

# The Mechanics of an Ambush

April 2010

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**Contents**

Page

The Mechanics of an Ambush ..... 1

I. Principal Considerations.....2

1. Raising the Issue: At Which Meeting? .....2

(A) Annual Meeting .....2

(B) Special Meeting.....2

2. Is the Board Staggered?.....3

3. Is the Board Elected by Slate Ballot?.....3

4. Is there a Confidential Voting Policy?.....3

5. Who Should be Nominated?.....4

6. Evaluating the Chances of Success .....4

II. Gather Support.....5

1. Quiet Solicitation.....5

2. Identify Holder Positions.....6

(A) Submit Shareholder List Request .....6

(B) Access Corporate Records .....6

(C) View the Meeting Shareholders' List.....6

(D) Use Publicly Available Information .....7

3. The Problem of Identifying Beneficial Owners .....7

(A) Identify Beneficial Owners.....7

(B) Beneficial Owners and Proxy Appointees .....7

III. Attend the Meeting.....8

1. Chair Asks for Nominations.....8

(A) Eligibility to Nominate.....8

(B) Put Forth Nominees .....8

(C) Exercise Right of Discussion .....8

(D) Obligations of the Chair .....8

(E) Close of Nominations .....8

2. Power of the Chair to Adjourn.....8

3. The Vote .....9

(A) Procedure (Generally) .....9

(B) Dissident Votes .....9

(C) Management Votes.....10

## The Mechanics of an Ambush

This memorandum provides a general overview of the significant legal considerations relevant to the replacement of directors of a corporation governed by the *Canada Business Corporations Act* (the “CBCA”) by way of an ambush. For the purpose of this memorandum, an ambush is characterized as the appearance at a shareholders’ meeting by a dissident shareholder, whose unannounced and unexpected purpose is to replace one or more of the corporation’s directors. Success is defined by the dissident in each case depending on the particular dissident’s circumstances and objectives. As there is no one standard of success in these circumstances it is important for a dissident to understand how an ambush works and what can be achieved.

There are various means by which a dissident may attempt to ambush a shareholders’ meeting, examples of which are set out below. First, this memorandum explores certain principal considerations of the dissident, including a determination as to which meeting presents the best forum at which to seek to replace directors by means of an ambush. Whether the target corporation’s board is staggered and/or elected by slate ballot, whether there is a confidential voting policy in place and who should be nominated as dissident candidates are additional principal considerations that are explored with respect to their impact on the success of an ambush. A successful ambush will require “quiet solicitation.” The second part of this memorandum provides a discussion of the mechanics of soliciting proxies without issuing a dissident proxy circular. This part also outlines certain potential obstacles to solicitation, including the need to identify shareholder positions and the problem of identifying beneficial owners. In the third part, this memorandum examines the process of the meeting itself: the ability of the dissident to nominate directors from the floor balanced by the powers of the chair.

As the application of regulatory regimes outlined in this memorandum are highly fact specific, this memorandum should not be considered as providing legal advice in respect of any particular transaction. For non-CBCA corporations, income trusts or REITs, the issues discussed in this memorandum will need to be considered in light of the relevant governing statute or document.

## *I. Principal Considerations*

### **1. Raising the Issue: At Which Meeting?**

#### **(A) Annual Meeting**

The election of directors is addressed at the annual meeting. Under the CBCA, shareholders of a corporation are required, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, to elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.<sup>1</sup>

Because the election of directors is already on the agenda at the annual meeting (or at a special meeting where the election of directors is already on the agenda), the annual meeting presents the best forum at which to replace directors by means of an ambush. The issues inherent in so doing at a special meeting are outlined below.

#### **(B) Special Meeting**

The shareholders of a corporation may, at a special meeting, remove any director or directors from office by ordinary resolution. At the same meeting, the vacancy created by the removal of a director or directors may be filled.<sup>2</sup>

##### *Process*

Anyone who is entitled to vote at the meeting may make a motion or propose an amendment to a motion already put forward at the meeting, on condition that the motion is within the scope of the agenda and the authority of the meeting.<sup>3</sup>

If a shareholder wishes to add a new item to the circulated agenda, that shareholder or such shareholder's duly appointed proxy may move to amend the agenda. The item can then be listed under 'other business.' Alternatively, the shareholder may simply present a motion from the floor, requesting the removal of directors.

##### *Issues*

The introduction of new matters at a shareholders' meeting without advance notice is potentially problematic. In the first instance, the corporation's articles and/or by-laws may require that all motions be in writing or that specific notice be given.<sup>4</sup> A motion to remove a person from office or membership typically requires special notice.<sup>5</sup> If specific notice for the item is required, the motion may not be raised.<sup>6</sup> As a result, it is important for a dissident to review the corporation's articles and by-laws in advance of initiating such a process.

Second, as H.R Nathan and M.E Voore explain in *Corporate Meetings: Law and Practice*: "Not only are the majority of shareholders unaware of the matter and unable to make a determination on it (leaving management proxyholders potentially free to vote on the basis of the discretionary authority usually granted to them by the form of proxy) but the chair, on the grounds of such lack of prior information and potential prejudice may rule the new matter out of order (where the shareholder proposal has not previously been submitted to management in accordance with the applicable statutory provisions)".<sup>7</sup>

In light of these issues, the annual meeting (or special meeting where the election of directors is already on the agenda) would in most cases be the preferable forum from the perspective of the dissident to launch an ambush.

## 2. Is the Board Staggered?

### *Classification of the Board*

It is not necessary that all directors elected at a meeting of shareholders hold office for the same term.<sup>8</sup> As a result, a corporation may have a staggered board.

### *Issue*

If a corporation has a staggered board, only one class of directors comes up for election at each annual meeting.<sup>9</sup> In such a case, a dissident shareholder will have to determine from a tactical perspective if success could be defined by that dissident as replacing only those directors that come up for election at the upcoming meeting. If not, it would be necessary for a dissident shareholder to requisition a meeting and seek to remove the desired number of directors, including up to the entire board, by a resolution passed by a simple majority of votes cast. Requisitioning a meeting eliminates the ambush option.

Notably, in a number of jurisdictions in the United States (i.e. pursuant to Delaware General Corporation Law), where a board is staggered there is no mechanism by which shareholders may replace the entire board at once. Only those directors eligible for re-election in the relevant year may be removed, meaning that shareholders must typically wait for at least two years to pass before the majority of the board of directors can be replaced.<sup>10</sup>

## 3. Is the Board Elected by Slate Ballot?

### *Use of Slate Ballots*

As a general rule, elections of directors of CBCA corporations are decided by a plurality of votes (cumulative voting is possible but rarely used); votes are cast in favour of candidates or withheld from them. The directors who get the most votes are elected. Currently, seventy-two percent of the largest capitalized issuers on the S&P/TSX Composite Index hold individual elections.<sup>11</sup> At the same time, a number of Canada's largest issuers still elect directors by slate ballot. This means that in the context of a slate ballot, approval or rejection is expressed in respect of an entire slate, rather than in respect of individual directors.

### *Issue*

The implication of slate voting for a dissident seeking to ambush a meeting is a requirement that the dissident nominate the number of directors necessary to replace the entire slate. In other words, because slate voting does not give shareholders the opportunity to vote for or to withhold their vote with respect to each director individually, the dissident would not be able to seek to replace only part of the board or slate, as the case may be. The chances of success for a dissident facing a corporation that elects its directors by slate ballot may therefore be more limited in this "all or nothing" situation.

## 4. Is there a Confidential Voting Policy?

Confidential voting policies require that all proxies, ballots and other voting materials be kept confidential by the transfer agent and/or scrutineer and not be disclosed to management; only the results of the vote will be announced. The objective of such a policy is to preserve the true democratic nature of the voting process and to restrict the opportunity for coercion and re-solicitation by management. Where a confidential voting

policy is in place, the dissident shareholder is in a better position to successfully take management by surprise in its attempt to replace directors. With such a policy in place, the return of proxies will not alert management to the existence of dissident shareholders.

In 1999, the Canadian Senate Standing Committee on Banking, Trade and Commerce released a report on the governance practices of institutional investors (the “Kirby Report”). The Kirby Report recommended that the federal government examine the issue of confidential proxy voting in respect of corporations incorporated under the CBCA. Since then, confidential proxy voting has remained a prevalent issue. On December 31, 2009, RiskMetrics Group released its core policies for the 2010 proxy season. The policies examine RiskMetric’s views of the most important governance issues and recommend benchmark corporate governance practices, developed in line with an industry approach to the relevant governance issue. The 2010 Canadian Proxy Voting Guidelines outline the policy on confidential voting as follows: “generally vote FOR shareholder proposals requesting that corporations adopt confidential voting, use independent vote tabulators and use independent inspectors of election...generally vote FOR management proposals to adopt confidential voting.”<sup>12</sup>

The dissident should consult the target corporation’s Corporate Governance Guidelines, which are usually published online, to determine whether such a policy is in place.

## 5. Who Should be Nominated?

### *Qualifications*

A nominated director must be over 18 years of age, of sound mind, an individual and not be bankrupt. In addition, at least 25% of the directors for a corporation incorporated under the CBCA must be resident Canadians. If such a corporation only has one or two directors, that director or one of the two directors, as the case may be, must be a resident Canadian.<sup>13</sup>

If a corporation engages in an activity in Canada in a prescribed sector<sup>14</sup> or if a corporation, by an Act of Parliament or by a regulation made under an Act of Parliament, is required, either individually or in order to engage in an activity in Canada in a particular business sector, to attain or maintain a specified level of Canadian ownership or control, or to restrict, or to comply with a restriction in relation to the number of voting shares that any one shareholder may hold, own or control, then a majority of the directors of the corporation must be resident Canadians.<sup>15</sup>

In addition, a reconstituted board will need to continue to comply with various regulatory requirements under applicable securities laws, such as the independence requirements set out in National Instrument 52-110, *Audit Committees* and consider the implications of other policies and guidelines such as National Policy 58-201, *Corporate Governance Guidelines* relating to corporate governance.

The dissident shareholder should ensure that its nominees are willing and qualified candidates and should be prepared to provide proof at the meeting at which they are nominated.

## 6. Evaluating the Chances of Success

### *Shareholder Constituencies*

In order for an ambush to be successful, the dissident shareholder may need information concerning the composition of the shareholder body. In many instances, the dissident may need to identify significant shareholdings and voting constituencies in order to gauge whether the requisite support may be gained. The problems inherent in gathering this information without alerting management are described below.

### *Voting Patterns*

In many cases it will be important for the dissident shareholder to be able to identify quorum requirements and the number of votes required to replace directors. Such analysis begins with a review of the historical voting patterns of the target corporation with respect to voter turnout and percentage of proxies returned.

A dissident should be aware that any change to historical practices as a result of dissident solicitation may alert management. For example, if major shareholders who typically return proxies in favour of management choose instead to attend the meeting in order to support the dissident, a red-flag may be raised (where management has access to proxy information prior to the meeting).

## **II. Gather Support**

### **1. Quiet Solicitation**

#### *Exemption from Preparing Dissident Proxy Circular*

In order to be successful, a dissident may need to engage the support of other shareholders. Dissidents have a wide range of options for garnering support among shareholders. Of options available, shareholders have tended to rely on proxy contests as an effective means to replace directors. A proxy contest occurs when a dissident solicits shareholders' proxies and the right to vote those shareholders' shares in favour of the dissident group's objective.

The general rule is that proxy solicitation must be done "publicly" (i.e. via dissident proxy circular) but there are some exemptions that allow for "quiet solicitation". For example, a person may solicit proxies, other than by or on behalf of the management of the corporation, without sending a dissident proxy circular, if the total number of shareholders whose proxies are solicited is fifteen or fewer, with two or more joint holders being counted as one shareholder.<sup>16</sup>

In addition to the obvious means of contacting securityholders (by way of personal communication), it is noteworthy that preliminary meetings and discussions by dissidents restricted to the organization of a shareholders' group have been held not to constitute a solicitation.<sup>17</sup> Proceeding in this manner can be very delicate and a dissident pursuing such a strategy should do so carefully.

#### *Issues*

Soliciting or communicating with shareholders in any manner increases the risk that the dissident's activities will become known to management of the target.

Shareholders of CBCA corporations are permitted to enter into a written agreement to provide that in exercising voting rights the shares held by them will be voted as provided in the agreement.<sup>18</sup> Such agreements may trigger joint actor disclosure obligations that would have the effect of alerting management as to the dissident's intentions.<sup>19</sup> Where shareholders acting jointly or in concert acquire beneficial ownership of, or the power to exercise control or direction over, voting or equity securities of any class of a reporting issuer that, when added together would constitute 10% or more of the outstanding securities of that class, those shareholders must issue a press release and file an "early warning report" disclosing their ownership of relevant securities and their intentions.<sup>20</sup>

## 2. Identify Holder Positions

In order to determine which shareholders it might approach for support, the dissident shareholder must identify shareholder positions. This can be done in a number of ways:

- a) submit a shareholder list request;
- b) access corporate records;
- c) view the meeting shareholders' list; or
- d) use publicly available information.

### (A) Submit Shareholder List Request

Shareholders, on payment of a fee and on sending to a corporation an affidavit, may require the corporation or its agent to furnish, within ten days of the receipt of the affidavit, a list setting out the names of the shareholders of the corporation, the number of shares owned by each shareholder and the address of each shareholder as shown on the records of the corporation (made up to a date not more than ten days before the date of receipt of the affidavit).<sup>21</sup>

While the particular purposes for obtaining the list do not need to be spelled out in the affidavit, the statutory declaration must provide that the list will be used solely for the purposes permitted by the statute (i.e. in an effort to influence the voting of shareholders of the corporation, an offer to acquire securities of the corporation, or any other matter relating to the affairs of the corporation). Any misuse of the list is an offence, punishable by fine or imprisonment or both.<sup>22</sup>

### (B) Access Corporate Records

Shareholders are entitled to examine a corporation's records during the usual business hours of the corporation, and may take extracts from the records, free of charge, and, if the corporation is a distributing corporation, any other person may do so on payment of a reasonable fee.<sup>23</sup> By exercising this right, the dissident may attempt to identify holder positions by examining the minutes of meetings, resolutions of shareholders or the securities register.

### (C) View the Meeting Shareholders' List

A corporation is required to prepare an alphabetical list of its shareholders entitled to receive notice of a meeting, showing the number of shares held by each shareholder. If a record date is set, the list must be prepared not later than ten days after the record date. If no record date is fixed, the list must be prepared at the close of business on the day immediately preceding the day on which notice is given, or if no notice is given, the day on which the meeting is held.<sup>24</sup>

A shareholder may examine the list of shareholders during usual business hours at the registered office of the corporation or at the place where its central securities register is maintained.<sup>25</sup>

#### *Issues*

Each of the three approaches referred to above will likely raise the suspicions of the target corporation as to their intended purpose. Also, the shareholder lists discussed above only provide the names of registered shareholders that are likely of little benefit to the dissident given the number of shareholders in Canada who own their shares beneficially and hold their interests in "street name" with a broker.



## (D) Use Publicly Available Information

The dissident may be able to identify holder positions simply through review of the public record such as early warning reports and insider reports.

In addition, certain organizations can be engaged to provide reports that are compiled from publicly-available information, outlining significant institutional holdings.<sup>26</sup>

## 3. The Problem of Identifying Beneficial Owners

### (A) Identify Beneficial Owners

Because most shareholders own their shares beneficially, asking for information with respect to registered ownership will be of limited value to a dissident. A beneficial owner is anyone who owns a security and receives all the benefits of ownership, but does not necessarily appear as a registered holder on the records of a reporting issuer. For the purposes of National Instrument 54-101, *Communication with Beneficial Owners of Securities of a Reporting Issuer* (“**NI 54-101**”), which was introduced to ensure that beneficial owners of securities of a reporting issuer have the same access to proxy-related materials, corporate information and voting rights as registered shareholders,<sup>27</sup> a beneficial owner is the person or company that is identified as providing the instructions, or authorized to provide the instructions, contained in a client response form.<sup>28</sup>

Any person or company may, for a fee, request from a reporting issuer the most recently prepared Non-Objecting Beneficial Owner (“**NOBO**”) list for any proximate intermediary holding the issuer’s securities. The request must be accompanied by an undertaking in the prescribed Form 54-101F9.<sup>29</sup>

#### *Issue*

The use of the NOBO list is restricted. No reporting issuer or other person can use a NOBO list, except in connection with sending securityholder materials, influencing the voting of securityholders, offering to acquire securities of the issuer, or any other matter relating to the affairs of the issuer.<sup>30</sup> This restriction on the use of a NOBO list means that any request for a NOBO list would have the effect of alerting management as to the potential existence of a dissident.

### (B) Beneficial Owners and Proxy Appointees

If the dissident shareholder is able to identify beneficial owners it would be necessary to arrange for such owners to name themselves (or the dissident) as their own proxy appointees. In this way, solicited shareholders can be present and ready to vote at the meeting.

If a beneficial owner so requests and provides an intermediary with appropriate documentation, the intermediary must appoint the beneficial owner or a nominee of the beneficial owner as proxyholder.<sup>31</sup>

If a beneficial owner submits a written request to the registered holder, the registered holder must give to the beneficial owner or its nominee a proxy enabling the beneficial owner or the nominee to vote any voting securities.<sup>32</sup>

#### *Issues*

The directors of a CBCA corporation may specify in a notice calling a meeting of shareholders a time not exceeding forty-eight hours, excluding Saturdays and holidays, preceding the meeting or an adjournment thereof before which time proxies to be used at the meeting must be deposited with the corporation or its agent.<sup>33</sup> Because proxies would, in this circumstance, be required to be deposited in advance of the meeting,

beneficial owners who name themselves as their own proxy appointees may, in the absence of a confidential voting policy and as a result of this deadline, prematurely hint at the existence of a dissident shareholder group.

### ***III. Attend the Meeting***

#### **1. Chair Asks for Nominations**

Assuming the dissident has obtained what it believes is enough support to launch a successful ambush, the dissident should attend the annual meeting. At the meeting, the chair will list the directors proposed by management, as outlined in management's information circular, and will then open the floor to nominations.

##### **(A) Eligibility to Nominate**

Every person entitled to vote at the meeting may propose one or more nominees. A nomination does not require seconding and is not debatable or amendable.<sup>34</sup> However, only registered shareholders or their proxies that are present in person are permitted to nominate from the floor.<sup>35</sup>

##### **(B) Put Forth Nominees**

The dissident shareholder should rise and communicate an intention to nominate one or more nominees, including a slate.

##### **(C) Exercise Right of Discussion**

A registered holder or beneficial owner of shares that are entitled to be voted at an annual meeting of shareholders may discuss at the annual meeting any matter in respect of which that person would have been entitled to submit a proposal.<sup>36</sup>

The dissident shareholder may utilize this right of discussion to read a supporting statement, outlining the reasons for proposing alternate directors and the potential benefits of voting in favour of the dissident's nominees. It should be noted, however, that the chair may choose to rule such a discussion to be out of order.

##### **(D) Obligations of the Chair**

Where nominations are made from the floor, the chair is responsible to confirm that the nominees are eligible and willing to serve.<sup>37</sup> If a nominee is not present at the meeting, prior consent to serve should be obtained and brought to the meeting as explicit evidence of that nominee's willingness to serve if elected.<sup>38</sup>

##### **(E) Close of Nominations**

Nominations may be closed by the chair after a reasonable time has elapsed and no further nominations are put forth or by the voters on approval of a motion that the list of nominations be closed. A motion to close requires seconding and is not debatable.<sup>39</sup> If more than the required number are nominated, a poll is required.<sup>40</sup>

#### **2. Power of the Chair to Adjourn**

The chair may adjourn the meeting. The prerogative of the chair to adjourn arises in three instances: (1) where such power is expressly granted by the corporation's constating documents; (2) when the meeting becomes disorderly and the transaction of business becomes impossible; or (3) on the chair's authority to facilitate the meeting, for the taking of a poll.<sup>41</sup>

*Issues*

It is the latter power that is potentially most problematic for a dissident in the context of an attempted ambush. The dissident runs the risk that on the nomination of directors from the floor, the chair will adjourn the meeting thereby providing management with the opportunity to respond and to bolster support for the management nominees. However, it is generally expected that the poll will be taken immediately.<sup>42</sup>

It is important to consult the corporation's articles and bylaws. In some cases the articles and/or bylaws may require the poll to be taken immediately at the meeting, whereas in other cases they may provide that the poll be taken at a later time.

While the chair does have the power to adjourn the meeting, the chair cannot interrupt or postpone the business of a meeting by an adjournment to which the attendees have not consented.<sup>43</sup> In the absence of a contrary provision in the constating documents, the right to adjourn lies with the meeting;<sup>44</sup> a meeting that is regularly convened is not legally adjourned by the chair unless a motion to adjourn has been passed by a majority of the shares represented.<sup>45</sup> Where the chair improperly seeks to adjourn the meeting, the meeting may be continued by attendees on the election or appointment of a new chair.<sup>46</sup>

It is the duty of the chair to act in good faith and in an impartial manner. A chair should not be permitted to defeat the purpose for which the meeting was called by adjourning the meeting or by refusing to put proper motions to a vote. In this context, the chair must act so as to facilitate the business of the meeting: the election of directors.

### **3. The Vote**

#### **(A) Procedure (Generally)**

Unless the by-laws otherwise provide, voting at a meeting of shareholders of a CBCA corporation will be by show of hands, except where a ballot is demanded by a shareholder or proxyholder entitled to vote at the meeting.<sup>47</sup> If a ballot is demanded or required, a ballot is handed to every person entitled to vote. The ballot may be either a blank paper or a paper containing the names of the persons nominated. It may be useful for the dissident shareholder to provide a ballot outlining management's directors and the dissident's nominees, for ease of voting.

#### **(B) Dissident Votes**

Ideally, the dissident's supporters should be present to vote at the meeting.

If it is possible to do so without raising the suspicions of the target corporation, the supporting shareholders may have appointed the dissident as proxyholder. In other words, the supporting shareholders may appoint the dissident as proxyholder if the target has a confidential voting policy and the proxy cut-off prior to the meeting would not, therefore, alert management to the potential existence of a dissident shareholder.

Alternatively, where constating documents are not specific as to the timing of the deposit of proxies, proxies deposited after the meeting has commenced, but before voting has taken place, are valid.<sup>48</sup> If constating documents do not provide conditions on deposit, it is likely that any statement in a circular that requires proxies be delivered by registered shareholders before a certain time is not a valid restriction on deposit and need not be considered mandatory.<sup>49</sup> Where the constating documents are so silent, the dissident may effectively have proxies of the supporting shareholders "in his back pocket". As a proxy acts to revoke prior proxies, the proxy held by the dissident would supersede any previously deposited proxy by a supporting shareholder. The dissident shareholder would then be able to deposit the proxies at the meeting, after having

nominated directors from the floor. The ability to deposit proxies at this stage in the meeting would be particularly helpful in the event that a proxy deposited at any earlier stage by the supporting shareholder in favour of the dissident's nominees would be out of the ordinary course and would therefore potentially raise the suspicion of management.

The form of proxy used at a meeting must meet the requirements outlined in *Canada Business Corporations Regulations*, Subsection 54 and Section 9.4 of National Instrument 51-102, *Continuous Disclosure Obligations* ("NI 51-102").<sup>50</sup> It should also confer as much discretionary authority on the proxyholder as possible in order to facilitate the election of nominees not previously proposed in a circular. According to the Securities Transfer Association of Canada's *Protocol Regarding Validity of Proxies*, where a proxyholder other than a management nominee is named, he or she will have discretionary voting power subject to specific language in that regard in the form of proxy. Where a proxy is solicited by a dissident and the dissident is appointed as the proxyholder, the shareholder is assumed to intend a vote consistent with any statement in that regard in the dissident's circular. Where there is no documentation regarding dissident voting intentions, the proxyholder will be considered to have discretionary voting power.<sup>51</sup>

Where this is the case, the dissident will complete the ballot in favour of the dissident nominees.

#### *Right to Revoke*

A shareholder may revoke a proxy by depositing an instrument in writing executed by the shareholder or by the shareholder's attorney authorized in writing at the registered office of the corporation at any time up to and including the last business day preceding the day of the meeting at which the proxy is to be used, or with the chairman of the meeting on the day of the meeting. The proxy may also be revoked in any other manner permitted by law.<sup>52</sup>

Common law suggests that the appointor shareholder may terminate the appointment of a proxyholder at any time before the power conferred by the proxy is exercised, even where the proxy purports on its face to be irrevocable.<sup>53</sup> When a shareholder attends and votes, that vote must be accepted and the proxy previously given, rejected:

Where a proxy had not been validly revoked in accordance with the articles, the shareholder who had given the proxy was free to attend at the meeting and vote personally; and, when he had done this, the vote tendered by the proxyholder was properly rejected.<sup>54</sup>

Where the dissident and the supporting shareholders have determined that the best course of action is to return a proxy in the normal course, the ability to revoke the proxy pursuant to the above may facilitate an ambush by allowing the supporting shareholder to rescind the proxy at the last minute. In other words, attending and voting at the meeting supersedes any requirement to deposit or revoke proxies forty-eight hours prior to the meeting. Additionally, the ability to revoke a proxy provides the dissident with the opportunity to solicit those shareholders who may have previously returned their proxies. It should be noted, however, that this approach only works in the case of a registered shareholder.

### **(C) Management Votes**

A form of proxy provides an option for shareholders to specify that securities registered in their names be voted or withheld from voting in respect of the election of directors.<sup>55</sup> A failure to withhold might be deemed a grant of an authority by management to vote.<sup>56</sup>

Where the form of proxy has specified that shares be voted by management in respect of the election of directors, management would proceed to vote those shares in favour of their nominees. Where a poll is to be

taken immediately, shareholders would not have an opportunity to revoke their proxies (unless present at the meeting) and absentees would not be given further opportunity to vote.

*Votes are Tabulated and Results Announced*

Polls should be closed after permitting a reasonable time for voting. Generally, a shareholder may change its vote at any time up to the announcement of the voting result.<sup>57/58</sup>

Once the polls are closed, the votes are tabulated and the results are announced.

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The purpose of this memorandum has been to provide a general overview of the significant legal considerations relevant to the replacement of directors of a CBCA corporation by way of an ambush. The matters associated with the ambush process are often complicated and fact-specific and it is strongly suggested that you contact any member of Goodmans' corporate securities team should you wish to discuss any transaction-specific questions.

## ENDNOTES

<sup>1</sup>Directors of a CBCA corporation are required to call an annual meeting of shareholders not later than eighteen months after the corporation comes into existence and subsequently not later than fifteen months after holding the last preceding annual meeting and, in any case, no later than six months after the end of the corporation's preceding financial year. A corporation may delay its annual meeting by applying to the court for an order extending the time for calling an annual meeting. Section 464 of the Toronto Stock Exchange (the "Exchange") Manual requires every corporation having securities listed on the Exchange to hold its annual meeting of shareholders within six months from the end of its fiscal year, or at such earlier time as is required by applicable legislation. Where a company wishes to delay its annual meeting beyond the stipulated six-month period, a duly completed Form 9-Request for Extension or Exemption for Financial Reporting/Manual Meeting must be filed with the Exchange's Listed Issuer Services well in advance of the prescribed deadline for the meeting. A postponement may be permitted in justifiable circumstances. At the same time, a corporation may be limited in its ability to extend such meeting beyond six months following the fiscal year end. Section 155 of the CBCA requires financial statements to be presented before a meeting within six months of the last completed fiscal year. It is not clear that relief for this requirement is readily available under the CBCA.

<sup>2</sup> *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss.109(1), 109(3) [hereinafter *CBCA*].

<sup>3</sup> L.H. Jenkins, *Conduct of Canadian Meetings* (Toronto: Butterworths, 1983) at 44.

<sup>4</sup> Jenkins, *ibid.* at 129; M. Kerr and H. King, *Procedures for Meetings and Organizations*, 3<sup>rd</sup> ed. (Scarborough: Carswell, 1996) at 89.

<sup>5</sup> Kerr, *ibid.* at 185.

<sup>6</sup> In the U.S., companies have started adding "advance notice" requirements to by-laws with increased regularity in order to avoid ambush scenarios. While by-laws of CBCA corporations may require advance notice in certain circumstances, provisions such as these are much more prevalent in the U.S.

<sup>7</sup> H.R. Nathan and M.E. Voore, *Corporate Meetings: Law and Practice* (Scarborough: Carswell, 1995) at 17-1.

<sup>8</sup> *CBCA*, *supra* note 2, s.106(4).

<sup>9</sup> Voore, *supra* note 7 at 20-45.

<sup>10</sup> 8 *Del. C. c.1* § 141(d), 141(k), 141(l).

<sup>11</sup> RiskMetrics Group, *2010 Draft Policy for Comment, Slate Ballots (Canada)* online: RiskMetrics Group <[www.riskmetrics.com/policy/2010canada\\_slateballots](http://www.riskmetrics.com/policy/2010canada_slateballots)> (date accessed: March, 2010).

<sup>12</sup> The 2010 Canadian Proxy Voting Guidelines further recommend that in the case of shareholder proposals requesting that corporations adopt confidential voting, the proposal should include a provision for proxy contests as follows: "In the case of a contested election, management should be permitted to request that the dissident group honor its confidential voting policy. If the dissidents agree, the policy remains in place. If the dissidents will not agree, the confidential voting policy is waived for that particular vote."

<sup>13</sup> *CBCA*, *supra* note 2, ss.105(1),105(3),105(3.3).

<sup>14</sup> Prescribed sectors include uranium mining, book publishing or distribution, book sales where the sale of books is the primary part of the corporation's business, and film or video distribution.

<sup>15</sup> *CBCA*, *supra* note 2, s.105(3.1); *Canada Business Corporations Regulations*, S.O.R./2001-512, s.16 [hereinafter *CBCA Reg.*].

<sup>16</sup> *CBCA*, *ibid.*, s.150(1.1).

<sup>17</sup> Voore, *supra* note 7 at 18-21; *Pantry Pride Inc. v. Rooney* (1984) 598 F. Supp. 891 (S.D.N.Y.).

<sup>18</sup> *CBCA*, *supra* note 2, s.145.1.

<sup>19</sup> *Ontario Securities Act*, R.S.O. 1990, c.S.5, s.91(1)(b) [hereinafter *OSA*].

<sup>20</sup> *Ibid.*, s.102.1(1).

<sup>21</sup> *CBCA*, *supra* note 2, s.23(1).

<sup>22</sup> *Ibid.*, ss.21(9), 21(10).

<sup>23</sup> *Ibid.*, s.21(1).

<sup>24</sup> *Ibid.*, ss.138(1), 134(2)(a).

<sup>25</sup> *Ibid.*, s.138(4)(a).

<sup>26</sup> Voore, *supra* note 7 at 20-9.

<sup>27</sup> *Ibid.* at 15-16.

<sup>28</sup> National Instrument 54-101, *Communication with Beneficial Owners of Securities of a Reporting Issuer*, s.1.1.

<sup>29</sup> *Ibid.*, s.6.1.

<sup>30</sup> *Ibid.*, s.7.1.

<sup>31</sup> *CBCA*, *supra* note 2, s.153(5).

<sup>32</sup> *OSA*, *supra* note 19, s.49(5).

<sup>33</sup> *CBCA*, *supra* note 2, s.148(5).

- <sup>34</sup> H.R. Nathan, *Nathan's Company Meetings Including Rules of Order*, 8<sup>th</sup> ed. (Scarborough: Carswell, 1998) at 82.
- <sup>35</sup> Voore, *supra* note 7 at 19-35.
- <sup>36</sup> *CBCA*, *supra* note 2, s.137(1)(b).
- <sup>37</sup> Kerr, *supra* note 4 at 169.
- <sup>38</sup> Voore, *supra* note 7 at 19-35.
- <sup>39</sup> Kerr, *supra* note 4 at 169.
- <sup>40</sup> Nathan, *supra* note 34 at 82.
- <sup>41</sup> Jenkins, *supra* note 3 at 48; Voore *supra* note 7 at 22-6.
- <sup>42</sup> Voore, *ibid*, at 21-55.
- <sup>43</sup> Jenkins, *supra* note 3 at 48; *National Dwellings Society v. Sykes* (1894) 3 Ch. 159.
- <sup>44</sup> *Stoughton v. Reynolds* (1736), 2 Stra. 1045, 93 E.R. 1023 (K.B.D.); *R v. Chester (Archdeacon of)* (1834), 1 Ad.&E. 341, 110 E.R. 123 (K.B.D.).
- <sup>45</sup> Voore, *supra* note 7 at 22-4.1.
- <sup>46</sup> Jenkins, *supra* note 3 at 48; Nathan, *supra* note 34 at 126.
- <sup>47</sup> *CBCA*, *supra* note 2, s.141.
- <sup>48</sup> Voore, *supra* note 7 at 18-64; *Kelly v. Electrical Construction Co.* (1907), 16 O.L.R. 232 (H.C.).
- <sup>49</sup> Voore, *ibid*, at 18-64.
- <sup>50</sup> It is worth noting that NI 51-102 s.9.4(9) provides that a form of proxy sent to securityholders of a reporting issuer must not confer authority to vote for the election of any person as a director of a reporting issuer unless a *bona fide* proposed nominee for that election is named in the information circular. While the need to comply with this provision would prevent the dissident from voting proxies in favour of dissident nominees nominated from the floor, the common law suggests that compliance with this rule would only apply where a circular is mailed. See *NQL Drilling Tools Inc. (Re)* (2003), A.S.C.D. No. 951.
- <sup>51</sup> Securities Transfer Association of Canada, *Protocol Regarding Validity of Proxies*, May 2007, s.B(3)(i)-(iii).
- <sup>52</sup> *CBCA*, *supra* note 2, s.148(4).
- <sup>53</sup> Nathan, *supra* note 34 at 156.
- <sup>54</sup> *Cousins v. International Brick Co., Ltd.*, (1931) 2 Ch. 90.
- <sup>55</sup> *CBCA Reg. supra* note 15, s.54(7); National Instrument 51-102, *Continuous Disclosure Obligations*, s.9.4(6).
- <sup>56</sup> Voore, *supra* note 7 at 18-37.
- <sup>57</sup> If the vote is by show of hands, a shareholder may change his vote at any time until the result is declared. If a poll is taken, a shareholder has a right to change his vote up to the time his ballot is handed to the chairman or scrutineer.
- <sup>58</sup> Nathan, *supra* note 34 at 116; Voore *supra* note 7 at 21-58.1.