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Top Ten Contentious Issues at Board and Shareholders' Meetings Webinar

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Question and Answer Document

This question and answer document is resource material from the CCH Online Seminar '**Top Ten Contentions Issues at Board and Shareholders' Meetings'**. For more information on CCH Canadian Ltd's online seminars and range of business and HR solutions, please contact:

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Question and Answer Document

First QA Period

1. **If minutes of the previous meeting are corrected, are the corrections entered in the minutes of the meeting at which the corrections were made? [Hartley Nathan]**

I would suggest that the minutes of the current meeting reflect the discussions and the minutes of the meeting in question be amended or corrected, so the record will be clear on a stand-alone basis.

2. **What happens in the event that board member is not reachable to receive notice but an emergency matter must be dealt with at a board meeting? [Hartley Nathan]**

As long as a meeting is properly called in good faith, and a notice is sent out in the proper manner and a **quorum** is present, the board can proceed.

3. **What is meant by a unanimous shareholder agreement? [Hartley Nathan and Phillip Bevans]**

[Hartley Nathan begins] Both the OBCA and the CBCA in sections 115(1) and section 102(1) refer to unanimous shareholder agreements. Basically, the board must manage the affairs of a corporation, subject to any unanimous shareholder agreement. The unanimous shareholder agreement is basically defined in section 140(1) of the CBCA and section 108(3) of the OBCA. So where a corporation has more than one shareholder, a unanimous shareholder agreement is an otherwise lawful written agreement among the shareholders or the shareholders and one or more persons who are not shareholders that restricts in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of the corporation.

[Phillip Bevans begins] Basically, what happens is the directors can delegate to the shareholders certain powers subject to some limitations. To the extent directors delegate powers of the directors to the shareholders, the directors are relieved of any responsibility or liability in respect of those matters.

4. **Can the chair designate his powers to another director as acting chair of a meeting provided that the board agrees? [Hartley Nathan]**

There are a few situations where that might happen. For example, where the chair has a conflict of interest, the appropriate procedure is for the chair to give up the chair and for someone else to chair that portion of the meeting.

There are other instances where someone other than the chair can chair portions of the meeting.

5. **What steps need to be taken if the accuracy of the meetings' minutes comes into question? [Hartley Nathan]**

In that instance a vote should be taken at the particular meeting as to whether the particular matter is or is not accurate and the majority vote would prevail. There are of course, appeal processes from certain chair's rulings.

6. **What happens if directors are conflicted on a particular issue? How does the matter get board approval? [Hartley Nathan]**

In those circumstances, the conflicted director should declare his or her conflict of interest and refrain from voting. And if there is still a quorum in office then they can continue and determine the matter. Both the OBCA and CBCA provide that if there is a quorum loss because of this, the balance of the directors present at the meeting can make a decision.

7. **Can the board fire the chairman in the course of a board meeting and thus effectively replace the chair at a meeting. [Hartley Nathan and Phillip Bevans]**

[Hartley Nathan begins] Once again it depends on the constating documents as well as contractual documents. Sometimes the board will think that having appointed a chair, the chair is free to dispense services at will. Sometimes that is true. However in many cases, the bylaws of course will prescribe the duties of the chair and things the chair has to do.

[Phillip Bevans begins] In addition, we are seeing increasingly that chairs are entering into agreements with the corporations that stipulate their duties, access to information, all kinds of other things. Sometimes there is provision for termination payments and that sort of thing, largely because the role of the chair has become much more important in recent years. It takes a lot more time and a greater commitment, and there is also prestige for the individual acting as chair. One thing that you do have to be aware of is that even if the board determines that the right thing to do is to terminate the chair in that role, there still may be contractual arrangements to consider, just as there might be with other management members.

8. Should a director leave the room if there is a conflict or just abstain from voting? [Hartley Nathan]

As I mentioned previously, section 132(5) of the OBCA provides that the director in conflict shall not attend any part of the meeting of directors during which the contract or transaction is discussed and shall not vote on any resolution and so on. The commentators have two views. It may well be that a conflicted director is knowledgeable about the affairs in question and may very well have something to contribute to the particular matter on the table. So I think there is some flexibility here. The requirement is to leave but some people and some boards prefer that the director stay and express his or her views and then leave. So it is up to the board or chair to decide this. But in law, the person is not supposed to be there during the discussion.

There is no equivalent in the CBCA in section 120(5). It deals with the fact that the person cannot vote but it does not require that the person actually leave the meeting.

9. If the Meeting goes in camera, do the people who have permission to attend the meeting have to leave? [Phillip Bevans]

There are two kinds of in camera situations. One is where there are guests who are admitted with the consent of the board. And so that is the one obvious sense of that and if it was in camera then yes the intention is that they would leave. The other is that often meetings are held by the board for the purpose of excluding management. There may be members of management who are also members of the board and there may be members of management who are attending the board meeting for the purpose of presenting reports or providing information to the board itself. The independent directors often want to deal with certain matters in the absence of people who are directors and members of management and they also want to deal with them in the absence of other officers or members of management who were there for the purpose of assisting the board. That is the second kind of in camera situation. That again is a good practice and it is something that is increasingly being asked of boards. "Do you have a regular practice of excluding management directors from meetings either on a regular basis or with respect to certain kinds of questions? What is your policy on doing that? " That has become quite important.

10. **Once board minutes have been prepared and approved do you recommend that a board member keeps his or her rough notes or destroys them? [Hartley Nathan]**

In my judgment I think it is appropriate for directors to maintain their notes but be very cautious about what is in the notes. That is not to say you want to falsify what is in the notes but be certain in your taking of notes. If you hear a director asking a question, do not put in your notes "Mr. X is stupid for asking that question" or more particularly for that person do not write in your notes "he should be asking this question versus that question". Those notes will be examinable in any subsequent proceedings and you do not want some unfortunate phraseology to catch you up. But conversely, notes are the best way to show that the business judgment rule was observed at least by the individual in his or her notes by saying "I discussed this, I put this question, I discussed that, etc." So I am in favour of keeping one's notes as long as you are careful in so doing.

Second QA Period

1. **What is the proper procedure if someone comes into a meeting late during the middle of a vote? [Phillip Bevans]**

The answer to this question might depend on whether the vote is by a show of hands or by ballet. As noted in Rule 181 of Nathan's, unless the bylaws otherwise provide, voting at a shareholder meeting is normally by a show of hands unless a poll is demanded. On a show of hands, the shareholder/ proxy holder arriving at the meeting is unlikely to know what the subject matter is so is unlikely to cast an informed vote. However, if upon inquiry from other members at the meeting, the shareholder is able to ascertain this, there is nothing to prevent that person voting. If the vote is by show of hands, the vote does not take very long and it may be over before the person determines what the issue is. It is also possible that a portion of the vote, like the "yea" vote or the vote in support of the resolution might be over and that would only leave the "nay" vote or vote against the resolution, and so he might be disenfranchised simply by the fact that the opportunity to vote affirmatively has gone by. However, a shareholder joining the meeting in progress cannot demand that the vote be interrupted to facilitate his or her participation. The best thing to do if you enter a meeting while a shareholder show of hands is in progress is to demand a poll. As noted previously this does not require the consent of the chair or of the meeting and so it should be conducted without debate. But if the vote is a vote by ballot then the shareholder or proxy holder can enter his or her vote as long as the result of the vote has not been announced and such shareholder's ballot can be registered with the scrutineers

or otherwise complies with the voting arrangements that have been adopted. If the report of the scrutineers on the vote has already been delivered to the chair, then it is up to the chair of the meeting how to proceed. However, once the result of the vote has been announced, that aspect of the business of the meeting has been concluded and there is no opportunity to record any further votes.

2. **Can you speak to the effect of accidental omission to give notice to a meeting? [Hartley Nathan]**

A standard form of bylaw does provide for accidental omission to give notice of a shareholders meeting. There is no such provision that I am aware of when it comes to notice of a board meeting. Directors have to have notice of the meetings and I would question the validity of any board meeting where a director has not been notified even due to an accidental omission.

3. **Should the minutes of the meeting be signed by the chair and secretary present at the meeting when one of these officers changes between the meeting and the meeting at which they are being considered? [Hartley Nathan]**

My view is that only the chair and secretary of the meeting itself should be the ones signing the minutes so that if the person has been removed, then they would have to go back to the chair or the secretary to have them signed. Now keep in the mind the fact that there is no absolute requirement for minutes to be signed. So if it turns out that it is not possible to obtain the signature of the chair of the meeting (who might be the president) the minutes would not be invalidated. The minutes are just prima facie evidence when they are signed of the facts set out therein. These can still be contradicted by parol evidence.

4. **Are only registered as opposed to beneficial shareholders permitted to make and second motions at a meeting? [Phillip Bevans]**

This really depends on the contents of the shareholders list and that really determines who is entitled to notice. The relevant date is the date on which the shareholders entitled to vote is determined. A list of shareholders is prepared at that date and the persons named on that list are the ones treated as entitled to vote at the meeting. In some cases that will include registered shareholders, holders who hold shares on behalf of other beneficial shareholders, trust companies, and your broker who typically holds shares in your account in street form. This means that they are registered in your broker's name and not your name. In that case there are certain obligations under securities law to ask if you want to get the meeting materials or if you want to provide instructions directly and so on. There are procedures as well whereby you can, for example, have your shares held in street form and they are held by your broker. Here, your broker can appoint you as proxy holder

with respect to the shares of which you are the beneficial but not the registered owner. So it is possible that persons who are beneficial shareholders may be permitted to make second motions but they would do so in their capacity as a registered shareholder.

5. How should a friendly amendment be dealt with? [Phillip Bevans]

When we say friendly, I guess we are going to assume that it does not alter the sense of the motion itself. Any motion that varies the original resolution to the extent that it reverses it or negates it is not a suitable one to be introduced. Generally, the first thing that should happen to a friendly amendment is that the Chair should ask if the mover or seconder consents to the amendment and if they do, there is no need to vote on the amendment. Voting on the amendment is time consuming. It might be that somebody just happened to come up with a good idea as to which the mover and seconder think: "Fine. That sounds reasonable. That is an improvement to our original motion. Let's accept that and get on with a vote." But there may be cases where even a well-intentioned amendment might be thought unwise by the proponents of the motion or might otherwise affect the sense of the resolution, in which case the mover and the seconder might not want to consent to the amendment. If they do not, then the meeting should immediately proceed to consider the amendment before the question is put on the main motion. If the amendment is passed, then the main motion, as so amended, is put to a vote. If the amendment is voted down, then the unamended motion is put to a vote. You'll see this discussed at rules 147 to 152 inclusive at pages 120 to 123. The same procedure incidentally applies to sub-amendments to amendments and that's dealt with in rules 153 to 155. The rules also indicate that some kinds of motions are not amendable at all. Those are by and large procedural motions such as points of order, information, question, privilege, motions to conclude or terminate the meeting and so on. There are others that are amendable to some extent and there are others that are amendable completely, without any restrictions. So you have to look at the nature of the amendment and the rules, particularly 147 and others to see whether it can be done.

6. Do motions need to identify who makes the motion or seconds the motion? [Hartley Nathan]

It is up to the company practice; normally there is no requirement to do this. It is up to the company if they want to identify who has made the motion or who has seconded it. The fact that somebody seconds a motion does not necessarily mean that the person agrees with the motion. It is just an expediency matter to move the meeting along.

7. **If a new meeting is required due to a procedural problem, does the same notice requirement need to be satisfied for the new meeting? [Phillip Bevans]**

I am assuming that when we say that a new meeting is required, we mean that there was some defect in procedure that went to the validity of the meeting itself. And either that would be because somebody made an objection to it at the meeting or it went to court and was determined to be defective and so on. If the defect went to the validity of the meeting itself then the meeting already held was a nullity and because a whole new meeting is required, a new notice must be given. So if there was a defect that went to the propriety of the meeting itself you need a new notice.

If there was a defect that went to a part of the business of the meeting, like a special business meeting so that there was general business conducted and the defect was limited only to the special business, in that case you would need a new notice only with respect to the item of special business. It might be, for example, that you adjourn the meeting. But with respect to the general business you would not need a new notice for that. But again it is complicated and the general rule is that if the meeting as a whole is invalid with respect to all items of business before it, then a new notice is required.

8. **Are there any criteria on who should move and second a motion? Can the same person move and second the motion? [Hartley Nathan and Phillip Bevans]**

[Phillip Bevans begins] As a general rule, the point of requiring a motion and a seconder is to ensure that there is some support for the motion at the meeting. The point of requiring a motion and a seconder is to ensure that there is some support for the motion at the meeting. The point of the motion is not that the mover is necessarily in support of the motion, but to put the subject of the motion before the meeting for its discussion. Is that business something that the meeting is willing to consider? A motion at a director's meeting does not require a seconder so such a motion does not fail. Normally at a shareholders' meeting if there is no seconder it is likely to be because no one wants to see that issue discussed. However, it's likely that this is going to be a subject of ruling by the chair because the chair is thought to have the discretion to admit a motion for discussion even if there is no seconder.

[Hartley Nathan begins] I think it makes no sense whatever for the same person to be moving and seconding the motion, I think it is really a case of expediency. If the person who proposes the motion then seconds it, it is an indicator that nobody else really wants to proceed with that motion. You really need two separate people. A question that is often asked is about whether a motion requires seconders and this is in Rule 140 on page 117 of the text.

There are a couple of situations that appear to require seconding but yet there is still I believe the discretion on the part of the chair to proceed without a seconder. But in absolute terms, the chair should not be criticized in those specific circumstances where there is no seconder and he or she refuses to move forward on the motion.

9. **Please explain the difference between termination of a board meeting and an adjournment of a board meeting. [Hartley Nathan and Phillip Bevans]**

[Hartley Nathan begins] I think to some extent, these are matters of terminology. I think they are sometimes used interchangeably. There are specific rules relating to the adjourning of meetings. If there is no further business to be discussed at the meeting and all matters have been attended to, I think either term could be used. I think people would agree that the meeting is over. There are of course specific situations. If a meeting gets out of hand, a chair may ask for a motion to adjourn. The meeting may be adjourned to another day, or may be adjourned sine die, which simply means to be brought on again on proper notice. If there is no quorum, there are some rules which provide that the meeting can be brought on again or can be automatically adjourned.

[Phillip Bevans begins] In some cases, you do not want to lose quorum. For example, a matter that is presented before the board which may go on at some length and the board might not want to have new notices of the board meeting given again or it might be a meeting of a special committee considering a takeover bid or some other transaction of that nature like an M&A transaction. Sometimes a report will not be ready in time for the board to consider. There may be all kinds of reasons why you do not want to lose quorum or other reasons as to why you want the keep the board procedure in process. In that case you might say "we are adjourning the meeting pending the receipt of the report of the corporate finance advisors or accountants as the case may be." You may know when you are getting the work back, maybe on a fixed date or it takes two or three days for the secretary to receive the corporate report from the corporate finance advisors. Of course it is also complicated by the quorum issues and so on. There could be reasons why you might want to keep the meeting going. At the same time when you have the M&A transaction going or when you have insider transactions going, one of the things the board likes to report is that there had been a certain number of meetings of the board or special committee meetings that took place and you might like that raw number or you might like how the board met on certain dates, in which case you put down the dates and say whether or not it was a new meeting or an adjourned meeting.