BANKING ON CORPORATE

THAT'S WHAT PROXIES ARE FOR

By Neill May
nmay@goodmans.ca

On occasion, we are slow to adapt to innovations. This can be attributed to habit, adherence to tradition and/or confusion. I suffer all three when it comes to revolving doors (for me, this counts as innovation). Is opening doors for women chivalrous or sexist? If it's polite, for a revolving door does that mean going first? Should I enter first, but come out last, with maybe a few extra spins for style points? This dynamic arises in the context of corporate proceedings as well. Consider the seconding of motions and what that does for anyone other than Smokey Robinson.

Of more general application, the slowness of some issuers and practices to adapt to modern phenomena of shareholder activism and unregistered shareholders was reflected in the recent decision of the British Columbia Supreme Court in *Russell v. Synex International Inc.* That decision arose in the wake of an effort by the largest shareholder of Synex to replace the company's board of directors at Synex's 2018 shareholder meeting. The dissident shareholder held approximately 33 per cent of the outstanding shares and had gathered proxies without using a dissident proxy circular for additional shares that, when combined with his own, gave him authority to vote a majority of the outstanding shares.

The dissident held proxies in three forms, which reflects the variety of methods of delegating voting authority. First, he held proxies granted on Synex's own form of proxy, with the shareholder having designated the dissident as the proxy holder (in place of the management nominees proposed in that form). Second, he held proxies granted on authority of the transfer agent's voter instruction form that is sent to beneficial shareholders who are "non-objecting" (in that they don't object to having their identities disclosed). And third, he held proxies granted based on the voter instruction form circulated by Broadridge (among other things, a distribution agent for the financial system) to objecting beneficial shareholders. None of the instruments gave voting instructions to the dissident shareholder, which he maintained gave him the power to exercise discretion to vote as he saw fit and, specifically, to vote to replace the Synex board.

Naturally, each of the different forms has its own set of unique instructions. The Broadridge and transfer agent forms included broad authority for the proxyholder to attend and act at the meeting at their discretion, though there was also language indicating that if the form didn't include voting instructions the holder should vote as recommended by management. The company form of proxy itself did not feature the broad authority language, but it did state that in the absence of voting directions the proxy would be voted in accordance with the management recommendations. At the shareholder meeting, the chairperson did not permit the dissident to vote the proxies for his preferred slate of directors.

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The court concluded that, after undertaking a detailed analysis of the regulatory framework, industry practices and standards and the proxy system generally (something that might, ironically, be good to read while spinning in a revolving door), the entire scheme is geared in favour of facilitating the exercise of shareholders' voting rights. So oriented, the court resolved the inconsistency in the forms by concluding that language requiring the proxyholder to vote in accordance with management's recommendations should only apply to management-proposed proxyholders and not to third parties. The court refers to the well-known law of common sense, which persuasively raises the question of why a shareholder would go to the trouble of appointing a proxyholder other than the proposed management representatives if they simply wanted their proxyholder to follow management's recommendations? It is difficult to argue with common sense, which is why though I do so constantly; it is always unintentional.

Notably, on the theme of resistance to evolving trends, Synex had not implemented an advance notice policy, which would have required that notice be given to the company of the dissident's proposed nominees. In this Synex case, the dissident's objectives were known to the company, the dissident having tried previously to unseat the board. The irony is that Synex argued that there is an implied advance notice requirement on the basis that public policy requires that shareholders have notice of proposed nominees to their company's board. The court in Synex was not persuaded that any such public policy should override the proxy regulatory framework.

One adaptation that has taken root as electronic information sources replace paper — and as advance notice policies render surprise board nominations from the meeting floor increasingly rare — is the declining incidence of young lawyers arriving at shareholder meetings toting volumes of arcane meeting procedure books. I do look back fondly on those days and often wonder how, without their carrying those dusty volumes around business centres, the general population will be able to identify younger generations of corporate lawyers as ultra cool.

Neill May is a partner at Goodmans LLP in Toronto focusing on securities law. The opinions expressed in this article are his alone.