Special Quorums : Recent news on responsible defences with respect to shareholder activism

July 1, 2013

In September 2012, we reported that the Supreme Court of British Columbia had rendered a judgment[1] confirming that a corporate policy imposing an advance nomination process for a shareholders' meeting was reasonable and did not infringe the shareholders' rights relating to the election of the corporation's directors ("**Advance Notice Policy**"). We concluded at the time that Advance Notice Policies are a tool that can prevent nominations in cases where they might be enforced by ambush or by proxy contest. Nine months later, we notice that Advance Notice Policies have been adopted by numerous Canadian public corporations and that proxy advisory firms such as Institutional Shareholder Services Inc. ("**ISS**") and Glass Lewis & Co., LLC ("**Glass Lewis**") have widely supported their implementation.

Furthermore, since many Canadian public corporations are still seeking to put in place other responsible defences against proxy contests, we wish to advise in this bulletin that Canadian Oil Sands Limited and other Canadian public corporations recently adopted **"Enhanced Quorum By-Laws"**, in addition, to Advance Notice Policies, at their respective annual and special shareholders' meetings. Enhanced Quorum By-Laws require a minimum of two shareholders holding at least a majority of the issued and outstanding common shares (an **"Enhanced Quorum"**) to be present or represented by proxy at any meeting at which a shareholder will be seeking to replace half or more of the board of directors, before the meeting can be held and business validly transacted.

This is different from the more standard practice among issuers with respect to quorum at shareholders' meetings, which is generally 10% of the shareholders, represented in person or by proxy. The Enhanced Quorum requirement is intended to ensure the enfranchisement of all the shareholders and that a material number of shares are represented at shareholders' meetings, where such a fundamental change to the business and strategic direction of a corporation may occur. Enhanced Quorum By- Laws have recently been adopted by at least four Canadian public corporations.

An Enhanced Quorum would provide a better framework to shareholders for exercising their fundamental right to make significant changes to the board of directors of a public corporation. In the absence of an Enhanced Quorum for the transaction of business at any meeting where the Enhanced Quorum is required, those present and entitled to vote will constitute a quorum for the purpose of (i) conducting all business other than for the election of directors, and (ii) the adjourning of such meeting. The meeting may be adjourned no more than twice for an aggregate of no more than 65 days. If an Enhanced Quorum is not present at the opening of the second adjourned meeting, if any, those shareholders present and entitled to vote at that adjourned meeting will constitute quorum for the transaction of business, including the election of directors, at the adjourned meeting.

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The concept of Enhanced Quorum was integrated by a few other Canadian corporations such as Open Text Corporation, Rutter Inc. and Enghouse Systems Limited into those companies' respective majority voting policies. Majority voting policies generally provide that if the votes in favour of the election of a director nominee at a shareholders' meeting represent less than a majority (50 %) of the shares voted and withheld, the nominee will submit his or her resignation promptly after the meeting, for the corporation's consideration. The majority voting policies of the corporations referred to above would only apply in an uncontested election at which more than 65% of the outstanding common share have been voted by holders in person or by proxy.

It is reasonable to believe that both ISS and Glass Lewis will generally support the adoption of Enhanced Quorum By-Laws. Like Advance Notice Policies, Enhanced Quorum By-Laws appear to be yet another answer to shareholder activism, which has been growing and trending in Canada. Similarly to Advance Notice Policies, Enhanced Quorum By-Laws will particularly benfit junior issuers.

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[1] *Northern Minerals Investment Corp.* v. *Mundoro Capital Inc.*, 2012 BCSC 1090 [Mundoro Capital].

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