series of shareholders receives is permitted to be greater or less than those of any other director or class of directors where the certificate of incorporation so provides. While neither statute provides expressly for voting parity among directors, the requirement is implicit under the CBCA and OBCA. See also *Wells v. Melnyk, Supra,* footnote 29.

7. Motions - do they require a seconder?

This can be a contentious issue. A director on a frolic of his or her own may propose a motion.

Shackleton[31] states:

> There is no law of the land which says that a motion cannot be put without a seconder, and the objection that the motion was not seconded cannot prevail". However, the chair has the ability to determine if he or she is willing to have the board consider the matter without a seconder.

8. Debate

The shareholders are entitled to have the directors engage in a meaningful interchange of ideas and views before a board decision is made. All directors should be given an opportunity for such interchange. Vocal participation and support are essential for an effective board meeting – up to a point. Directors should be pro-active and are expected to contribute, but within limits. This means they should not raise more than their fair and reasonable quota of questions, which in reality, will be limited considering the short period of time usually set aside for discretionary issues at board meetings. Even though the majority directors can normally bind the minority directors on any vote, the minority have a right to be heard at any meeting of directors.[32] In the New Zealand case of *Trounce v. NCF Kaiapoi Ltd*.[33], the majority directors resolved to exclude the minority directors from deliberations on a takeover offer because the latter were also directors of the offeror corporation. It was felt that the minority directors would inevitably act to the detriment of the interests of the company and in favour of the company that nominated them. The court granted an injunction restraining the company from excluding them. Heron J. said:

> The right to attend board meetings and to participate in the affairs of the company and to have access to its books and records and information is a right which is implicit in the duties and responsibilities of a director, and on the basis that without those rights their obligations cannot be properly discharged. The principles governing the right to speak at meetings of shareholders will apply to

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[31] Madeleine Cordes et al, *Shackleton on the Law and Practice of Meetings,* Tenth Edition (London: Sweet & Maxwell) 2005 (hereinafter "*Shackleton*"), at p. 64.
[32] *Great Western Railway Co. v. Rushout* (1852), 5 De G. & Sm. 290, 64 E.R. 11221 (Ch. D.).
[33] (1985), 2 N.Z.C.L.C. 99,422 (H.C.N.Z.) See also *Cameron v. Campney & Murphy* (1993) 85 B.C.L.R. (2d) 293 (B.C.S.C.).

> meeting of directors. The Chair may seek to terminate debate on any motion by asking the meeting to vote on a cessation of the debate.

9. Casting Vote

At common law, the Chair did not have a casting vote[34] if directors were equally divided on a question. Paragraph 3.10 of the CBCA By-law (paragraph 3.9 of the OBCA By-law) provides:

> In the case of an equality of votes on any question at a meeting of the board, the chair of the meeting shall not be entitled to a second or casting vote.

There is no equivalent provision for same in either of the CBCA or the OBCA. If the Chair is to have a casting vote, it is to be provided for in the By-Laws. If there is provision for the Chair to have a casting vote it is meant to be used to remedy occasional tie votes[35], not to deal with a continuous and settled deadlock condition.[36]

Where the Chair has a casting vote on a tie vote, as with any other director on a vote, he or she may not be compelled to cast it. A Chair must act in good faith in casting a tie-breaking vote.

10. Whether an abstention is considered to be a vote against the resolution.

An abstention is defined as "the refusal to vote either for or against a motion."[37] In our opinion, an abstention is not necessarily the equivalent to a "no" vote as such, but may have that effect in some circumstances. If for example, a matter under the By-laws must be passed unanimously by all of the directors then in office and not just by all directors who form a quorum, an abstention will be considered a "no" vote. See *Municipal Mutual Insurance Ltd. v. Harrop*[38] (our emphasis).

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[34] *Nell v. Longbottom,* [1894] 1 Q.B. 767 (Q.B.D.).
[35] Re: *Citizen's Coal v. Forwarding Co.,* [1927] 4 D.L.R. 275 (Ont. Co. Ct.).
[36] Re: *Daniels and Fielder* (1988), 65. O.R. (2d) 629 (Ont. H.C.).
[37] See Geoffrey H. Standford et al, *Bourinot's Rules of Order,* Third Edition (Toronto: McClelland & Stewart) 1977.
[38] [1998] B.C.L.C. 540 (UK Ch. D.).

Under the CBCA a "special resolution" is defined in S. 2(1) as "a resolution of not less than 2/3rds of the votes cast by the shareholders who voted in respect of that resolution". The underlining makes it clear that an abstention does not count at all in this circumstance (See S.1.1 of the OBCA).

Likewise, a resolution of directors is one which is passed by a majority of the votes cast at a meeting. In other words, "an abstention is not considered a vote cast" (our emphasis).

Strategy Tip #6

Be careful to define "unanimity" in the By-law to make it clear what is meant by it.

11. Method of Voting

There are no provisions in either the CBCA or OBCA 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. An attempt is usually made at directors' meetings to obtain a consensus rather than to press matters to a vote. Irreconcilable differences of opinion can arise between directors, and in this case a vote will be necessary in order to make a board decision. In the case where there is not unanimity in voting, it is good practice to record the names of those who vote for and against a motion. A director should request that his or her vote against a motion be recorded in the minutes.

Secret Ballots

If the matter is a sensitive one, there is a question of whether there can be a secret ballot at a meeting of directors, so that one director would not be aware of how other directors have voted. Only the Chair who counts the ballots would know, assuming directors' names were on the ballots.

We have been unable to find any jurisprudence on whether voting by way of a secret ballot would be permissible at a directors' meeting. In Ontario, and in most other provinces, the corporation's By-laws set out the procedural matters that govern the conduct of meetings. A corporation's By-laws do not normally include any reference to a secret ballot at directors' meetings. The UK equivalent of our standard form By-law, namely Table A, does not make mention of it either.

However, *Shackleton* states the following, at 22-08, "there is no provision in Table A for voting at a directors' meeting by poll."

The implication of this is that one could make specific provisions for voting by secret ballot in a corporation's By-Laws.

It could be argued that the call for a secret ballot is within the discretion of the Chair.
On the other hand, a secret ballot could give rise to some problems. For example, a director of a corporation may have the right to dissent from certain proposed actions to avoid potential liabilities.[39] How does one dissent in a secret ballot so that the dissent can be reflected in the minutes of the meeting? A person who has dissented could insist that his or her dissent be recorded in the minutes. In addition, as ballots in a shareholders' meeting are open to inspection by shareholders, by analogy, secret ballots at a directors' meeting could be open to inspection by other directors. This desire for secrecy would not be accomplished.

Strategy Tip #7

The drafters of the By-law using some foresight and careful drafting could make effective provision for voting by secret ballot.

12. Nominee Directors

Nominee directors must act in the best interests of the corporation. Needless to say, many board members will be corporate members whose nominees will often be on the board as part of some arrangement with the majority shareholders pursuant to a shareholders

[39] For example, shareholders may decide to sue directors for breach of their fiduciary duties.

agreement or by agreement with management in a public company. Nominee directors need to exercise caution. Corporate directors should be aware that over the past decade much attention has been focused on the expected standard of care of directors. The Supreme Court of Canada in *Peoples v Wise*[40] and the Ontario Court of Appeal in *Pente Investment Management Ltd. v. Schneider Corp.*[41] both place heavy emphasis on the fact that a director owes a fiduciary duty to the corporation. A director is not an agent of the shareholders who appointed him or her. The director is expected at all times to act in the best interests of the corporation as a complete entity, and not in the best interests of any of its individual parts.

13. Appeals from Decisions of the Chair

The Chair of a meeting has *prima facie* authority to decide all questions relating to procedure at the meeting. If the Chair's decision is challenged, any member may request a ruling from the meeting itself. Other decisions are deemed to be correct unless successfully challenged in Court by a member. In *Indian Zoedone Co.*[42] Cotton L.J. stated:

> Whether the objection depends on the form of the document or on the general point of law, the Court can decide, and is bound to decide, when the question comes before it, whether the decision of the chairman was right or wrong; but until the contrary is shown his decision must be held to be right, that is to say, the Court must decide the questions between the parties, but not until those who object to his decision satisfy the Court before whom the question comes that his decision was wrong.

It is not easy to overturn a Chair's ruling. In the recent Ontario Superior Court case of *Hadjor's v. Homes First Society.*[43] Belobaba J. had this to say about the Court's role in reviewing a Chair's exercise of discretion:

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[40] (2003), 41 C.B.R. (4th) 225 aff'd October 29, 2004, 224 D.L.R. (4th) 564 (S.C.C.).
[41] (1998), 42 O.R. (3rd) 177 (Ont. C.A.) See also *BCE Inc. v 1976 Debentureholders 2008* SCC 69.
[42] (1884), 26 Ch. D. 70 (C.A.) See *Shackleton* at 6-11; *Roberts* at p. 254.
[43] (2010), 70, B.L.R. (4th) 101 at pg. 109. The cite for the *Australian Olives Ltd*. case quoted is [2007] FCA 2090 (Aust Fed. Ct.). As to a Chair acting in bad faith, See *Portnoy v Cryo-Cell International, Inc. et al Supra,* footnote 29. Here the Chair kept the polls open for voting for an inordinate period of time and had numerous management reports delivered while trolling for votes to keep management directors from being voted out. The Court ordered a new meeting at management's cost.

> Mr. Hadjor's complaint is that the Chair wrongly ruled certain makers or amendments out of order. This is not an allegation directed at the Board. It is an allegation directed at an individual acting as the Chair, who is not a party to these proceedings. In any event, the Chair has a wide discretion in its decision making powers during meetings. As noted in *Australian Olives Ltd. v. Stout:*
>
> > …the Court will not readily intervene in a supervisory review of the exercise of the chairman's discretion unless the Court is satisfied that the discretion was exercised in bad faith. The relevant principles are these. The acts of chairman must be demonstrated to be other than bona fide or at least neglectful…The chairman 'as a matter of law has a wide discretion with which the Court will not interfere unless the exercise of the discretion can be shown to be invalid, e.g. on the ground that it was exercised in bad faith'.

14. <u>How to deal with the difficult director</u>

How should directors behave at a meeting? Although the procedure and appropriate decorum of any meeting is largely in the hands of the Chair, such authority is derived from the meeting itself.

The primary and most suitable place to determine the proper conduct of meetings is a corporation's By-laws. However, in day-to-day operations, a pragmatic approach should be observed.

What can be done with the difficult director, the one who may be argumentative or even obstreperous and who appears to treat his or her fellow directors with a lack of respect?

The textbook answer is to have the Chair declare a short recess at a meeting, talk to the offending director and hope to reason with him or her. If this is a one-off, it may be effective. If it is habitual, it may not be effective.

The Chair has the power to "adjourn" (but not terminate) a meeting for a period of time. The purpose of such adjournment would be to allow clearer heads to prevail after a brief respite. If, however, disagreements continue, then in extreme cases it might be necessary to terminate a meeting and try another day. To the extent possible, a board of directors should operate on the basis of consensus and with an element of congeniality. Only if

repeated dissension occurs should the Chair talk, one on one, with the dissenting parties to see if an approach can be agreed upon that allows board chemistry to be reestablished.[44]

Strategy Tip #8

In dealing with any case of disorder in a meeting, the Chair should always maintain a calm, deliberate tone, although he or she may become increasingly firm if a situation demands it. Under no circumstances should the Chair attempt to drown out a disorderly member, either by his or her own voice or the gavel, or permit himself or herself to be drawn into a verbal duel. If unavoidable, however, proper disciplinary proceedings to cope with immediate necessity can be conducted while a disorderly member continues to speak.

The authorities[45] suggest the following disciplinary steps may be taken for disruptive speakers or attendees:

(a) The Chair can call a speaker who persists in speaking on irrelevant matters or speaks improperly, "to order" and ask the person to be seated. If the person refuses to obey, the order may be enforced as set out below.

(b) If a director's behaviour seriously interferes with the business of the meeting, the Chair should issue a warning as to the possible consequences of this behaviour. If the interruption persists, he or she should be given an opportunity to leave, and if he or she refuses, the Chair should secure the support of the majority of the meeting if practical, the expulsion should be effected in as peaceful a manner as possible by a sergeant at arms or the attendants.

(c) If a non-director is permitted to attend the meeting and engages in disorderly conduct the Chair has the power to require that person to leave the meeting. If the person refuses to leave, again a sergeant at arms or

[44] See Brian Lechem, *Chairman of the Board: A Practical Guide* (Hoboken: 2002).
[45] See *Robert's Rules of Order* at p 640 and following; *Shackleton* at 3-02 and following.

other attendants can escort the person out, failing this, the police may be called in as a last resort.

15. Codes of Conduct

Strategy Tip #9

The board should establish a written Code of Conduct for directors articulating the minimum standard of conduct required for all directors of that corporation. It should also include the consequences of non-compliance and be adopted by By-law.

In order to set a framework for how directors should conduct themselves, a Code of Conduct is recommended. In one Alberta case the judge commented on the lack of a Code and how it might have made a difference in that case. In *Carlson Family Trust v MPL Communications Inc.,*[46] Nation J stated:

> [207] In the Notice of Meeting and Management Proxy Circular for the annual meeting of shareholders for at least the 2006, 2007 and 2008 years, the following statement was made in relation to ethical business conduct:
>
> > The board has not adopted a written code of business conduct and ethics for its directors, officers and employees and believes that the small number of directors, officers and employees makes adoption of a code unnecessary. The skill and knowledge of board members and advice from counsel ensure that directors exercise independent judgment in considering transactions and agreements in respect of which a director or executive officer has a material interest.
>
> [208] when a close analysis is done of the manner of making decisions about inside director compensation and contracts which involved insider dealing, perhaps a written code of business conduct would have reminded the directors of the need to honour its process. A written code may have lead to a considered and proper method of dealing with insider contracts, and more care in avoiding the conflicts that arise when two inside directors who see and promote themselves as the life blood of the company proceed to run a public company as if it were a closely held private company.

The Code of Conduct of the Australian Institute of Company Directors, while perhaps incomplete in some respects, is an example of such a Code. We paraphrase from the introduction to that Code:

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[46] 2009 A.B.Q.B. 77.

> The Code provides guidance to directors to assist them in carrying out their duties and responsibilities and defines the standards expected of directors of business corporations.[47]

Here is the text of a portion of this Code:

> The Code provides for disciplinary action for failure to comply with its principles and a corporation could provide for sanctions for breach of its Code, assuming it is adopted. Here are the essential components of the recommended Code. While there is much common sense in these principles and little that directors should not already know, in this concise form it will act as a constant reminder of one's obligations.
>
> 1. A director must act honestly, in good faith and in the best interests of the company as a whole.
>
> 2. A director has a duty to use due care and diligence in fulfilling the functions of office and exercising the powers attached to that office.
>
> 3. A director must use the powers of office for a proper purpose, in the best interests of the company as a whole.
>
> 4. A director must recognize that the primary responsibility is to the company's shareholders as a whole but should, where appropriate, have regard for the interests of all stakeholders of the company.
>
> 5. A director must not make improper use of information acquired as a director.
>
> 6. A director must not take improper advantage of the position of director.
>
> 7. **A director must not allow personal interests, or the interests of any associated person, to conflict with the interests of the company. (our emphasis).**
>
> 8. A director has an obligation to be independent in judgment and actions and to take all reasonable steps to be satisfied as to the soundness of all decisions taken by the board of directors.
>
> 9. Confidential information received by a director in the course of the exercise of directorial duties remains the property of the company from which it was obtained and it is improper to disclose it, or allow it to be disclosed, unless that disclosure has been authorized by that company, or

[47] Abstracted from *Code of Conduct* (Australian Institute of Company Directors, 1996).

by the person from whom the information was provided, or required by law.

10. A director should not engage in conduct likely to bring discredit upon the company.

11. A director has an obligation, at all times, to comply with the spirit, as well as the letter, of the law and with the principles of this Code.

Many of the Codes are far more detailed so we would not recommend this as a precedent, but we reproduce it only to show the kind of provisions often included in Codes.

In *Wang v British Columbia Medical Association*[48] the Code of Conduct established by the Association contained the following provisions:

- Directors are to maintain the confidentiality of the information they acquire by virtue of being directors.
- Directors must deal with each other openly, honestly, truthfully and in good faith and are to observe proper decorum at all meetings. The interactions of directors in meetings must be courteous, respectful and free of animosity.

The consequences of non-compliance were as follows:

> Any complaint of non-compliance with this Code of Conduct shall be referred to a committee comprised of the Immediate Past President, Director who is not a member of the Executive Committee, and a on-Director Parliamentarian (or such other committee as the Board of Directors may constitute) who shall investigate the matter with respect and impartiality and report to the Board with their recommendation.
> Consequences for non-compliance with this Code of Conduct will be as determined by the Board and may include any one or more of the following:
>
> - Censure
> - Exclusion from debate on any matter related to the non-compliance
> - Letter to the director
> - Request for resignation
> - Recommendation of a special resolution to remove the director.

[48] 2008 B.C.S.C. 1559.

16. What is the ultimate sanction for the incorrigible director?

There may be specified sanctions for a breach of a corporation's Code of Conduct.

Apart from the ones set out in the *Wang* Case, we have seen the following sanctions set out in one association's Code for the director in breach:

(a) exclusion from one or more meetings;
(b) refusal to allow the director to have access to corporation's records
(c) removal of the director

There are some concerns whether any of these sanctions are enforceable.

(a) Exclusion from meetings

Normally a director cannot be excluded from attending a meeting,[49] so a Chair would not seem to have the inherent power to insist a director leave the meeting unless the By-laws so provide or in a conflict intent situation, S.132(5) of the OBCA requires that a conflicted director "not attend any part of a meeting of directors during which the contract or transaction is discussed". There is no such restriction in the CBCA, but can be provided for in the By-laws or in a Code of Conduct adopted by By-law.

(b) Denial of access to corporate records

In order to accomplish the duties entailed by "stewardship," directors have certain rights that enable them better to oversee the corporation. Of prime importance is the right to inspect corporate records and other documents germane to the corporation.

In order to be fully effective, a director should insist upon access to all relevant information to be considered by the board. This information should be made available in sufficient time to allow proper consideration of all relevant issues.

[49] *Hayes v. Bristol Plant Hire Ltd.* [1957] All E.R. 685 (Ch. D.).

In the old Australian case of *Edman v. Ross*[50] the Judge stated:

> The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties, and, though I am not prepared to say that the Court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true nevertheless, that its exercise is, generally speaking, not a matter of discretion with the Court and that he cannot be called upon to furnish his reasons before being allowed to exercise it. In the absence of clear proof to the contrary the Court must assume that he will exercise it for the benefit of his company. Directors also have the right to attend member meetings, the right to view the auditors report and to review financial statements of the corporation.[51]

As noted, the right of directors to inspect records to enable them to discharge their responsibilities as directors[52] as well as to ascertain with reasonable accuracy the financial position of the corporation.[53] The Court has ordered a corporation to make available financial and corporate records for inspection even where the officer/shareholder was suing the corporation for oppression.[54]

(c) Removal of a director

The only legally effective recourse appears to be the removal of a director by the shareholders.

Section 109(1) of the CBCA and S.122(1) of the OBCA provide for the removal of a director by the shareholders by ordinary resolution.

Both statutes also give the affected director the opportunity to submit a written statement why he or she opposes such action.

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[50] (1922), 22 S.R. (N.S.W.) 351 (Sup. Ct.).
[51] These rights are generally now provided for in the CBCA (S.20(4) and OBCA (S.144(1)).
[52] *Sangha v. Sangha*, [2002] B.C.J. No. 89 (B.C.S.C.).
[53] *Richardson v. Control Fire Holdings Inc* (2002), 29 B.L.R. (3rd) 208 (Ont. Sup. Ct. Jus.).
[54] See *Boreta v. Primrose Drilling Ventures Ltd* (2010), 70 B.L.R. (4th) 88 (Alb. Q.B.).

See also the CBCA By-law paragraph 2.6 (OBCA By-law 2.5).

The courts strictly construe these provisions. In the *Sikh Spiritual Centre Case* previously referred to in footnote 5, the board of the Sikh Spiritual Centre purported to remove a director. The Court referred to an article in the Sikh Centre's By-law which provided that a director "can only be removed at a meeting of members after notice and at which two-thirds of the members are present". The Court rejected the argument that the board meeting where the removal took place was a members' meeting, even though it was agreed that the board constituted the entire membership of the corporation.

There have been some other cases where the courts have considered the right of directors to remove other directors, with varying results.
In the case of *Lee v. Chou Wen Hsien*,[55] the articles of association of a Hong Kong company provided that the office of a director was to be vacated if he was requested in writing by his co-directors to resign. The co-directors gave written notice to a director to resign and the Privy Council upheld the expulsion.

However, in the Delaware Case of *Bruck v. National Guarantee Credit Corp.*[56], the court considered whether the board had the authority to remove another director. The Court held the directors could not remove another director but only the shareholders could do so.

[55] [1984] 1 W.L.R. 1202 (P.C.).
[56] (1922), 116 A. 738 (Del. Ch.). See also *Portnoy v Cryo-Cell International, Inc. et al Supra,* footnote 29.

> Likewise, in the British Columbia case of *Re: Lajoie Lake Holdings Ltd*.[57] it was held that a board of directors does not have the authority to remove a director under the British Columbia Company Act.
>
> It is interesting to consider whether a provision in a corporation's By-laws providing for removal of a director by the other directors would be valid in light of the above.

17. Duty to Prepare for Meetings

Directors must be adequately prepared for board meetings. They must be sufficiently informed of material information to make effective, accurate decisions at meetings. It is thus the director's responsibility to obtain any necessary information in a timely fashion from corporate management. The timeliness of this information is especially important to ensure a director can seek clarification or advice on an unclear matter and that he or she can share any relevant clarifications or information with other directors before their next meeting. While this is not a statutory obligation, this will ensure directors are well suited to address perturbing issues at meetings and to effectively oversee the business of the corporation and undertake their duties.

The 1998 final report of the UK Hampel Committee on Corporate Governance stated:

> 3.4 The effectiveness of a board (including in particular the role played by the non-executive directors) is dependent to a substantial extent on the form, timing and quality of the information which it receives. Reliance purely on what is volunteered by management is unlikely to be enough in all circumstances and further enquiries may be necessary if the particular director is to fulfill his or her duties properly. Management has an obligation to ensure an appropriate supply of information. In addition, we endorse Cadbury's view (Report 4.8) that **the Chairman has a particular responsibility to ensure that all directors are properly briefed on issues arising at board meetings** (our emphasis).

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[57] (1991), 24 A.C.W.S. (3rd) 1332 (B.C.S.C. IN Chambers). The judge did not cite any authority. See also C. Hansell, *Directors and Officers in Canada: Law and Practice* (Toronto: Thomson Carswell, 1999) looseleaf, 2 volumes at 5-33.

Strategy Tip #10

The corporation should designate a "point" person to whom directors can direct questions or from whom directors are able to obtain access to information or copies of documents, if necessary.

This will provide consistency in responses and be less disruptive to staff. As we point out later this could be the corporate secretary who is the point person.

18. Conflicts of Interest

As noted in point 7 of the Australian Code of Conduct referred to on page 26:

> A director must not allow personal interests, or the interests of any associated person, to conflict with the interests of the company.

This could be the subject of an entire treatise.

For the purposes of board meetings of an OBCA corporation, note Section 132 (5) of the OBCA regarding the requirement for a conflicted director to absent himself or herself from a meeting while the issue is under discussion. This is not the case in CBCA corporations.

The conflict issue often becomes relevant in situations where there are nominee directors. Directors owe their duties to the corporation and to the corporation alone, subject of course, to the broad range of interests that can be considered under the statutory duty of care. They are required to exercise judgment that is independent of the wishes of management and, in the case of nominee directors, independent of the wishes of those responsible for their election or appointment to the board. A frequently quoted statement of the relevant principles governing the conduct of nominee directors is found in the trial court decision in *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.*[58]

[58] (1993), 8 B.L.R. (2d) 221 at para. 176 (Ont. Gen. Div.), aff'd (1993), 10 B.L.R. (2d) 109 (Ont. C.A.). See also B. Reiter: *Director's Duties in Canada* Third Edition (Toronto, CCH Canadian Ltd., 2001) at page 63.

> A director nominated by a particular shareholder of the corporation is not in any sense relieved of his or her fiduciary duties to the corporation. A nominee director is not accorded an attenuated standard of loyalty to the corporation. The director must exercise his o her judgment in the interests of the corporation and comply with his duties of disclosure, and must not subordinate the interests of the corporation to those of the director's patron.

According to Justice Farley in *820099 Ontario Inc. v. Harold E. Ballard Ltd.*, a nominee director must have sufficient courage of conviction to act contrary to the wishes of his or her appointer if this is what the best interests of the corporation call for.[59]

It is interesting to note that Section 122(4) of the *Alberta Business Corporations Act* provides that in determining what is in the best interests of the corporation, directors may give special, but not exclusive, consideration to the interests of those who appointed or elected them.

19. The Independence of Directors

Numerous statutes such as *The Securities Act* (Ontario), the *Bank Act*, the *Insurance Companies Act* require that independent directors be part of the board. For example: Section 171 the *Insurance Companies Act* says:

> Section 167(1) provides that a company must have at least 7 directors and section 171 qualifies that, Therefore, at least 3 directors must be unaffiliated.
>
> Unaffiliated Directors
>
> 171(1) At the election of directors at each annual meeting of the shareholders and policyholders of a company and at all times until the day of the next annual meeting nor more than two thirds of the directors may be persons affiliated with the company.
>
> Exception
>
> (2) Subsection (1) does not apply where:
>
> (a) all the voting shares of a company, other than directors' qualifying shares, if any, are beneficially owned by a Canadian financial institution incorporated by or under an Act of Parliament; and

[59] (1991), 3 B.L.R. (2d) 113 at para. 106 (Ont. Gen. Div.).

(b) there are no policyholders who are entitled to vote.

Independent directors must voice their concerns if they have any.

If there is any doubt whether a proposed course of action is inconsistent with a director's fiduciary duties then the course of action should not be supported. Independent legal advice should be sought as soon as possible to clarify the issue. Board counsel or corporate counsel may not be in a position to give this advice.

When a director feels so strongly as to be unable to acquiesce in a decision of the board, some or all of the following steps should be considered:

(a) making the extent of the dissent and its possible consequences clear to the board as a means of seeking to influence the decision;

(b) asking for additional legal, accounting or other professional advice;

(c) asking that the decision be postponed to the next meeting to allow time for further consideration and informal discussion;

(d) tabling a statement of dissent and asking that it be minuted;

(e) writing to the Chair, or all members of the board, and asking that the letter be filed with the minutes;

(f) if necessary, resign, and state the reason for so doing.

20. Minutes of Meetings

There is nothing in the corporate statutes that prescribes the form that minutes should take. The question that now arises for the secretary is whether the minutes be simply a summary of what resolutions were passed or a more factual rendition of the debate that took place? J.B. Colburn, author of *The Efficient Corporate Secretary in Strategies for*

Success: Management Techniques for Small and New In-House Law Departments,[60] stated the following;

> There are two schools of thought in respect of minutes: the "bare-bones" type with little narrative and the more informative narrative style. There is no question that the "bare-bones" approach or meetings by resolution in writing is appropriate for private companies and wholly owned subsidiaries. However, with today's legal environment the "bare-bones" approach is not appropriate for public companies as minutes of that type do nothing to satisfy third parties that the board members are properly entitled to rely on the "business judgment rule" to protect themselves from potential liability. Minutes are *prima facie* evidence of what transpired, and while preferably not voluminous, should succinctly and accurately reflect the material aspects of the board's deliberations. The formal record should be self-serving record of discussions and decisions on material issues. Merely recording formal resolutions is no longer sufficient or advisable.

Disputes have often arisen over wording in minutes, accusations are levied as to the secretary not being impartial. In my experience, many organizations prefer to keep a record of the discussions. Directors themselves often wish to ensure that all relevant matters have been considered, again in case there is an allegation of breach of fiduciary duties.

In one early case the judge stated[61]:

> Directors ought to place on record, either in formal minutes or otherwise, the purpose and effect of the deliberations and conclusions. If they do this insufficiently or inaccurately they cannot reasonably complain if false inferences are drawn from their reports.

Strategy Tip #12

In case of contention, the Chair could order that the proceedings be recorded. If so, the transcript should be kept in a secure place at the office, available only to a director to listen to in order to ensure the minutes of the meeting are accurate. In keeping with the duty of confidentiality, no director should be able to duplicate the transcript and take it away with him or her.

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[60] (Canadian Bar Association: Ontario, June 1, 1987) at 9.
[61] *Re: Liverpool Household Stores Ass'n* (1890), 59 L.J. Ch. 616 per Kekewich J., p. 619.

It is good practice to have the minutes of directors' meetings signed by both the Chair and secretary of a meeting. Failure to sign the minutes does not invalidate them; however, signing of the minutes strengthens the evidence as to what was said at the meeting in case of a later dispute. Moreover, there does not appear to be any legal requirement to approve minutes of a meeting at a subsequent one.[62] There does not appear to be any obligation to have minutes signed to be valid.[63]

21. Notes of Meetings

The following is an extract from the Director's Manual:

> Notes should certainly be taken at meetings. Some commentators state that once minutes have been distributed and the director is satisfied his or her comments have been adequately recorded, the notes can be destroyed. Others feel it is important to keep them to establish a due diligence defence. One must be careful what they say. Some directors have deeply regretted the existence of those notes. References to issues which were of concern to a director and which the director did not pursue could well be damaging to the director individually or to the board as a whole. Notes that indicate a director's privately held assessment of board colleagues or members of management inevitably prove embarrassing if they become public.

22. Role of the Corporate Secretary

Where the corporate lawyer acts as a director and/or as secretary of the corporation there are recognizable advantages, however there are some concerns which are set out in some detail in Appendix "C" to this presentation being an extract from the Director's Manual.

On the other hand corporate counsel serving as the corporate secretary play a more positive role in the new corporate governance regime. That person may be in a better position from the "inside" to fulfill the roles relating to the calling and conduct of meetings:

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[62] See *Nathan's* commentary to Rule 185 at p. 117; *Shackelton* at 8-03.
[63] See *Nathan and Voore at 4-11.*

(a) Ensure the effective running of the activities of the Board and its committees;

(b) Keep under review all legal and regulatory developments affecting the Company's operations and make sure the Directors are properly informed of same;

(c) Act as a sounding board for the Chairperson and the Directors on matters that concern them and take a lead in dealing with difficult interpersonal issues, such as removal of a Director from the Board;

(d) Act as a primary point of contact and source of advice/guidance for non-executive or independent directors with regard to the company and its activities in order to assist their decision making process;

(e) Arrange and manage the process of calling and holding board, Annual General or Special Meetings and advise the Board on matters to be raised at the meetings.

The above are recognized to be general guidelines and will vary by company. These guidelines were slightly abbreviated from the original wording put forward by the Institute of Chartered Secretaries and Administrators.

IV. CONCLUSIONS:

There will always be contentious issues at board meetings. Carefully drafted By-laws and the adoption of some of the Strategy Tips outlined in the paper will hopefully resolve or reduce the number of them.