

## advance notice by-laws, part III – advance notice by-laws gain greater acceptance in Canada; sample updated by-law

Shareholders of Canadian public companies have in the past devised schemes to remove existing directors by nominating a dissident slate from the floor of a shareholders' meeting to the surprise and prejudice of other shareholders. Advance notice by-laws were designed to prevent such ambushes, and to ensure that all shareholders are treated fairly and provided with timely information in connection with the nomination of directors.

Over the past year, advance notice by-laws or policies have been widely accepted in Canada, following the adoption of such a by-law in October 2011 by one of our firm's clients. In order to provide shareholders with additional protections, we have updated our form of advance notice by-law, a sample copy of which is attached.

### background

Advance notice by-laws have been utilized by American public companies for more than 20 years and are prevalent in the United States. In the past year, advance notice by-laws have been adopted by many of our clients. Over the course of the 2013 proxy season, we expect several more clients to adopt such by-laws, with the result that clients governed by the *Business Corporations Act (Ontario)* ("OBCA"), the *Business Corporations*

*Act (Quebec) ("QBCA") and the Canada Business Corporations Act ("CBCA") will have adopted such by-laws.*

Under applicable corporate legislation in Canada, there are generally only two methods available to shareholders to nominate directors at a meeting without providing ample notice to all shareholders:

- *proxy fight.* Following the mailing of proxy materials by an issuer relating to the election of directors, any person may solicit proxies, so as to elect their own nominees to the board of the issuer, by delivering a dissident's proxy circular (or by way of public broadcast, speech or publication in circumstances prescribed by the legislation). This type of activity is generally referred to in business parlance as a 'proxy fight'. There is no time restriction as to when one may solicit proxies through these means, subject of course to practical time constraints. As a result, a proxy fight could be commenced with little prior notice to the issuer or its shareholders.
- *nominations at a meeting.* Shareholders or proxyholders may, at a meeting called for the purpose of electing directors, nominate from the floor of the meeting one or more persons to serve as a director. Since no prior notice of such nomination need be given to the issuer or its shareholders, this type of nomination is often referred to as an 'ambush.'

Advance notice provisions have been designed to prevent shareholders from nominating directors through a proxy fight or an ambush, without in each case providing an issuer with adequate time to consider and respond in an informed way to such proposed nominations. Advance notice provisions benefit shareholders by:

- ensuring that all shareholders – including those participating in a meeting by proxy rather than in person – receive adequate notice of the nominations;
- allowing shareholders to register an informed vote;
- facilitating an orderly and efficient meeting process; and

- preventing an ambush.

## implementation of by-law or policy

The directors of a company governed by the OBCA or CBCA may by resolution pass an advance notice by-law, following which the by-law must be submitted by the directors to the shareholders at the next meeting of shareholders. The advance notice by-law would be effective from the date of such directors' resolution.<sup>1</sup> If the advance notice by-law is confirmed by shareholders at the next meeting, it would continue in effect in the form in which it was so confirmed. If the advance notice by-law is rejected by shareholders at the next meeting, or the directors do not submit the advance notice by-law to the shareholders at the next meeting, the advance notice by-law would cease to be effective from the date of the meeting.

For British Columbia companies, advance notice provisions have recently been adopted by way of a policy of the board<sup>2</sup>. Such a policy, which is effective upon adoption by the board, is put to shareholders for approval, on the basis that the policy would cease to be effective at the conclusion of the shareholders'

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<sup>1</sup> We would note that under the QBCA it would appear that an advance notice by-law would not be effective until duly approved by the shareholders.

<sup>2</sup> The reason for this is due to the manner in which the constating documents may be amended under the *Business Corporations Act* (British Columbia) ("BCBCA"). Companies governed by the BCBCA have "notice of articles" which contain prescribed information such as the company's name, names and addresses for each of the directors, registered and records office address, authorized share structure and whether there are special rights or restrictions attached to a class or series of shares. The articles of a company incorporated under the BCBCA set out the general rules governing the company's internal affairs and the restrictions, if any, on the businesses that may be carried on by the company and the power that the company may exercise. The company adopts its notice of articles and articles at the time of incorporation and in order to amend the notice of articles or articles, as the case may be, the company's shareholders must approve (in most cases by special resolution) the amendment prior to such amendment becoming effective. Under the CBCA, the OBCA and in most other provincial or territorial corporate statutes in Canada, the "articles of incorporation" contain prescribed information such as the corporation's name, authorized share structure, whether there are special rights or restrictions attached to a series of shares and the restrictions, if any, on the businesses that may be carried on by the corporation. The by-laws under such corporate statutes are adopted post incorporation and set out the rules of the corporation's conduct, subject only to confirmation (or rejection) by the corporation's shareholders. By-laws are roughly similar to the articles of a company incorporated under the BCBCA but the key difference between by-laws and articles is that by-laws become effective immediately upon director approval and are subject to confirmation (or rejection) at the next meeting of shareholders by ordinary resolution whereas any amendment to the articles of a company incorporated under the BCBCA is subject to shareholder approval (in most cases by special resolution) and the amendment is effective only upon the requisite shareholder approval being obtained. As a result, the implementation of an advance notice by-law would not take effect immediately and would therefore not apply to the meeting at which the by-law is being approved. Although the QBCA has a similar structure to the CBCA and the OBCA, as outlined in footnote 1, advance notice by-laws under that statute may also not be effective until shareholder approval has been obtained.

meeting (and therefore after the election of directors) if not approved by shareholders at that meeting. Notwithstanding a recent court decision upholding such a policy, we remain concerned with the adoption of advance notice provisions outside of a corporation's articles or by-laws.<sup>3</sup>

## advance notice provisions

The length of the notice period for advance notice provisions varies but, in the case of an annual meeting of shareholders, is usually no less than 30 nor more than 65 days prior to the date of the annual meeting. Institutional Shareholder Services Inc. ("ISS") and Glass, Lewis & Co., LLC support advance notice by-laws and policies, which provide for such minimum notice provisions.<sup>4</sup> Also, ISS supports issuers making a reasonable request from dissidents for information additional to that required under applicable law, in order to review any proposed nominee.<sup>5</sup>

Advance notice provisions have also been supported by judicial decisions. In *Mundoro Capital*, the British Columbia Supreme Court upheld the adoption of an advance notice policy. Likewise, in *Maudore Minerals Ltd. v The Harbour Foundation*,<sup>6</sup> the Ontario Superior Court of Justice noted that there "was nothing unfair or inappropriate" in the implementation of an advance notice by-law in connection with a proxy fight "to ensure that all shareholders would have sufficient notice of a contested election of directors."<sup>7</sup>

## sample updated by-law

ISS, in its *Canadian Corporate Governance Policy (2013 Updates)*, recommends that shareholders vote to "support additional efforts

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<sup>3</sup> Nevertheless, the decision in *Northern Minerals Investment Corp v Mundoro Capital Inc*, 2012 BCSC 1090 [*Mundoro Capital*] fully supports the policy rationale for advance notice by-laws (or articles with advance notice provisions in the case of a company incorporated under the BCBCA) in that such by-laws (or articles) prevent dissidents from hiding "in the weeds" until a shareholders' meeting and thereby "preventing all shareholders from having notice and the opportunity to vote in a proxy contest" (¶ 54).

<sup>4</sup> See Institutional Shareholder Services Inc., "Canadian Corporate Governance Policy 2013 Updates" (16 November 2012) at 13, available online: <http://www.issproxy.com/files/2013CanadianPolicyUpdates.pdf>, and Glass, Lewis & Co., LLC, "Guidelines 2013 Proxy Season An Overview of the Glass Lewis Approach to Proxy Advice" at 11 (2012), available online: [http://www.glasslewis.com/assets/uploads/2012/02/Abridged\\_Guidelines\\_Canada\\_2013.pdf](http://www.glasslewis.com/assets/uploads/2012/02/Abridged_Guidelines_Canada_2013.pdf).

<sup>5</sup> ISS, *ibid* at 13.

<sup>6</sup> 2012 ONSC 4255.

<sup>7</sup> *Supra* note 3 at ¶ 114.

by companies to ensure full disclosure of a dissident shareholder's economic and voting position in the company so long as the informational requirements are reasonable and aimed at providing shareholders with the necessary information to review any proposed director nominees".<sup>8</sup> Consistent with this guideline, we have updated our form of advance notice by-law to require that issuers and their shareholders be provided with more fulsome disclosure in order that shareholders may register a more informed vote. In this regard, the principal changes to our previous form of advance notice by-law are as follows:

- all nominees (including management-solicited nominees) are required to deliver to the issuer an agreement to abide by all applicable policies of the issuer.
- disclosure of all shares indirectly owned by each nominee and the shareholder making the nomination, including convertible securities and shares owned through derivatives, would be required.
- the nominating shareholder is required to include a statement as to whether each nominee would be "independent" of the issuer (within the meaning of applicable securities laws).

A sample advance notice by-law is attached as an appendix.

## conclusion

An advance notice by-law is an important tool for a public company in order to ensure that all shareholders are treated fairly and are provided with timely information in connection with the nomination of directors. Over the past year, several Canadian public companies have adopted the form of advance notice provisions first presented to our clients in October 2011. We are hopeful that the new form of advance notice by-law for Canadian public companies which we have introduced for the 2013 proxy season will further enhance the rights of shareholders.

by Paul D. Davis

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<sup>8</sup> ISS, *supra* note 4 at 13.

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**a cautionary note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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**Appendix**

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sample advance notice by-law provisions**

**Note:** *These sample by-law provisions have been drafted for an Ontario corporation and assume there are no inconsistent provisions in the articles or by-laws. Accordingly, these sample by-law provisions need to be modified for non-Ontario corporations and to conform to applicable provisions in the articles and by-laws.*

*These materials are published as a service to our clients and should not be construed as legal advice. Should further analysis or explanation of these sample by-law provisions or the matters addressed in these materials be required, please contact either of the authors or the McMillan LLP lawyer with whom you normally consult.*

*Paul D. Davis and David Mendicino*



(the "Corporation")

**BE IT ENACTED** as a by-law of the Corporation as follows:

**ADVANCE NOTICE OF NOMINATIONS OF DIRECTORS**

1. By-law No. ● of the by-laws of the Corporation is hereby amended by adding in Article ● thereto, following paragraph 3 thereof and preceding paragraph 4 thereof, the following:

**"3A. Nomination of Directors**

Subject only to the Act, only persons who are nominated in accordance with the following procedures shall be eligible for election as Directors of the Corporation. Nominations of persons for election to the Board may be made at any annual meeting of shareholders, or at any special meeting of shareholders (but only if the election of Directors is a matter specified in the notice of meeting given by or at the direction of the person calling such special meeting), (a) by or at the direction of the Board or an authorized officer of the Corporation, including pursuant to a notice of meeting, (b) by or at the direction or request of one or more shareholders pursuant to a proposal made in accordance with the provisions of the Act or a requisition of the shareholders made in accordance with the provisions of the Act or (c) by any person (a "Nominating Shareholder") (i) who, at the close of business on the date of the giving of the notice provided for below in this paragraph 3A of this Article ● and on the record date for notice of such meeting, is entered in the securities register as a holder of one or more shares carrying the right to vote at such meeting or who beneficially owns shares that are entitled to be voted at such meeting and (ii) who complies with the notice procedures set forth below in this paragraph 3A of this Article ●:

(A) In addition to any other applicable requirements, for a nomination to be made by a Nominating Shareholder, such person must have given (a) timely notice thereof in proper written form to the Corporate Secretary of the Corporation at

the principal executive offices of the Corporation in accordance with this paragraph 3A of this Article ● and (b) the representation and agreement with respect to each candidate for nomination as required by, and within the time period specified in, paragraph 3A(D) of this Article ● .

- (B) To be timely under paragraph 3A(A)(a) of this Article ●, a Nominating Shareholder's notice to the Corporate Secretary of the Corporation must be made (a) in the case of an annual meeting of shareholders, not less than 30 nor more than 65 days prior to the date of the annual meeting of shareholders; provided, however, that in the event that the annual meeting of shareholders is called for a date that is less than 40 days after the date (the "Notice Date") on which the first public announcement of the date of the annual meeting was made, notice by the Nominating Shareholder may be made not later than the tenth (10<sup>th</sup>) day following the Notice Date; and (b) in the case of a special meeting (which is not also an annual meeting) of shareholders called for the purpose of electing Directors (whether or not called for other purposes), not later than the fifteenth (15<sup>th</sup>) day following the day on which the first public announcement of the date of the special meeting of shareholders was made. Notwithstanding the foregoing, the Board may, in its sole discretion, waive any requirement in this paragraph (B).
- (C) To be in proper written form, a Nominating Shareholder's notice to the Corporate Secretary of the Corporation, under paragraph 3A(A)(a) of this Article ●, must set forth (a) as to each person whom the Nominating Shareholder proposes to nominate for election as a Director (i) the name, age, business address and residence address of the person, (ii) the principal occupation or employment of the person, (iii) the class or series and number of shares in the capital of the Corporation which are controlled or which are owned beneficially or of record by the person as of the record date for the Meeting of Shareholders (if such date shall then have been made publicly available and shall have occurred) and as of the date of such notice, (iv) a statement as to whether such person would be "independent" of the Corporation (within the meaning of sections 1.4 and 1.5 of National Instrument 52-110 – Audit Committees of the Canadian Securities Administrators, as such provisions may be amended from time to time) if elected as a Director at such meeting and the reasons and basis for such determination and (v) any other information relating to the person that would be required to be disclosed in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to the Act and Applicable Securities Laws; and (b) as to the Nominating Shareholder giving the notice, (i) any information relating to such Nominating Shareholder that would be required to be made in a dissident's proxy circular in connection with solicitations of proxies for election of Directors pursuant to the Act and Applicable Securities Laws, and (ii) the class or series and number of shares in the capital of the Corporation which are controlled or which are owned beneficially or of record by the Nominating Shareholder as of the record date for the Meeting of Shareholders (if such date shall then have been made publicly available and shall have occurred) and as of the date of such notice.
- (D) To be eligible to be a candidate for election as a Director of the Corporation and to be duly nominated, a candidate must be nominated in the manner prescribed in this paragraph 3A of this Article ● and the candidate for nomination, whether nominated by the Board or otherwise, must have previously delivered to the

Corporate Secretary of the Corporation at the principal executive offices of the Corporation, not less than 5 days prior to the date of the Meeting of Shareholders, a written representation and agreement (in form provided by the Corporation) that such candidate for nomination, if elected as a Director of the Corporation, will comply with all applicable corporate governance, conflict of interest, confidentiality, share ownership, majority voting and insider trading policies and other policies and guidelines of the Corporation applicable to Directors and in effect during such person's term in office as a Director (and, if requested by any candidate for nomination, the Corporate Secretary of the Corporation shall provide to such candidate for nomination all such policies and guidelines then in effect).

- (E) No person shall be eligible for election as a Director of the Corporation unless nominated in accordance with the provisions of this paragraph 3A of this Article ●; provided, however, that nothing in this paragraph 3A of this Article ● shall be deemed to preclude discussion by a shareholder (as distinct from nominating Directors) at a meeting of shareholders of any matter in respect of which it would have been entitled to submit a proposal pursuant to the provisions of the Act. The chair of the meeting shall have the power and duty to determine whether a nomination was made in accordance with the procedures set forth in the foregoing provisions and, if any proposed nomination is not in compliance with such foregoing provisions, to declare that such defective nomination shall be disregarded.
- (F) For purposes of this paragraph 3A of this Article ●:
- (a) "Affiliate", when used to indicate a relationship with a person, shall mean a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such specified person;
  - (b) "Applicable Securities Laws" means the *Securities Act* (Ontario) and the equivalent legislation in the other provinces and in the territories of Canada, as amended from time to time, the rules, regulations and forms made or promulgated under any such statute and the published national instruments, multilateral instruments, policies, bulletins and notices of the securities commissions and similar regulatory authorities of each of the applicable provinces and territories of Canada;
  - (c) "Associate", when used to indicate a relationship with a specified person, shall mean (i) any corporation or trust of which such person owns beneficially, directly or indirectly, voting securities carrying more than 10% of the voting rights attached to all voting securities of such corporation or trust for the time being outstanding, (ii) any partner of that person, (iii) any trust or estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity, (iv) a spouse of such specified person, (v) any person of either sex with whom such specified person is living in conjugal relationship outside marriage or (vi) any relative of such specified person or of a person mentioned in clauses (iv) or (v) of this definition if that relative has the same residence as the specified person;

- (d) "Derivatives Contract" shall mean a contract between two parties (the "Receiving Party" and the "Counterparty") that is designed to expose the Receiving Party to economic benefits and risks that correspond substantially to the ownership by the Receiving Party of a number of shares in the capital of the Corporation or securities convertible into such shares specified or referenced in such contract (the number corresponding to such economic benefits and risks, the "Notional Securities"), regardless of whether obligations under such contract are required or permitted to be settled through the delivery of cash, shares in the capital of the Corporation or securities convertible into such shares or other property, without regard to any short position under the same or any other Derivatives Contract. For the avoidance of doubt, interests in broad-based index options, broad-based index futures and broad-based publicly traded market baskets of stocks approved for trading by the appropriate governmental authority shall not be deemed to be Derivatives Contracts;
- (e) "Meeting of Shareholders" shall mean such annual shareholders meeting or special shareholders meeting, whether general or not, at which one or more persons are nominated for election to the Board by a Nominating Shareholder;
- (f) "owned beneficially" or "owns beneficially" means, in connection with the ownership of shares in the capital of the Corporation by a person, (i) any such shares as to which such person or any of such person's Affiliates or Associates owns at law or in equity, or has the right to acquire or become the owner at law or in equity, where such right is exercisable immediately or after the passage of time and whether or not on condition or the happening of any contingency or the making of any payment, upon the exercise of any conversion right, exchange right or purchase right attaching to any securities, or pursuant to any agreement, arrangement, pledge or understanding whether or not in writing; (ii) any such shares as to which such person or any of such person's Affiliates or Associates has the right to vote, or the right to direct the voting, where such right is exercisable immediately or after the passage of time and whether or not on condition or the happening of any contingency or the making of any payment, pursuant to any agreement, arrangement, pledge or understanding whether or not in writing; (iii) any such shares which are beneficially owned, directly or indirectly, by a Counterparty (or any of such Counterparty's Affiliates or Associates) under any Derivatives Contract (without regard to any short or similar position under the same or any other Derivatives Contract) to which such person or any of such person's Affiliates or Associates is a Receiving Party; provided, however that the number of shares that a person owns beneficially pursuant to this clause (iii) in connection with a particular Derivatives Contract shall not exceed the number of Notional Securities with respect to such Derivatives Contract; provided, further, that the number of securities owned beneficially by each Counterparty (including their respective Affiliates and Associates) under a Derivatives Contract shall for purposes of this clause be deemed to include all securities that are owned beneficially, directly or indirectly, by any other Counterparty (or any of such other Counterparty's Affiliates or Associates) under any Derivatives Contract to which such first Counterparty (or any of such first

Counterparty's Affiliates or Associates) is a Receiving Party and this proviso shall be applied to successive Counterparties as appropriate; and (iv) any such shares which are owned beneficially within the meaning of this definition by any other person with whom such person is acting jointly or in concert with respect to the Corporation or any of its securities; and

- (g) "public announcement" shall mean disclosure in a press release reported by a national news service in Canada, or in a document publicly filed by the Corporation or its agents under its profile on the System of Electronic Document Analysis and Retrieval at [www.sedar.com](http://www.sedar.com).
- (G) Notice or any delivery given to the Corporate Secretary of the Corporation pursuant to this paragraph 3A of this Article ● may only be given by personal delivery, facsimile transmission or by email (provided that the Corporate Secretary of the Corporation has stipulated an email address for purposes of this notice, at such email address as stipulated from time to time), and shall be deemed to have been given and made only at the time it is served by personal delivery, email (at the address as aforesaid) or sent by facsimile transmission (provided that receipt of confirmation of such transmission has been received) to the Corporate Secretary at the address of the principal executive offices of the Corporation; provided that if such delivery or electronic communication is made on a day which is a not a business day or later than 5:00 p.m. (Toronto time) on a day which is a business day, then such delivery or electronic communication shall be deemed to have been made on the subsequent day that is a business day.
- (H) In no event shall any adjournment or postponement of a meeting of shareholders or the announcement thereof commence a new time period for the giving of a Nominating Shareholder's notice as described in paragraph 3A(B) of this Article ● or the delivery of a representation and agreement as described in paragraph 3A(D) of this Article ●.

2. By-law No. ●, as amended from time to time, of the by-laws of the Corporation and this by-law shall be read together and shall have effect, so far as practicable, as though all the provisions thereof were contained in one by-law of the Corporation. All terms contained in this by-law which are defined in By-law No. ●, as amended from time to time, of the by-laws of the Corporation shall, for all purposes hereof, have the meanings given to such terms in the said By-law No. ● unless expressly stated otherwise herein or the context otherwise requires.