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The Role of the Chairman

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Introduction

Every corporation is operated differently and it may take on a life of its own. However, there are several factors that every corporation have in common, such as the fact that every corporation must have officers, directors, shareholders or members and a chairman for the meetings of its shareholders/members and directors. Corporations must continue to take positive action to comply with corporate governance in order to remain legally compliant.

Who is Entitled to Chair Meetings and Role of Chair

One of the many factors that a corporation must take under advisement is that they must appoint a chairperson for meetings of directors and shareholders/members in order for the meetings to be considered valid. The courts have heeded this need and in one Australian case in particular the, the judge stated as follows:

> It is an indispensable part of any meeting that a chairman should be appointed and should occupy the chair. In the absence of some person (by whatever title he or she be described) exercising procedural control over a meeting, the meeting is unable to proceed to business.[2]

[1] Mr. Nathan is a senior partner of Minden Gross LLP and is Editor-in-Chief of *The Directors' Manual*.
[2] *Colorade Construction Pry. Ltd. v Platus* (1966), 2 N.S.W.R. 598 at 600.

Most by-laws provide that the Chair of the board, if present and willing, will preside 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 no such provision exists, a remaining quorum of the board may elect a new Chair from among the directors.[3]

The Chair Need Not Be a Lawyer

In the B.C. case of *Hastman v. St. Elias Mines Ltd.*[4], the applicants sought to set aside a shareholders meeting. They alleged the Chair was not a lawyer and basically was not qualified to rule on the validity of proxies. The Court rejected this argument and stated:

> …from a policy point of view, it would not be desirable to restrict the group of people who could be chairs of a corporation to lawyers. The authorities are replete with situations where chairs of companies are not lawyers and I was not given any authorities to contradict that history.[5]

The Chair should, however, consider having counsel to advise on issues, especially if those issues may become contentious at the meeting or afterwards.

Authority of Chair

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*[6], 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.

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, if the conduct was such as to affect the outcome of the meeting itself.[7]

The Delaware decision in *Portnoy v. Cryo-Cell International, Inc.*[8] is an example where the Court ordered a new election with a new chair at the expense of the management due to the improper

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[3] *Klein v. James* (1986), 36 B.L.R. 42 (B.C.S.C.) affirmed (1987), 37 B.L.R. (XXV1) (B.C.C.A.).
[4] 2013 B.C.S.C. 1069.
[5] *Ibid* at para 139.
[6] (1927), 156 N.E. 314 (Ill. Sup. Ct).
[7] See *Re: Canadian Pacific Ltd.* (1997), 30 B.L.R. (2d) 297 (Ont. Ct. Gen. Div.).

behavior of the Chair at a shareholder meeting in trying to maintain control of the board. The Chair, Mercedes Walton, and the management groups devised a plan to buy up stock and bolster their position in a proxy contest. Going into the annual meeting at 10:00 a.m. the Chair sensed defeat and did not want to close the polls and count the vote when the scheduled presentations at the meeting were over. So she had members of her management team make long, unscheduled presentations to give her side more time to gather votes and ensure that they had locked in two key blocs. She overruled motions to close the polls. Even after filibusters, Walton still harbored doubt that the Management Slate would prevail if the vote was counted and the meeting was concluded. So, at around 2:00 p.m. Walton declared a very late lunch break, supposedly in response to a request made much earlier.

In fact, Walton called the break so that she would have more time to seek votes and so that she could confirm that the major blockholders had switched their votes to favour the Management Slate. Only after confirming the switches did Walton resume the meeting at approximately 4:45 p.m., declare the polls closed, and have the vote counted.

The judge had harsh words to say about the Chair's behavior in finding a serious breach of fiduciary duty that tainted the election of directors. The Court ordered a new meeting with a new Chair at management's cost.

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.

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 foreward, by wrongfully declaring the result of the vote, or by refusing to permit the expression by the majority of its will. The Chair is the representative of the body over which he or she presides. His or her will is not binding on it, but its will, legally expressed by a majority of its members is binding.

Casting Vote of Chair

At common law, the Chair did not have a second or casting vote[9] if directors were equally divided on a question. There is no provision for a casting vote in the corporate statutes. 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,[10] not to deal with a continuous and settled deadlock condition.[11] Some people think the Chair only has a vote if the

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[8] (2008), 940 A.2d 43 (Del.Ch.).
[9] *Nell v. Longbottom*, [1894] 1 Q.B. 767 (Q.B.D.).
[10] Re: *Citizen's Coal v. Forwarding Co.,* [1927] 4 D.L.R. 275 (Ont. Co. Ct.).
[11] Re: *Daniels and Fielder* (1988), 65. O.R. (2d) 629 (Ont. H.C.).

Chair has a casting vote. This assertion is wrong. A Chair must act in good faith in casting a tie-breaking vote, but is not compelled to cast the tie-breaking vote.

If it is intended that consensus be achieved amongst the directors, the occurrence of a tie vote shows that obviously consensus has not been achieved. Those who are of the consensus view would argue that the Chair should not have a casting vote or exercise a casting vote in order to break a deadlock.

Appeals from Chair's Rulings

The rulings of the Chair related to procedural matters may be appealed to the meeting. The best practice is for the person acting as Chair of the meeting to vacate the chair while a vote is taken. The appeal of such procedural rulings by the Chair should not involve speeches. A majority vote is required to vary or reverse the Chair's ruling.

There is a presumption that the Chair's decision was a correct one. There have been several pronouncements in cases to this effect. For example, In the *Re Indian Zoedone Co.*[12] case in the English Court of Appeal, 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.

Removal of Chair

A Chair appointed by the meeting 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. All one can do is to bring a motion in Court to order a new meeting.

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[12] (1884), 26 Ch. D. 70.