

Removal of Directors of Business Corporations

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Introduction

In some cases a director may be in breach of his or her fiduciary duties to the corporation, or has otherwise acted inappropriately and should be removed from office.

Corporate Statutes

At common law, there was no procedure for the removal of a director during his or her term of office, however, both the Canada Business Corporations Act (“CBCA”) and Ontario Business Corporations Act (“OBCA”) have provided for mechanisms through which a director may be removed. Section 109(1) of the CBCA and section 122(1) OBCA provide that the shareholders of a corporation may remove a director by ordinary resolution before his or her term of office expires at an annual or special meeting called for that purpose. A director is entitled to receive notice of any meeting where it is purposed to remove that director and to attend and be heard at such meeting, See Section 123(1) of the OBCA and section 110(1) of the CBCA. Section 123(2) of the OBCA and section 110(1) of the CBCA provide a director with the opportunity to submit written reasons why he or she should not be removed.

Removal by the Court

Outside the ordinary removal powers of the shareholders, there are exceptional circumstances where the courts have exercised their power to remove directors. In *Catalyst Fund General Part I Inc. v. Hollinger Inc.*[1] the oppression remedy provided for in section 241 of the CBCA was recognized as a statutory basis for the court to remove a director. However, Justice Ground in *Albrecht v. Kuhn*[2], in refusing to remove a director from a corporation’s board, noted that the court will exercise its power of removal in only the most extraordinary circumstances where the continuation of the board of directors in its present state would be harmful to the corporation or where the conduct of the director rises to the level of misconduct. A summary of cases dealing with circumstances where the judiciary has removed a director of a corporation was set out in *Walker v. Betts*[3].

Removal by the Board of Directors

As noted above under “Corporate Statutes”, normally only the shareholders of a corporation can remove a director by way of an ordinary resolution at an annual or special meeting. It is submitted that the board, committee of the board or individual member of the board has no authority to remove a director.

The court in the Delaware case of *Portnoy v. Cryo-Cell International, Inc.*[4] upheld the spirit and rationale of the legislative restrictions on directors’ powers. The Portnoy case dealt with a voting scheme designed to wrest control of the board from the current sitting members in favour of a selected group of other individuals. In reinstating the original directors the court noted that the rationale of having the shareholders dictate and control the individuals selected to manage the business affairs of the corporation is based upon the fact that the corporation exists for the benefit of the shareholders.

In *Re: Lajoie Lake Holdings Ltd.*[5] a British Columbia case dealing with this topic, the court concluded that a board of directors did not have any authority to remove a director under the British Columbia Company Act, whose provisions were similar to the CBCA and the OBCA.

Other Suggestions

However, there are arguments to be made which may provide the directors of a corporation with the ability to remove a co-director.

1. Frequently a corporation's Code of Conduct, usually adopted by by-law, provides as a consequence of a breach of duty that a director may be suspended or even removed from his or her office.

There are no Canadian and U.S. cases to the writer's knowledge which have considered the issue whether this would be an enforceable provision.

2. A director may be required to file an undated resignation with the secretary or the corporation when he or she is elected to the board.

The triggering event for implementing the resignation may be a resolution of the remaining directors as long as the grounds for its exercise are set out in advance and there is fairness in the process.

3. A director may agree in advance to removal by the board when he or she has been elected [6], again as long as the grounds for its exercise are set out in advance and there is fairness in the process.
4. Provisions may be made in a corporation's article for resignation in certain circumstances.

In *Lee v. Chou Wen Hsien*[7], a case in the Privy Council, a Hong Kong company provided in its articles of association that a director must resign if a written request to do so was submitted by the co-directors of the corporation. The Privy Council upheld the removal of the director in this fashion where execution of the provision was administered in accordance with the stipulated method. Thus, a specific intention manifested in the articles placing the power of removal in the co-directors' hands was viewed as a valid means of removal.

Conclusion

It is arguable that where the by-laws or articles of a corporation set out a procedure for the removal of a director by the board, such a procedure could be upheld as a legitimate means of empowering the decision making process of the "owners" of a corporation. However, there is a lack of authority to support this claim unequivocally. The current state of the law with respect to the power to remove a director in Ontario, and more generally in Canada, is statutorily vested with the shareholders of the corporation only.

Mr. Nathan is a senior partner of Minden Gross LLP and is Editor-in-Chief of the Directors Manual, © CCH Canadian Limited. The writer wishes to express his appreciation to Daniel Wiener, student-at-law, for his assistance in preparing this article.

[1](2006), 79 O.R. (3d) 288 (C.A.)

[2](2006) 15 B.L.R. (4th) 8 (O.N.S.C)

[3](2006), 20 B.L.R. (4th) 152 (B.C.S.C) at 158

[4](2008), 940 A.2d 43 (Del. Ch.)

[5](1991), 24 A.C.W.S. (3d) 1332 (B.C.S.C)

[6] This suggestion was put forward by Chris J. Matthews in a Mondaq article published November 25, 2010 titled "Confidentiality: An Important Commercial Interest"

[\[7\]](#)[1984] 1 W.L.R. 1202 (P.C.)