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In Camera Directors' Meetings



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Introduction

Most directors have heard the phrase “*in camera* meeting” but many are not certain what such a meeting really means.

Historically, a legal case was said to be heard *in camera* when the judge either heard it in his private room, or caused the doors of the court to be closed and all persons, except those concerned in the case, to be excluded. This was formerly done where it was in the public interest that the facts of the case should not be published.²

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² Jowitt: *The Dictionary of English Law*

There is legislation which contemplate *in camera* meetings. For example, the *Municipal Act (Ontario)* provides that meetings of council are open to the public with certain exceptions. These include if the subject matter being considered is:

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (d) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;



An *in camera* meeting in today's business world usually connotes a meeting where the independent directors of a corporation might have an opportunity to gather together without management present. Often the *in camera* sessions will consist of a series of meetings between the independent directors and key persons such as the Chief Executive Officer ("CEO"), internal and external auditors, the chief risk officer, etc. This provides the independent directors an opportunity to meet with these individuals privately and to have a candid discussion about the affairs of the company without other parties being present.

Directors often hold *in camera* meetings where there are sensitive issues, often where only a certain number of directors attend, which may or may not constitute a quorum.

A CEO is often a director of a company. Suppose there is a concern that the CEO is not properly performing his or her duties? How to terminate the CEO's employment, or at least have a discussion of what to do, may be an example of such a sensitive matter. Another concern might be the difficult director who may be a nominee for a larger shareholder. There may be confidentiality concerns.

Notice and Right to Attend Board Meetings

It is settled law that if due notice is not sent to all directors, the meeting is invalid unless the absent director waives notice or acquiesces to the transaction of business. It is also settled law that every director has the right to attend and participate in all meetings of the board of directors.³ A director cannot be excluded from a meeting of the board.⁴ One exception that comes to mind is under section 132(5) of the *Ontario Business Corporations Act*. This section provides that a conflicted director shall not attend any part of the meeting of directors during which the contract or transaction in question is discussed and shall not vote on any resolution to approve the contract or transaction unless the contract or transaction is.

- (a) one relating primarily to his or her remuneration as a director of the corporation or an affiliate;
- (b) one for indemnity or insurance; or
- (c) one with an affiliate;

There are other Acts which make these provisions applicable such as the *Toronto Atmospheric Fund Act*, 2005, s.7.

³ *Boak v. Woods* (1926), 36 B.C.R. 456, 1 D.L.R. 1186 (C.A.).

⁴ *Hayes v. Bristol Plant Hire Ltd.*, [1957] 1 All E.R. 685; *Howard v. Dench*, [1942] 2 D.L.R. 177 (B.C.C.A.); *Trounce v. NCF Kaiapoi Ltd.* (1985), 2 N.Z.C.L.C. 99, 422 (H.C.).



Inspection of Records

Directors have the right to inspect minutes of directors' meetings and other company information under the *Canada Business Corporations Act* (s. 20(4)) and the *Ontario Business Corporations Act* (s. 144). Minutes of an inquorate *in camera* meeting may be subject to inspection by directors who were not invited to that meeting as company information. They could also be the subject matter of discovery in litigation. A common sense approach would be to hold the *in camera* meeting, make a decision, toss away notes and do not keep minutes.

Use of Executive Committee / By-Laws

What if an *in camera* meeting is held without the CEO and a decision is made to terminate the CEO? How is that decision legally carried out?

What is the way to ensure the difficult director does not pass along information to his or her nominator?

Theoretically, a board meeting can be convened with the CEO director invited and the bad news delivered at that meeting. This is often difficult to carry out from a personal point of view. The termination will often be confrontational. Accordingly, the *in camera* meeting should be used as a prelude to a proposed termination. If the *in camera* meeting comes to the conclusion that terminating the CEO is in the best interests of the company, the Chair could have a talk with the CEO and give him or her the bad news. Thereafter, the CEO might well decide to resign or absent himself or herself from a proper meeting of the board where the termination will be confirmed.

Both the *Canada* and *Ontario Business Corporations Acts* provide for the creation of an Executive Committee to which may be delegated certain of the powers of the board.

If there has been such a delegation of the power to hire and fire employees, the Executive Committee may have the power to terminate the CEO's employment.

Recent Case Law

In the recent Delaware case of *Kalisman, et al. v. Friedman, et al.*,⁴ the Court of Chancery provided guidance for a board dealing with a difficult director. It confirmed the following:

1. a director's right to company information is "essentially unfettered in nature."
2. a director's right to information extends to privileged material;

⁴ C.A. NO. 8447-VCL



The Court dismissed the defendant’s argument that the privileged information might be used by the petitioner to harm the corporation. Laster V.C. stated that if the petitioner misused the information, the company had its remedy in the courts.

3. a corporation cannot assert the privilege to deny a director access to legal advice furnished to the board during the director’s tenure.

The rationale is much the same as the Canadian law, namely that “all directors are responsible for the proper management of the corporation.”

The Court went on to discuss the formation of a special committee which in this case was convened to discuss the company’s strategic alternatives. The committee met without the knowledge of the petitioner.

The Court held such a committee could be struck and exclude certain directors **as long as this is done with the knowledge of the excluded directors.**

Conclusions

The lessons learned from the cases are:

1. that once a director is elected he or she is part of the team for all purposes;
4. the courts will respect and protect a director’s rights to ensure he or she has access to all relevant information.
5. CEO’s do not necessarily have to be directors and just as there is a strong movement to have the Chair and CEO occupy different offices, consideration should be given for the CEO not to be a member of the board.

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