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THE CALLING AND CONDUCT OF SHAREHOLDERS' MEETINGS

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I. THE NEED FOR MEETINGS OF SHAREHOLDERS

> The ultimate control of a company rests with the general meeting. It is therefore essential to a proper understanding of investor protection to appreciate how such meetings are summoned and conducted. Basically this is a matter for the regulations of each individual company, but in practice there is a considerable measure of uniformity; indeed, there now has to be because recent Companies Acts have laid down an increasing number of rules which must be complied with whatever the company's regulations may say.

In these clear words Prof. Gower[1] has outlined the essenti concerns of this paper: how the meeting can be used to protect investor or better, shareholder, interests; how this can be best achieved through the formalities of calling and conductir the meeting; what abuses are to be guarded against in the call and conduct of meetings; what formalities in calling and condu are best left to be determined by the companies themselves and which require legislation; in short, what balance should be struck between the freedom of the incorporators and the regulation by the state.

a) Introduction to the Present Situation

Gladstone, the father of our modern companies statutes,[2] characterized corporations as "little republics,"[3] a term appropriate to the classical theory of company law but which may no longer reflect the realities of corporate life today. Harbrecht[4] suggests that modern corporations are no longer independent, democratic entities, but, because important parts of their capital are are now provided through financial institutions which also provide the consumer credit that permits allows corporations to stay in the market place, we should view them as part of a single organic economic system --"like the skeleton of a living organism served by a bloodstr of financial funds and a nervous system of securities markets

The suggestion put forward in this view is that the degree of legal independence gained by the management from the shareholders over the years, be it because of the business judgmen rule, the inability of shareholders to challenge directoral and managerial expertise, or because of the physical inabilit to mobilize the shareholders in large, complex corporations--that this independence has been supplanted by a dependence on a system not subject to direct, democratic controls. Harbrecht in effect superimposes another dimension on the divorce of ownership of corporate property from its control as first described by Berle and Means.[6]

Nor does Harbrecht see this development as an evil to be dealt with. He states:[7]

> . . . those who appear on the shareholder lists today may have sold their interests by tomorrow. The corporation's loyalty is to itself and it serves its shareholders best in the circumstances by maintaining a steady rate of growth and overall health. The income-producing dimension of the shareholders' interest, after all, is measured by the corporation's prospects for future earnings.

While this may accurately reflect the <u>de facto</u> situatio existing between shareholders as gamblers in share-certificat essentially unconcerned with the issuing entity, and the corporation as an essentially autonomous creature that is rarely called to account, this gloomy view begs the fundamenta policy question of whether this result is a desireable one for our society or whether it is a trend that needs correctio and control.

Certainly we must question the value nowadays of a small shareholder's presence at a meeting in which large blocks of shares are controled by other corporations or by management, and where a meaningful debate on the agenda items is effectively precluded.

b) The Rationale for Shareholder Democracy

The small shareholder was not always such a powerless figure in the corporate scheme. Under early company law, before the advent of Gladstone's legislation, the rule was th each shareholder regardless of his financial interest had an equal vote in the management of theenterprise, using the poli analogy that each man was equally interested in the good gove ment of the company and should have an equal voice in the management of that government. While courts upheld this view on the ground that it was for the public interest,[8] this probably represented the large measure of distrust of joint stock companies that lasted for a century following the bursting of the SouthSea Bubble in 1720.[9]

Eventually the analogy of political and economic equalit was discarded and replaced by the more pragmatic theory of self-interest in shareholder voting,[10] that shareholders ente corporate ventures for gain, and that therefore the amount of control granted should be inrelation to the amount invested. While the principle of rule by the majority in interest established itself as a fundamental feature of modern company law, it should be noted that legislatures have always put restrictions on its pure application. Some of the American legislatures sought to protect the small shareholder by puttir quantitative restrictions on voting strength, a situation that was open to circumvention and did not last long.[11] Attempts were also made to give the individual shareholder a veto over basic alterations in the corporate structure (such as charter amendments, mergers, sale of assets, dissolut but this too proved unworkable since lone dissenters were able to block needed change.[12] The modern situation, whereby a special majority may approve fundamental changes represents a workable compromise, although it leads to an increase in the managerial powers of the majority in interest.

Likeother contemporary companies statutes, the Alberta Companies Act specifies a long list of items that can only be

dealt with by special resolutions--requiring 21 days notice and a three-quarters majority of all the entitled votes votir As will be seen from the following list,[13] all of the sectior requiring a special resolution and special majority relate tc the fundamental changes in a company--name, objects, capital structure, sharerights, terminating the company:

> The following matters must be dealt with by special resolution: section 32—change of name; section 33—change of location of registered office, if articles do not provide for this power to be exercised by ordinary resolution of the company, or by resolution of the directors; section 34—alteration of objects; section 35—restriction on calling up uncalled capital; section 37—increase and alteration of share capital; section 38—reorganization of share capital; section 38—reduction of share capital; section 42—alteration of articles; section 43—conversion of company limited by shares to specially limited company; section 44—conversion of specially limited company to company limited by shares; section 46—conversion of public company into private; section 47—conversion of private company into public; section 69—issue of shares with preferred, deferred or other special rights or restrictions and variation of rights of classes of shares and shares issued in series; section 90—give authority to directors to issue shares as dividends; section 112—return of accumulated profits; section 113—payment of interest out of capital; section 161—appointment of inspectors; section 197—winding-up by court; section 226—a compromise or arrangement; section 237—voluntary winding-up; section 244—delegation of power to appoint liquidators; section 247—sanction of certain powers of liquidator; section 249—sanctioning sale of company's business for shares; section 271—disposition of books on voluntary winding up.

Other matters can be dealt with by ordinary resolition because they are essentially not of a nature to effect the fundamental basis of the company's existence, and hence do not represent a fundamental variation of the "contract" between the shareholder and the company. If there were considerations which the incorporators considered essential to the company's welfare or to safeguard their own interests in the company, it is always open to them to provide that these matters be dealt with by special resolutions when they incorporate the company, or later, by special resolution under s. 42 of the Alberta Companies Act in altering the articles of the company.

c) Managerial control and shareholder estrangement

Theoretically the majority in interest exercises its managerial powers by its ability to restrict the powers of management, by passing special resolutions restricting or mandating the exercise of managerial powers and by exercisin its powers of appointment and removal of directors.[14] Such a rationale for the ritual of shareholder meetings has a greater affinity with the commercial realities of the nine teenth century than it has with the highly volatile and dive sified nature of investment in the late twentieth century. In the nineteenth century companies were still relatively small--few were large enough to dominate the markets of thei business--and the chief scarce resource was capital. Those who had the capital were thus in a position to determine a company's objectives in general shareholder's meetings.[15] Of course, this is still applicable to small, closely held ("private") companies today, but in the larger, publicly traded companies the involvement of the majority of shareholders is minimal and more akin to the interest of a gambler or, at best, trader in the future performance of the selected stock. In such cases the frequent call for special interest representation in comoany affairs through consultative bodies or even on company boards more often than not serves to split the shareholders--the majority in interest--still further from any effective voice in company affairs. The involvement of such special interest groups, writes Willett,[16]

> . . . tends to reinforce the power of the senior executives, who are at the apex of the consultative process, in their relationship with the board of directors [i.e. the shareholders' representatives in the government of the company]. The consultative system becomes yet another interest group with right and claims on the company and in the multiplicity of such groupings the executive finds freedom.

More pernicious still to the theory of control by the majority in interest is the wholly "internal" board of direct in which each director is also an executive of the corporatio

So Willett continues:[17]

> When all directors are executives and are appointed to the board by virtue of the executive office to which they are promoted, then the general meeting has only residual powers which can only rarely be involved. In such a company the assumptions of company law on power relationships and responsibility are indeed irrelevant. The board is the creature of the manager and the shareholder has little but a passive role to play, for his only intervention can be to discharge the top management group.

Willett's remarks are prima facie inapplicable to closely held corporations in which the board assumes managerial roles: there would be a nearly complete merging of the roles of shareholder, director and manager, although here too minority shareholders are frequently effectively excluded fro any active role in the company. But in such cases as Willett describes above any board meetings that do take place are not really conducted under conditions suitable to a quasi-parliamentary forum of discussion and decision that is responsible to the shareholders. Rather, it is a command meeting of the managing director and his subordinates.

All this should not be taken to mean that there no longer is a valid rationale for shareholder's meetings as forums for making basic and essential corporate decisions. It suggests, rather, that classic Anglo-American company law has not been entirely successful in achieving the fulfillment of the rationale. German company law, for example, does not allow for a confusion of roles and responsibilities between executive-managerial functions and execut supervisory functions by imposing a two-level board.

As managements have seen their autonomy grow because of passive investors, they have estranged shareholders further by such means as minimizing dividend payments, as is clearly recognized, for example, by E. C. Bovey, chairman of Norcen Resources Ltd.[18] While Bovey sees this as resulting in

investor apathy, and while he makes suggestions to maximize contact between shareholders and companies, his suggestions do not touch the very basis of the shareholder's relative insignificance in the government of public companies--namely the very nature of the small shareholder and of his "investment". Bovey's description of the majority of Canadian shareholders is implicitly that of people whose prime concern is the performance of stock on the exchange rather than the performance of the issuing corporation:[19]

> Shareholders in public companies can be numbered in the millions in Canada. The overwhelming majority are ordinary people who have chosen to invest in one or more succesful companies in which they have confidence.

While these words are in neutral territory, the underlying gist becomes clearer in Bovey's portrayal of the typical investment as being of an indirect nature, or under external direction:[20]

> Most of them are wage and salary earners, part of the investment community by virtue of their participation in mutual funds, pension funds, insurance companies or other trusts.
> Others are retirees, looking to dividends and, they hope, to some capital gain in their personally or professionally managed portfolios.

Whether the beneficiary of a trust fund, the shareholder of a mutual fund share or the holder of an insurance policy should have a right to participate in the affairs of a company once removed from him is open to debate, and in any event not truly within the realm of shareholding. "Retirees" on the other hand, have the status of ordinary shareholders and merit no special concern because of their incidental position in life as "retired persons". But Bovey is surely deluding himself or pulling the wool over our eyes with

the following prescription for our economic well-being:[21]

> In addition to these groups [mentioned above], the growth and prosperity of our economy requires that the young, the entrepreneurial and the venturesome, develop a stake in our free enterprise society through purchase of the shares of Canadian corporati

Surely it is of the essence of entrepreneurship to get involved at the beginning of an enterprise, or at the beginn of an expansion, in a way that contributes directly to the guiding the enterprise to success (or failure). If this is what Bovey meant, there can be no quarrel with his words. But this probably accounts for the least amount of activity in share purchases. But nothing he says suggests that Bove seeks anything else than a more active stock market, with the attendent "gambling" and passivity of the small investor

Bovey's perspective is on the "alienated" investor rather than on the quintessentially passive shareholder. The problem of alienation may perhaps be dealt with by greater disclosure requirements, but above all by a company's performance either in dividend distribution or in the capital appreciation of the shares: that at least would prevent the alienation caused by dissatisfaction with what is seen to be an unwise investment. On the other hand, the passive shareholder presents the problem--apart from being by nature more closely related to a gambler--of seeing himself as an individual who is uniformed about and unimportant in the corporate structure, and whose participation would be ineffective. As an individual, within the context of a large corporation, he is right. The question facing us here is whether his unarticulated interests are capable of representation outside of the existing proxy mechanism, and if so, whether provision should be made for representing him, and by what mechanism this is to be done.

d) Closely-Held Corporations

While there may be a need to insure a democratic input into large corporations so that the majority in interest--a large anonymous mass--is well heard, in closely-held corporations very different considerations arise. It is in the very nature of a closely-held company that the providers of capital are closely concerned with the use and application of that capital and the performance of the company. Here company law in practice is seen to be much closer to its roots in partnership law than in the autonomous functioning of large public corporations.

Usually the majority shareholder or shareholders in smaller private companies take an active role in the management of the company as both directors and executives. But since they usually also represent the majority in interest, there is an inherent conflict between management and shareholders. The rationale for shareholder meetings in closely-held companies must therefore be founded on differer considerations--namely, the right of the minority to be heard, and the danger that the minority will suffer oppressi through the conduct of the majority if the minority is not in a position to put its objections on record. While a minority shareholder or shareholder group may in fact be in a less favorable position at a company meeting where the majority in interest is held by one person or a very small group than it would be in a larger company, in which the management, not being themselves controlling shareholders, are more open to the wishes of the minority, some protection is afforded to minorities in closely-held companies through the power of the court to order a winding-up on the "just and equitable" basis of s. 197(e) of the Alberta Companies Act. The scope of this subsection as it applies as share-

holder remedy seems to be uncertain in the minds of practitioners. In any event, no Alberta cases have been heard under it, although in recent years the section has been invoked on behalf of minority shareholders in other Canadian jurisdictions. However, it seems clear that in order for a plaintiff shareholder to succeed under this section he must be able to satisfy the court that essential the corporate form is merely a protective mantle over what is in substance a partnership and that accordingly principl analogous to those governing the dissolution of partnership are applicable.[22] However, it should be noted that the Manitoba Court of Appeal refused to allow a finding that there was in fact a partnership under the corporate mantle where a minority shareholder having 1/3 of the voting share petitioned for a winding-up on "just and equitable" grounds and the evidence showed that although the majority sharehol after properly disclosing his interest to the directors and shareholders and passing the appropriate resolutions , prop to sell all of the company's assets to another company in which he had an interest, at a price determined by him, and the minority shareholder disagreed only on the consideratio to be received, although the independent appraisal was not attacked.[23] The Manitoba Court of Appeal thus dismissed t petition on a narrow view of the facts, and did not heed th trial judge's quotation from In re Blériot Manufacturing Aircraft Co.[24] that

> The words "just and equitable" are words of the widest significance and do not limit the jurisdic of the Court to any case. It is a question of fact, and each case must depend on its own circum stances . . . .

These words were quoted by Lord Shaw of Dunfermline in the House of Lords decision Loch v. John Blackwood Ltd.[25] in a

review of the authorities on the meaning of these words. The Loch case seems to support a more liberal view of the l than that held in the Manitoba Court of Appeal. Lord Shaw states, in considering the make-up of the company:[26]

> It is thus seen that although taking the form of a public company the concern was practically a domestic and family concern. This consideration is important, as also is the preponderance of voting power just alluded to.

And later, after observing that certain statutory conditions and articles of the company had not been complied with, His Lordship continues:[27]

> [Lordships']
> In their opinion, however, elements of that character in the history of the company, together with the fact that a calling of a meeting of shareholders would lead admittedly to failure and be unavailable as a remedy, cannot be excluded from the point of view of the Court in a consideration of the justice and equity of pronouncing an order for winding up. Such a consideration, in their Lordships' view, ought to proceed upon a sound induction of all the facts of the case, and should not exclude, but should include circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders, both under statute and contract, are entitled. It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

The Ontario courts have held that the wide discretion of the courts to grant an order for winding-up may be properly exercised where the management of the company had been involved in a series of highly confusing and suspicious transactions, among them being the transfer of the company's assets for shares in a company over which it can never have voting control.[28]

It seems from these cases that the degree of damage done to a company by the management (i.e., the majority shareholders in closely-held corporations) must be of a very serious degree before the courts will interfere with the granting of a winding-up order, unless there is a deadlock between the two quarreling equal shareholder groups resulting in abortive shareholder meetings and an impairment of the company's ability to carry on business effectively.[29]

However, these cases show that the relief afforded by this section is uncertain and available only in very extreme circumstances, despite the courts' reiteration of the wide discretion granted them thereunder. Because of these practical limitations other jurisdictions have attempted to give the minority shareholders more protection by the enactment of a discretionary remedy in the case of "oppression". The U.K. Companies Act of 1948 enacted s. 210 to provide for investigation of a complaint of oppression, and, where grounds for a just and equitable winding-up exist but to so order would be unfairly prejudicial, the court could make such orders as it thought fit. A substantially similar section was adopted in the Australian State Companies Acts. However, by linking the "oppression" remedy to the "just and equitable" remedy, no easier remedy was obtained. The Jenkins Report expressed dissatisfaction with this and recommended an amendment to effect a severance from the requirement to show that a winding-up order on "just and

equitable" grounds could be made before granting relief for "oppression". It was also thought that[30]

> "oppressive" is too strong a word to be appropr in all the cases in which applicant ought to be held entitled to relief under the section.

It should be noted that the B.C. Companies Act, R.S.B.C. 1960, c. 67, incorporated the British wording in s. 185. Effective use, as well as the limitations of the section were illustrated in Re National Building Maintenance Ltd.[31] In that case unauthorized management fees taken by the majo shareholder-director had stripped the company of its surplu Such a lack of probity would justify a winding-up order but would not avail the minority shareholder the relief sought, namely to have a winding-up with a valuation of his shares as if the oppression had never taken place. Here the court was able to exercise the added discretion under the "oppression" section to order such a valuation.

Both British Columbia and the Federal Parliament have heeded the Jenkins Committee and enacted independent discretionary "oppression" sections which should prove to be effective remedies for shareholders who are not in a position to use the older forum of shareholders meetings effectively.

The B.C. section reads:[32]

> 221. (1) A member of a company or an inspector under section 230 may apply to the Court for an order on the ground
>
> (a) that the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner oppressive to one or more of the members, including himself; or
>
> (b) that some act of the company has been done, or is threatened, or that some resolution of the members or any class of members has been passed or is proposed, that is unfairly prejudicial to one or more of the members, including himself.

(2) On an application under subsection (1) the Court may, with a view to bringing to an end or to remedying the matters complained of, make such interim or final order as it considers appropriate, and, without limiting the generality of the foregoing, the Court may

(a) direct or prohibit any act or cancel or vary any transaction or resolution;
(b) regulate the conduct of the company's affairs in future;
(c) provide for the purchase of the shares of any member of the company by another member of the company, or by the company;
(d) in the case of a purchase by the company, reduce the company's capital or otherwise;
(e) appoint a receiver or receiver-manager;
(f) order that the company be wound up under Part 9;
(g) authorize or direct that proceedings be commenced in the name of the company against any party on such terms as the Court may direct;
(h) require the company to produce financial statements;
(i) order the company to compensate an aggrieved person; and
(j) direct rectification of any record of the company.

(3) Every company referred to in subsection (1) shall file a certified copy of any order made by the Court under this section, or on appeal therefrom, with the Registrar within fourteen days from its entry in the Court registry.

(4) The rights granted by this section are in addition to those granted under section 248.

(5) Every company that contravenes subsection (3) is guilty of an offence.

Under the Federal act, shareholders have a number of remedies, which in toto, are very far reaching. A shareholder may apply for an investigation: 33

PART XVIII

INVESTIGATION

222. (1) A shareholder or the Director may apply, *ex parte* or upon such notice as the court may require, to a court having jurisdiction in the place where the corporation has its registered office for an order directing an investigation to be made of the corporation and any of its affiliated corporations.

(2) If, upon an application under subsection (1), it appears to the court that

(a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person,

(*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a security holder,

(*c*) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose, or

(*d*) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly,

the court may order an investigation to be made of the corporation and any of its affiliated corporations.

(3) If a shareholder makes an application under subsection (1) he shall give the Director reasonable notice thereof, and the Director is entitled to appear and be heard in person or by counsel.

The shareholder may also proceed without an investigation under s. 234: [34]

Application to court re oppression

234. (1) A complainant may apply to a court for an order under this section.

Grounds

(2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(*a*) any act or omission of the corporation or any of its affiliates effects a result,

(*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

Powers of court

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(*a*) an order restraining the conduct complained of;

(*b*) an order appointing a receiver or receiver-manager;

(*c*) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(*d*) an order directing an issue or exchange of securities;

(*e*) an order directing changes in the directors as permitted by subsection 185(3);

(*f*) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(*g*) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;

(*h*) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(*i*) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 149 or an accounting in such other form as the court may determine;

(*j*) an order compensating an aggrieved person;

(*k*) an order directing rectification of the registers or other records of a corporation under section 236;

(*l*) an order liquidating and dissolving the corporation;

(*m*) an order directing an investigation under Part XVIII to be made;

(*n*) an order requiring the trial of any issue.

s. 235 is of interest because it prevents the majority in interest from using the otherwise valid shareholder resolutions as an estoppel: 35

Evidence of shareholder approval not decisive

235. (1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of such body corporate, but evidence or approval by the shareholders may be taken into account by the court in making an order under section 207, 233 or 234.

Court approval to discontinue

(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and, if the court determines that the interests of any complainant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the complainant.

A further remedy still is contained in s. 207: 36

Further grounds

207. (1) A court may order the liquidation and dissolution of a corporation or any of its affiliated corporations upon the application of a shareholder,

(a) if the court is satisfied that in respect of a corporation or any of its affiliates

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of

the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or

(b) if the court is satisfied that

(i) a unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or

(ii) it is just and equitable that the corporation should be liquidated and dissolved.

Alternative order

(2) Upon an application under this section, a court may make such order under this section or section 234 as it thinks fit.

Application of s. 235

(3) Section 235 applies to an application under this section.

e) Issues Properly Left for Shareholder Meetings

In the United States there are recognizably three types of corporation statutes in respect to the division of powers between shareholders and management. Some states vest general decision making powers in the Board of Directors, subject to limitations in the certificate of incorporation (our memorandum). Other states reserve all undelegated power to the shareholders. Finally, there are statutes providing for a balanced allocation of decision making.[37]

In such an allocation of decision making through the enabling statutes, policy considerations obviously play a dominant role. Statutes which have their roots in generally expansive economic times are more likely to delegate residual power to the directors in the interests of decision efficiency. On the other hand, less expansive

times are more likely to have given rise to conservative restrictions on what management may do without shareholder approval.

The Alberta Act, like the majority of Acts descended from the U.K. Companies Act of 1857, does not make a specific division of power between the board of directors and shareholders in that part of it which has statutory force--other than to reserve the power to make fundamental changes in the company to special majorities of the shareholders. The act does nowever provide, through the incorporation of Art. 55 of Table A, that the directors shall have the management of the company, leaving all residual powers in them:[38]

> ***Powers and Duties of Directors***
>
> **55.** The business of the Company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the Company, and may exercise all such powers of the Company as are not, by *The Companies Act*, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the Company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by ordinary resolution, whether previous notice thereof has been given or not; but no regulations made by ordinary resolution shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

It should be noted that under the Alberta Act the discretion of the directors to manage the business cannot be fettered by a unanimous shareholder agreement.[39] Of course, the recently enacted Canada Business Corporations Act[40] while generally leaving residual management powers in the board, has specifically made the directorial discretio subject to a unanimous shareholder agreement: s. 97(1).

II. CALLING THE MEETING

Meetings may be of several types, such as general or annual meetings, extraordinary meetings, or class meetings. They may be called by the compnay acting through the board of directors, or by the board on the requisition of a prescribed number of members. Under certain circumstances a meeting may be ordered convened by the court.

When a meeting is to be called, questions relating to the entitlement to receive notice and the sufficiency of notice aris The latter question is really a three part question as to suffic of time, content and formality, and will be dealt with in a late section of this paper. At this point we will examine the questi of entitlement to notice.

a) Entitlement to notice

As a general rule, all shareholders entitled to attend a meeting are entitled to receive notice of that meeting. Failure to give notice to persons entitled to receive it may invalidate the meeting.

Ordinarily, the entitlement to receive notice is determined by the names entered on the company register or transfer books as shareholders. While some statutes and authorities add that the recipient be entitled to vote at the meeting, the present Alberta Companies Act[41] clearly states in paragraph 135(1)(a) and Article 95 of Table A that notice of a meeting shall be served on <u>every member</u> of the company, although the articles may provide otherwise. The additional requirement of a voting right is added only for the calling of the meeting by shareholder requisition under section 134 or by application to the court under section 135(2). The rationales are clear: a shareholder, though lacking voting rights, is nonetheless entitled to be appraised of the state and course of the company's business, and to have his views heard. On the other hand, if he does not have it within his power to participate in the decision-making

of the company through voting power, there is not the least circumstantial guarantee that any meeting requisitioned by a non-voting shareholder would have any substantial support from voting shareholders. This would be an unnecessary burden on the company.

However, as noted above there is a contrary view. For example, the Delaware Court of Chancery has held that "reasonable notice to shareholders entitled to vote" (my italics) is a prerequisite to the validity of a special meeting of stockholders.[42] The court's wording depended on the wording of the Delaware Corporation Law, which was similar in this respect to that found in many American corporation statutes. This wording is retained in section 29 of the Model Code.

The same wording has also come into Canadian corporation law through section 129(1)(a) of the new Canada Business Corporations Act, which reads:[43]

> Notice of the time and place of a meeting of shareholders shall be sent not less than twenty-one days nor more than fifty days before the meeting,
>
> (a) to each shareholder entitled to vote at the meeting

Thus the C.B.C.A. does not accede to the idea that owners of the company have a statutory right to be present at and otherwise participate in the general meetings of the company if they do not also have voting rights. The Act does, however, recognize that the right to receive notice of meetings may arise as a contractual right expressly attached to non-voting shares. Thus subsection 128(1)(c), which provides for fixing the record date for determining shareholders, reads disjunctively in the following exclusionary clause: "for any purpose except the right to receive notice of or to vote at a meeting."

On the other hand, other relatively recent Canadian companies legislation has retained the position found in the present Alberta act. The Ontario Business Corporations Act, by a 1972 amendment, provides that "notice . . . shall be given to each person who is entitled to notice of meetings and who on the record date for the notice appears on the records of the corporation as a shareholder."[44]

Similarly, the B.C. Companies Act provides:[45]

> 166. Every company shall give to its members entitled to receive notice of general meetings, not less than twenty-one days' written notice of any general meeting of the company; but those members may waive or reduce the period of notice for a particular meeting by unanimous consent in writing.

The rationale behind the American position is not entirely clear. It may be explicable with reference to the provisions in the various state statutes authorizing the use of voting trust. In most states the use of a voting trust would not involve any difficulty with respect to notice since they generally require a transfer of shares on the company's books to the trust. There are, however, still some jurisdictions which do not require a transfer to the trust of the share certificates although, of course, the shareholder has surrendered his right to vote. In such cases the person having the statutory right to notice of the meeting is, of course, the trustee, and not the bearer of the certificates. Whether in fact the restriction is a sensible one to be continued in American law is a separate question that ought not to be vetted here

However, we must address ourselves to the question whether i fact the American position does not simply put into explicit statutory language what is implicit in the Alberta position. We note that section 135 of the Alberta Companies Act makes the giving of notice to every member of the company mandatory only if the Articles do not otherwise provide, thus allowing the company to stipulate in its by-laws that the right to receive notice may be limited to shareholders of voting shares. Of cour such a limitation would always be subject to a subsisting right to receive notice of class meetings or any other meetings directly affecting the non-voting shares in question (which, of course, may vote on any matter that affects the rights of thes shares). But at what point is an interest directly affected? While no right or privilledge pertaining to the share may be directly affected, surely any class of shareholders that is kept in the dark about the company's health is severely disadvantaged

While such distressful shareholder situations may be uncommon, nevertheless this is an area in which the basically contractual nature of shareholding might well be buttressed by an express statutory grant of the right to receive notice to to every shareholder of the company, subject to the limitations of practicality (e.g. geographical distance of overseas shareholders).

A step in this direction was taken by the Jenkins Committee, but we should note that in respect to non-voting shares the majority wanted to restrict the right to notice and information, and not extend it to be a right to attend and speak at meetings:[1]

> *Notice of meetings*
>
> **138.** There is considerable support for the view that the holders of voteless equity and preference shares should be given a statutory right to receive, for information, notice of all general meetings of the company at the same time as other members, in addition to the annual accounts and directors' reports to which they are already entitled under the Companies Act. They should also be entitled to receive a copy of any chairman's statement which is circulated with the accounts. This would help to ensure that all members were kept informed of developments affecting their company. We have considered, but the majority of us have rejected on grounds of administrative difficulties, the suggestion that holders of voteless shares should be given a statutory right to attend and speak at company meetings. A minority recommendation on this is on page 210.
>
> **139.** The possibility of giving voteless shares a right of voting on matters of special importance to them or in circumstances such as failure to pay any ordinary dividend for some specified period, has also been raised, but we think the adoption of this suggestion would involve too great an interference with contractual rights and would also unduly favour voteless shares as compared with preference shares with restricted voting rights which enjoy no similar statutory protection.
>
> **140. We recommend that:**
>
> **(a) the Board of Trade should seek to enlist the voluntary co-operation of the Stock Exchange, the press and other institutions and representative organisations concerned, to give adequate publicity in the press, investment circulars, etc. to any lack or restriction of voting rights attaching to particular equity shares;**
>
> **(b) notice of all general meetings of their company should be required to be sent to holders of voteless equity and preference shares at the same time as they are circulated to other members (when a meeting is held on short notice the notices should be required to be sent to such shareholders as soon as possible);**
>
> **(c) holders of voteless equity and preference shares should be entitled to receive a copy of any chairman's statement which is circulated with the accounts.**

The minority recommendation referred to in paragraph 138 was signed by L. Brown, Sir George Erskine and L.C.B. Gower. The gist of their dissent is based on a fundamental antagonism to non-voting equity shares because they perpetuate the separation of ownership of the company from control. Thus:[48]

> . . . Feeling, as we do, that the development of non-voting equity shares is undesirable both in principle and practice, we find ourselves unable to concur in the failure to make stronger recommendations for their control.

The minority would then recommend strengthening paragraph 140

> (a) that all equity shareholders, whether or not they have votes, should be entitled to attend, in person or by proxy, and to speak at all general meetings of their company.

Neither the majority nor the minority recommendation was enacted in the 1967 U.K. Companies Act.

b) Who is entitled to receive notice?

If we accept the proposition stated above, it seems clear the right to receive notice of the meeting should be determined on the basis of the company register of shareholders or the stock transfer book, as it is called in the American jurisdiction. The jurisprudence on the subject is well settled in Canadian law that the company has no right to go behind the names on the register to determine the beneficial ownership of the shares.

An attempt was made to deprive registered shareholders of shareholder rights on the basis that they were no longer beneficially entitled to them occurred in the Ontario case of Tough Oakes Gold Mines v. Foster[49]. At the annual meeting of the company, the chairman--Foster--refused recognize 40,000 shares for the purpose of constituting a quorum. This enabled him to retain control of the company. The certificates had previously been entrusted to him for the purpose of selling

them, and the shareholders had received partial payment. The shares were still registered in the company books in the names of the transferors. In the face of Foster's ruling that there was no quorum, the dissident shareholders, led by the proxyholder of the shares in question, continued the meeting on their own and elected a new board. Kelly J. states the issue:[50]

> The crucial question then is, whether these two blocks of 25,000 and 15,000 shares were properly repr sented at the meeting. Foster's objection was, no do based on the view he entertained, that Myrtice Oakes and Winifred Robins had ceased to be beneficial owner of the two blocks over which the contest has arisen.

His Lordship then stated the applicable law:[51]

> It seems to be the case that persons in whose name shares stand in the share-register of a company, unle there be expressly something to the contrary, are to deemed to be the holders of the shares for such purpo as the right to be present at meetings of the company and to vote upon the shares and that that right conti so long as their names are on the register.
>
> . . .
>
> Pending the registration the transferee has only t equitable right to the shares transferror to him; he d not become the legal owner until his name is entered the register in respect of the shares so transferred.

He finds support in judgment of Jessel M.R. in Pender v. Lushington[52], quoting the following passages:

> "It comes, therefore, to this, that the register of shareholders, on which there can be no notice of a trust, furnishes the only means of ascertaing whet you have a lawful meeting or a lawful demand for poll, or of enabling the scrutineers to strike out votes."
>
> ....
>
> "The result appears to me to be manifest that the company has no right to inquire who was the the benef owner of the shares and the votes in question ought t have been admitted as good votes independently of the inquiry as to whether the parties tendering them were were not, and to what extent, trustees for other perso beneficially entitled to the shares."

In the result Kelly J. held:[53]

> Myrtice Oakes and Winifred Robins were the registered holders of the shares in question, and as such they were entitled to recognition as shareholders to whom notice of the meetings of the company should be given; and it was not within the province of the preside or the presiding officer to sit in judgment in respect of that right as between them and any other claiming the shares, and to declare against the right of these two holders to attend or be represented and to vote at such meetings. If that course were permissible, then how wou it be possible to carry on such business of a compnay a must necessarily be transacted at a meeting of its share holders? for never would there be certainty as to who i properly entitled to appear at a shareholders' meeting take part in its deliberations.

Once a meeting of the shareholders has been called, there must, of course, be an immediate fixing or freezing of the lists when proper notice has been sent to every shareholder thereon, so that the right to receive notice of the meeting becomes suspended with respect to any person who thereafter until the meeting becomes a registered member of the company or becomes entitled to be registered. If this were not done, proper notice of meetings might be impossible for companies whos shares are actively traded.

c) Freezing the register of members

The two common ways of freezing shareholder lists for the purpose of maintaining valid notice of meetings are 1) by closing the register or suspending the registration of transfers, and 2) by "record date".

(1) closing the register

The older method of closing the register or suspending stock transfers in the period between the giving of the notice and the holding of the meeting is still followed in Alberta under the existing Companies Act. While closing of the register arises under an express statutory provision and the suspension of registration under the Articles, the method and effect are the same.

Under the Act, section 58 authorises the directors to close the register for up to 30 days per year by "giving notice" in a newspaper advertisement of this fact:

> Power to close register
>
> **58.** On giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, the directors may close the register of members for any time or times not exceeding in the whole 30 days in each year.
>
> [R.S.A. 1955, c. 53, s. 67]

The provision contained in Article 17 of Table A is somewhat more specific and limited:

> The directors may also suspend the registration of transfers during the 14 days immediately preceding the ordinary general meeting in each year.

Presumably, in the absence of any further express provision in a company's articles, where a special or extraordinary meeting is to be called resort would have to be had to the more general powers to close the register under section 58.

The intermeshing of these two provisions is not entirely clear. Section 58 seems to be intended to provide for an outright closure of the register for all purposes, including inspection, while Article 17 merely speaks in terms of suspending registration. Nor is it clear that section 58 provides for anything more in the way of notice of closure than of the concurrent fact of closure. Certainly the section lacks the specificity of language to assure that the notice is of a resolved intention to close the

books for a future period. One may also argue that the power to suspend registration given by the Articles is in addition to the 30 days of closure permitted, since there is no conflic between the two provisions.

Since the articles are subject to amendment by the company in general meeting, a longer suspensory period may be set in Article 17 and a suspension of registration quite distant from the meeting to be convened could be achieved. For the transferee of shares who neglects to take a proxy and an undertaking to forward the notice of meeting as well, this could involve a long period of non-participation in the affairs of the company. The mere proxy, of course, would still not entitle or assure him of notice of the meetings.

(2) "Record Dates"

"Record dates" for the purposes of determining the right to notice, to vote, and to receive dividends are the rule in more recent companies legislation. The basic scheme and purpose of record dates is well illustrated by the U.S. Model Corporations Act.

(2)(A) <u>The Model Business Corporations Act</u>

The U.S. Model Corporations Act provides the three alternat possibilities for a record date set out above in the following categories:

1) The right to receive notice of meetings.
2) The right to vote at meetings.
3) The entitlement to receive a dividend payment, or for any other purpose.

However, this section provides the record date as only one of three alternative procedures.

Firstly, the directors may provide that the stock transfer books shall be closed for at least 10 days but no more than 50 days prior to the meeting.

Secondly, the directors may fix a date for the record date within the same period as above, or the by-laws may so provide, instead of closing the books.

Thirdly, if the books are not closed, and no record date is set, then the date of mailing the notice is the record date.

Finally, the record date applies to any adjournment of the meeting called.

§ 30. CLOSING OF TRANSFER BOOKS AND FIXING RECORD DATE

For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors of a corporation may provide that the stock transfer books shall be closed for a stated period but not to exceed, in any case, fifty days. If the stock transfer books shall be closed for the purpose of determining shareholders entitled to notice of or to vote at a meeting of shareholders, such books shall be closed for at least ten days immediately preceding such meeting. In lieu of closing the stock transfer books, the by-laws, or in the absence of an applicable by-law the board of directors, may fix in advance a date as the record date for any such determination of shareholders, such date in any case to be not more than fifty days and, in case of a meeting of shareholders, not less than ten days prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. If the stock transfer books are not closed and no record date is fixed for the determination of shareholders entitled to notice of or to vote at a meeting of shareholders, or shareholders entitled to receive payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the board of directors declaring such dividend is adopted, as the case may be, shall be the record date for such determination of shareholders. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment thereof.

It will be noted that the alternative of closing the transfer books is equivalent in substance to s. 58 of the preser Alberta Companies Act. However, s. 58 is limited to 30 days in any calendar year, and to obtain a lomger period of notice, the "suspension" of transfers under the articles would have to be resorted to. Although section 135 (1)(a) calls for a minimum period of notice of seven days, all of this section is subject to a different provision being made in the articles. The Model Act, on the other hand, fixes minimum and maximum periods of notice on a fixed statutory basis--no less than ten and not more than fifty days. In this respect section 30 is sustained by section 29, which specifically provides these periods of notice for shareholder meetings.

It is interesting to note that the Model Act continous to permit the closure of the transfer books, as a matter of choice for each company, although in the accompanying annotation the annotator explains that the practice has become obsolete. The introduction of the record date concept is based on the exigencies of modern business practice by the annotator of the Model Act:[54]

> The modern procedure of fixing a record date permits continuous trading in securities without postponement of transfers and simplifies the operations of the corporation. It is unfortunate that the provisions disenfrachising transferred shares are still in effect in a few jurisdictions. They were useful when there were no provisions permitting a record date.
>
> The record date must be fixed in advance and the rules of the New York Stock Exchange require at least ten days' advance notice of any record ate so that the shareholders may have an opportunity to transfer shares into their names if they wish to do so before the record date.

Although the intention that the record date be fixed in advance appears from section 30 itself, it is not a consistent intention in the section; on the contrary, the statutory determination of a record date as the day of making the resolution or of mailing the notice when the company has not

declared a record date or closed the transfer books implicit denies that notice of the record date itself must be given. On the other hand, it would seem desirable, as the annotation acknowledges, that transferees of shares should be given a reasonable opportunity of perfecting their rights in the company. As we shall see, the new Canada Business Corporati Act has gone some way in meeting this objection.

(2) (B) Ontario Business Corporations Act

The American approach was first reflected in Canada by an amendment to the Ontario Business Corporations Act[55]. It should be noted that this enactment clearly distinguishes between a record date in respect of the right to receive notice and a record date in respect of the right to vote, keeping the latter alive in the transferee of shares until the second clear day before the meeting:

> **112.** (1) Record dates.—The by-laws may fix in advance or may authorize the directors to fix in advance a time and date as the record date,
>
> **(a)** for the determination of the shareholders entitled to notice of meetings of the shareholders, which record date for notice shall not be more than 50 days before the date of the meeting and not fewer than the minimum number of days for notice of the meeting and where no such record date for notice is fixed, the record date for notice shall be at the close of business on the day next preceding the day on which notice is given or sent; and
>
> **(b)** for the determination of the shareholders entitled to vote at meetings of the shareholders, which record date for voting shall not be more than two days, excluding Saturdays and holidays, before the date of the meeting and where no such record date for voting is fixed, the record date for voting shall be the time of the taking of the vote; and
>
> **(c)** for the determination of the shareholders entitled to receive the financial statement of the corporation pursuant to subsection (1) of section 184, which record date for the financial statement shall be not more than 50 days and not fewer than 21 days before the date of the annual meeting of the shareholders and where no such record date is fixed, the record date shall be at the close of business on the day next preceding the day on which the financial statement is given or sent.
>
> [Subsec. (1) substituted by 1972, c. 138, s. 27.]

(2)(C) British Columbia Companies Act[56]

Although the new B.C. Companies Act came into being a year af the amendment to the Ontario Act discussed above, the relevant B.C. section is less satisfactory: it does little more than to enact almost verbatim the provisions of section 30 of the U.S. Model Code, only trimming down the maximum period between the record date and the action to be taken from 50 to 49 days

As in the Model Code the "action to be taken" requiring the determination of members covers several categories. It may be for determining

(1) members of the company
(2) members of a class of members
(3) members entitled to receive notice of a meeting
(4) members entitled to vote at a meeting
(5) members entitled to receive a dividend
(6) members, for any other proper purpose

The intermingling of these various purposes under one record date provision is unfortunate. It effectively permits the removal of the entitlement to vote (as distinguished from the entitlement to receive notice) further than either the present Alberta Companies Act or the new federa Act permits. The Ontario Act of course permits the right to vote to be asserted until two days before the meeting.

Record date.

71. (1) For the purpose of determining members, or members of a class of members, entitled to notice of, or to vote at, any general meeting or class meeting or entitled to receive payment of any dividend or for any other proper purpose, the directors may fix in advance a date as the record date.

(2) Where a record date is fixed, it shall be not more than forty-nine days before the date on which the particular action requiring the determination of the members is to be taken.

(3) Where no record date is fixed for the determination of members entitled to notice, or to vote, or of members entitled to receive payment of a dividend or for any other proper purpose the date on which notice of the meeting is mailed or on which the resolution of the directors declaring the dividend is adopted respectively is the record date for such determination.

(4) A determination of members entitled to vote at any meeting made as provided in this section applies to any adjournment of the meeting.

(5) No company shall at any time close its register of members.

Subsection 5, which removes the power to close the register, is a departure from the Model Code provisions, where it is kept as an option. However, when compared in effect to the provisions

of s. 58 of the Alberta Companies Act (which gives the power to close the register for up to 30 days), this B.C. innovation is meaningless because the period of suspended rights is increased even further. Only in the case where a dissident shareholder wishes to ascertain and circularize the membership of a company would such a provision be beneficial.

Subsection 3, which provides that the record date shall be the day of the mailing of notice of the meeting when no other record date has been fixed by directors' resolution, still contemplates a relatively long period in which the voting rights of shares not previously registered are suspended. This subsection must be read in the context of section 136, which requires 21 days' written notice of meetings.

(2) (D) The Canada Business Corporations Act

The record date provisions of the new Canada Business Corporations Act, s. 128, are more particularly and precisely drafted than those of the other jurisdictions that we have considered. Although the wording of the U.S. Model Act is evident, the draftsman of the federal Act has avoided some of the pitfalls noted previously. Thus, while adopting the wording and time periods specified in the Model Act, s. 128(2) separates the entitlement to receive notice from other record date functions:

> **Notice of meeting** (2) For the purpose of determining shareholders entitled to receive notice of a meeting of shareholders, the directors may fix in advance a date as the record date for such determination of shareholders, but such record date shall not precede by more than fifty days or by less than twenty-one days the date on which the meeting is to be held.

Under the old Dominion Companies Act, the equivalent record date section had determined the entitlement of shareholders to vote.[57]

Where the directors have determined a record date in accordance with subsection 128(2), subsection 4 provides further particularity in requiring that 14 days' notice thereof must be given in one of two ways. The U.S. Model Act had merely provided that notice thereof must be given "in advance".

When record date fixed

(4) If a record date is fixed, notice thereof shall, not less than fourteen days before the date so fixed, be given

(a) by advertisement in a newspaper published or distributed in the place where the corporation has its registered office and in each place in Canada where it has a transfer agent or where a transfer of its shares may be recorded; and

(b) by written notice to each stock exchange in Canada on which the shares of the corporation are listed for trading.

Subsection 3 provides--as the other enactments do--for the case where the directors do not fix a record date in advance or fail to give notice at all:

No record date fixed

128(3) If no record date is fixed,

(a) the record date for the determination of shareholders entitled to receive notice of a meeting of shareholders shall be

(i) at the close of business on the day immediately preceding the day on which the notice is given, or

(ii) if no notice is given, the day on which the meeting is held;

When the Act was still a bill in the committee stage, draft section 128(3)(b) provided specifically and particularly for the fixing of record dates for the determination of shareholders entitled to vote at a meeting, in the following wording:

> (b) the record date for the determination 2
> of shareholders entitled to vote at a
> meeting of shareholders shall be
>
> (i) at the close of business on the day
> ten days before the meeting, or
>
> (ii) if no notice of the meeting is 2
> given, immediately before the meeting
> is held; and

These words have been deleted in their entirety from the Act. Prima facie there appears to have been a conflict with the provisi of section 129(1), which has not been altered, and which provides that notice of the time and place (but without mention of the purpose) of a shareholder's meeting shall be given not later than 21 days before the meeting. This is in conflict with a provision enacting that in the absence of notice the record date for determining shareholders entitled to vote shall be on the day that the meeting is held. Clearly, the latter provision could take effect only when all shareholders waive their rights to the statutory period of notice in accordance with section 130, and in that event draft sub-paragraph 130(b)(ii) is redundant in any event. Had Parliament left the rest of paragraph 130(b) intact, a separate statutory per: for determining voting rights would have remained, fixed at the close of business on the day ten days before the meeting, a period suggested by the much looser wording in the U.S. Model Code, but still quite a bit longer than the period in the Ontario Act (2 days). Parliament, however, saw fit to remove all mention of a separate "record date" for determining the right to vote, and retained only the catch-all paragraph of section 128:

> (b) the record date for the determination of shareholders for any purpose other than that specified in paragraph (a) shall be at the close of business on the day on which the directors pass the resolution relating thereto.

The net effect of this change between bill and statute is that the record date for determining the right to vote is removed further in time from the meeting than the right to receive notice of the meeting itself. This opens the question whether section 129(2), originally intended to be curative, is not rendered meaningless.

> 129(2)--A notice of meeting is not required to be sent to shareholders who were not registered on the records of the corporation or its transfer agent on the record date under subsection 128(2) or (3), but failure to receive a notice does not deprive a shareholder of the right to vote at the meeting.

In summary, it would seem that the draft version of s. 128, though fraught with some difficulties of interpretation, provided better protection and was closer to the intent of the draftsman than the result achieved by the enacted statute.

It is worth noting that the submission of the law firm of Tory, Tory, DesLauriers and Birmington, Toronto, of October 1972, on the then proposed new C.B.CA. sought a modification of section 128(3)(b) to permit a corporation to provide in its by-laws that if no record date for the determination of shareholders entitled to vote at meetings is fixed, the record date for voting shall be at the time of the taking of the vote.

While this may involve some disruption of the smooth running of the meeting while the entitlement to vote is determined from the register, and thus not a very practical proposal from the point of view of corporations with many shareholders, there seems to be no good reason why this should not be an option available to any company, particularly closely-held companies.

(d) The right to have shares registered

The need for either the power to suspend registration or to proclaim a record date so that the right to receive notice of meetings is crystallized in a fixed and certain group of persons is illustrated by the result in In re Panton and the Cramp Steel Co. Ltd.[59] In that case Osler J.A. granted mandamus to compel a company to register the shares of a transferee of fully-paid shares on the ground that the transfe was entitled, as of right, to have the shares transfered upon presentation of a transfer of shares. The company had failed to pass a by-law regulating the transfer of shares as provided under the Ontario Companies Act then in force (R.S.O. 1897, c. 191, s. 47(a)). Still, the directors had resolved to close the register for a brief period until a shareholder's meeting could be held. Osler J.A. held:

> The transfer being in order and the stock paid in full, the directors in the absence of a by-law under sub-sec. 47(a) regulating the transfer had no discretion to exercise in the matter or option but to comply with the demands of thetransferee to record it. It may be convenient that for a brief period before the annual or a special meeting of the shareholders transfers should not be recorded, so as to avoid confusion, or rather perhaps, some inconvenience in ascertaining who are shareholders entitled to be present or represented at the meeting, but the power to impose this restriction on selle and purchasers of shares has not, that I can see, in the absence of a by-law been conferred upon the directors, nor do I find any authority . . . . . which will indicate that, in the absence of statutory authority, the company have any discretion in this respect.

A somewhat more complicated set of facts arose a ye later in Re Benson and Imperial Starch Co.[60] in which mandamus was also issued to compel a transfer of shares In this case,the second registered owner of shares, Junkin, want to transfer one share each to Benson and Strachan. Benson was t managing director of another starch company. The transfer was refused by the transfer agent on the instructions of the preside of Imperial. A second request was again refused. Two days late the board of Imperial passed a by-law giving the directors discr to approve or reject any transfer of shares. This by-law was una ratified at a shareholder meeting representing 1700 of 2000 issu

shares. MacMahon J. granted the order, and referred specifically to the previous decision by Osler J.A. He continued, however, in what is probably an obiter to the actual decision, that the statutory power to regulate the transfer of shares cannot be extended to deprive a shareholder of his rights by permitting the directors the exercise of caprice:[61]

> The statute gives the company power to pass by-laws "regulating the transfer of stock"; that is; how and in what manner and with what formalities it is to be transferred. But the Imperial Starch Company have passed a by virtually empowering the directors to prohibit the transf of stock; that is, unless the directors approve of the transfer, it cannot be made in the books of the company. This, in effect would prevent a holder of fully paid shares in the company from selling and realizing on his stock, because no purchaser could be found, if registration as owner could be prevented at the caprice of the directorate.

Obiter or not, these words were quoted with approval by Sir Walter Phillimore in the decision of the Privy Council in Canada National Fire Insurance Co. v. Hutchings[62]. Once again a transferee of shares sought relief from a refusal to register the transfer of shares by bringing an action for an order in the nature of mandamus. The appellants were two companies constituted by special Act incorporating Part II of the Dominion Companies Act, 1906, c. 79. Section 132 thereof provided--as in Re Benson and Imperi Starch Co.--for the passing of bylaws "regulating . . . the trans of stock." The boards of both companies had passed articles purporting to give the directors an unrestricte power of approval or refusal of any registration of stock. His Lordship remarked:[63]

> In the argument for the appellant stress was laid upon the line of English decisions upon cases of this nature arising under the Joint-Stock Companies Act.
>
> There is, however, for the present purpose no analogy between companies in the United Kingdom which are formed by contract, whether it be by deed of settlement or under memorandum and articles of association to which the registrar of joint stock companies necessarily assents if

> the documents are regular in form, and Canadian companies which are formed under the Canadian Companies Act, either by letters patent or by special act.
>
> . . .
>
> The Canadian companies, at any rate those created unc Part II of the general Act by special Act, are pure creatures of statute, and their powers and duties are to be found in the two acts.

On this basis the Judicial Committee adopted the words of MacMahon J. in Re Benson and Imperial Starch Co. quoted above. It was further held that a directorial veto power, besides being ultra vires the powers conferred by the Act, "would interfere with that transferability of stock which is an ordinary incident to personal property, and which is provided for in the general Act." [64]

(e) Where registered shares may be disentitled

Although the law affecting the nature of shares share certificate has now been altered by the provisions of the C.B.C.A. which treat share certificates essentially as bills of exchange (ss. 47, 56, 71), and thus treats the bona fide holder for value effectively as the true owner, under the older company statutes the bare fact of registration on th transfer book is not indicative of the true title to the shares. It is, of course, trite law that the company need not look behin the register, indeed, ought not to look, and is not affected by any notice of trust. However, there are instances in which the shares on the register are tainted and all rights normally pertaining thereto may be suspended by order of the court Gower states:[65] (My comments in square brackets)

> The register is prima facie evidence of the matte entered in it [see Alta Cos Act, s. 53(3)], and hence of the fact of membership and the extent of shareholding But it is not conclusive. If therefore there is no true agreement [see Alta. s. 53(1)(a)--registration of a person who AGREES to become a member], and this can b proved, the so-called member will not in fact be a shareholder.

Thus there is no valid registration unless the fact of regis tion is accompanied by the fact of agreement between the member the company--that is, the other shareholders. Thusthe most common case in which a court will suspen the rights of register shares occurs where the allottment and issue of these shares by board is attacked by other shareholders, While generally the allotment of shares is a matter of management left in the hands of the directors [see Table A, 3], it is clear that the company cannot "agree" before the fact to an allottment tainted by irregularity or illegality, although in the former case, the company might ratify it in general meeting. If these shares have already been issued, should they nonetheless have voting rights at a meeting which must determine their status? This issue arose in the Alberta case of Caulfield v. Sunland Biscuit Co.,Ltd.,[66] on an application to set aside an interim injunction restraining the company from holding a meeting to ratify increases in capital. The

plaintiff had alleged that shares had been illegally issued, and that the defendants should not be permitted to vote them. The defendants submitted that it was a matter of internal managemen

> Counsel for the defendants contended that if the shares were held to be illegally issued the ratification would be of no effect, but I [Mr. Justice O'Connor] thou it better to keep the matter in statu quo until th trial when the court may settle what shares were legally issued and may be properly voted. The court may then call a meeting of the shareholders to ascertain their wishes.

In support of his ruling O'Connor J. quoted Lord Davey's reasons in Burland v. Earle [1902] AC 83, L.J.P.C. 1 at p. 5, adding emphasis to the last principal clause:

> "...no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company, and the intention of the majority of the shareholders is clear."

By shareholders I assume Lord Davey means those to whom s have been legally allotted. I do not see how a meeting befor the trial in the action could indicate a clear intention.

Then, applying the rule in Foss v. Harbottle (as paraphrased in MacDougall v. Gardiner (1875) 1 Ch.D. 13)), O'Connor J. found a second ground to sustain the injunction:

> If, for example, the defendants Bartschi and Tupper made a present to themselves of 5000 shares on March 31, 1941, and now propose to vote the shares to ratify the transactio this would be to allow the majority to oppress the minority
>
> I am not overlooking the well-settled principle that the Court will not interfere in the internal management of a company. I am merely deciding that until the Court settles the voters' list all meetings of shareholders should be adjourned.

(f) Who may call the meeting

(1) Generally

General meetings of the company may be of two kinds, "annua and "extraordinary". As a rule, the annual meeting is the "ordinary"meeting of the company at which the business of the company that needs to be transacted on a yearly basis is dealt with.[67] Usually the agenda for the meeting is largely determined by the Companies Act and the articles of association.

Under the Alberta Companies Act the fixed statutory requirements of business to be transacted at a general meeting of the company are minimal. Section 116(2) provides that the "company at each annual meeting shall appoint one or more audi and the auditor or auditors so appointed are under a duty, by virtue of section 118, to report to the shareholders at any annual meeting during his or their terms of office. The principal statutory onus rests on the directors under section 120 to lay before the annual meeting the financial statements of the company.

All other fixed requirements of business to be transacted at a general meeting must be taken from the articles. The most important provisions of the articles that require action by the shareholders relate to the election and remuneration of directo Thus we find the following relevant provisions in the articles of Table A:

> 52. Provides that the number of directors is to be determined by the general meeting;
>
> 65. Provides that the company may increase or decrease the number of directors by ordinary resolution, whether or not previous notice has been given.
>
> 53. Provides that the remuneration of the directors is to be determined by ordinary resolution, whether or not previous notice is given.
>
> 62. Provides that all the directors shall retire from office at each general meeting, and that directors shall be elected to fill the vacancies.

77. Provides that the company may by ordinary resolution, whether or not notice has been given, declare dividends not in excess of th amounts recommended by the directors.

89. Provides that the directors shall lay the financial accounts before the company.

These specific provisions must be read together with the following two more general articles, which I reproduce verbati

> **34. All business shall be deemed special that is transacted at an extraordinary meeting and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets, and the ordinary report of the directors and auditors, the election of directors and other officers, and the fixing of the remuneration of the auditors.**

In effect Article delimits the specific matters to be dealt with set out in the articles above as the only ordinary business of the company at an ordinary meeting, and all other business at an ordinary meeting as well as all the business transacted at an extraordinary meeting, is special business. This is of some importance with respect to the contents of the notices. In some American jurisdictions no notice at all need be given of the ordinary business to be transacted at the ordi meeting. As we have seen above, articles 53, 65 and 77 purpo to eliminate the need for specific notice of the business to be transacted thereunder.

While article 34 delimits the matters to be dealt with by the general meeting, article 55 of Table A in effect makes this delimitation an exhaustive provision for the business to transacted by the company in general meeting unless the article are amended or the statute otherwise provides. In effect, the shareholder's meeting is reduced to a mere supervisory functio

> **55. The business of the Company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the Company, and may exercise all such powers of the Company as are not, by *The Companies Act*, or any statutory modification thereof for the time**

> being in force, or by these articles, required to be exercised by the Company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by ordinary resolution, whether previous notice thereof has been given or not; but no regulations made by ordinary resolution shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Clearly, then, the requirements imposed by statute and the limitations contained in the articles are the two parameters governing the nature of the business to be transacted at a meeting. Where the board of directors is charged with carrying on the business of the company in the terms of article 55 it is questionable whether a company meeting can validly consider any matter relating to the conduct of the company's business which is not specifically entrusted to it by statute or by existing articles, unless the company first amends the articles. For most small companies this is not a practical problem, since the quick solution is to replace the board of directors. However, in a large company this kind of narrow circumscription of what may be done at shareholders' meetings might effectively block any meaningful input from minority shareholders. The very possibility of considering shareholder proposals at a meeting is placed in doubt. Any new companies legislation should consider providing some statutory protection for shareholder proposals, or at the very least, for shareholders to question aspects of the conduct of a company's business.

Special or extraordinary meetings of the company provide no open forum for all questions that shareholders might want answered since the business that may be transacted at such meetings is limited to that of which notice has been given. However, since such a meeting may be demanded by the shareholders having a requisite number of voting shares (10% of all voting shares in Alberta: s. 134 (1)), the subject of discussion is left to the requisitionists. Such a meeting

will most frequently be called to oust incumbent directors. However, whether such a meeting may be called to give directio to an incumbent board, notwithstanding the board's power to conduct the business, is questionable. Although s. 134(1) rea "Notwistanding anything in the articles," this phrase must be read as qualifying only articles governing the convening of meetings, not those which relate to the division of powers between shareholders and management.

(2) Division of shareholder and management powers:

In Carle v. Ranger and others[68] Mr. Justice Hyde reaffirmed the overriding authority of the directors to manage the affairs of the company, even though it involved the disposition of a substantial asset of the company. Among other claims, the plaintiff, a minority shareholder, sought a declaration that a resolution adopted at a meeting of the compahy which authorized the surrender of 450,000 shares in another company to that company, without consideration, was illegal. He objected that the proposal was special business not related to the ordinary business of the annual general meeting and that notice of this busine was not given. The notice calling the meeting stated only that the annual meeting would be held at a certain time and place.

The court held that this was indeed special business requiring notice if the shareholder's meeting were competent to deal with it, and it further held, obiter, that the full disclosure of the business in a circular letter soliciting proxies that was sent out at the same time as the notice of t meeting was sufficient, since the sharenolders attending woul no longer be taken by surprise. Hyde J. however, having aired these views, decided the matter simply on the grounds that:[69]

> It is a fundamental principle of company law that the management of the affairs of an incorporated company is entrusted to the directors.

Although his Lordship recognized that on certain matters sharenolder action was required to render effective a resolution of the board, as a question of fact he decided that the contract in question was not within that category and thus the opinion of the meeting had no executory effect. The shareholder plaintiff thus had no right to an injunction. Hyde J. concluded:[70]

> Thus the question as to whether the proposed transaction with Preissac itself is illegal is not in issue but only the legality of the shareholders resolution.

In fact, the decision of Mr. Justice Hyde supports the conclusion of K. A. Aikin[71] in his discussion of the division of power between the directors and the general meeting. Discussing the effect of the predecessor of our present Art. 55 of Table A (substantially the same provision), as a result of the decisions of the Court of Appeal in Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame[72] and Gramophone and Typewriter Ltd. v. Stanley[73] Aikin says:[7]

> These two decisions of the Court of Appeal, approved by the House of Lords, may properly be regarded as settling the matter and this has been the course of English authority since 1909. . . . It is true that there are verbal difficulties about this view . . . .
>
> However, it is impossible to regard a resolution of a general meeting which takes away from the directors their powersof management, either in general or in some particular matter, or interferes with the manner in which those powers are to be exercised, as being other than inconsistent with the opening words of the Article and thereby outside the scope of a general meeting except by an alteration of the Article itself.

On the other hand, in discussing the controlling shareholders' duties, Prof. Gower maintains that there is an import residual power in the general meeting to assume control over the business of the company, a power not as nicely clothed with corresponding duties as is that of the directors. Bearing in mind that the right to vote is a proprietary right, that the selfish interests of the shareholder may be opposed to the interests of the company, that the shareholder may contractually bind his vote, Gower says:[75]

> In all these respects the position of the shareholder is in striking contrast with that of the director. If it were the case that the general meetin could only operate in the few residual matters reserve to it by the company's constitution, this would not be unduly serious. But, as we have seen [Ch.7, pp. 13 the general meeting is regarded as having power to act in place of the board if, for any reason, the boar

> cannot function. If, therefore, a proper quorum cannc be obtained at a directors' meeting or there is a deadlock on the board, the general meeting may act instead. Furthermore, a transaction will not be rega as a breach of the directors' fiduciary duties if ful disclosure is made to the company in general meeting and the company's consent obtained by a resolution passed at that meeting. Hence, although the transac concerned may relate to ordinary management, and ther be within the powers of the board, the ratification c it will always be a matter appropriate for the gener meeting, which can waive what would otherwise be a breach of duty. As a result, the activities of gener meetings may indirectly extend over the whole sphere the company's operations, and ultimate control revert to the shareholders who are free from duties of good faith to which the directors are subject.

In the more recently enacted Canada Business Corporatio Act is affected only insofar as overriding precedence in manag ment is given to unanimous shareholder agreements (s. 97(1)); otherwise the directors remain under a duty to manage the business and affairs of the corporation. By s. 98(1) this duty is qualified as being subject to the articles or by-laws of the corporation, which are both subject to being confirmed by the shareholders. Where there is no unanimous shareholder agreement, but a person or faction is in effective control of the company, acts of the board or a member thereof, which might otherwise be invalid, are still capable of ratification by the meeting, provided that they are not illegal acts and not subject to attack under the investigation provisions (s. 222) or the oppression provisions (ss. 234 and 235).

Where a unanimous shareholder agreement exists the need for shareholder meetings and meetings of the board of directors should not be brought into question. Such agreements may only cover part of the scope of activity by both of these bodies. Even where they are so broadly drafted as to catch all the business affairs of the company, they should not preclude the

shareholder from having his right to information restricted by the absence of a meeting at which he may question the management even though management is purportedly acting accordi to a unanimous shareholder agreement. This appears to be, however, a question of balancing the commercial convenience of such agreements with the desire for maintaining a modicum of shareholder democracy. By s. 136(1)(b), permitting a resolution in writing, Parliament appears to have opted for commercial convenience. The paragraph reads:

> a resolution in writing dealing with all matters required by this Act to be dealt with at a meeting of shareholders, and signed by the shareholders entitled to vote at that meeting, satisfies all the requirements of this Act relating to the meetings of shareholders.

Unfortunately, this paragraph eliminates entirely the rights of participation in the affairs that a non-voting shareholder might otherwise have.

The question of the proper division of powers between management and the shareholders must also be considered with respect to the power of the directors to frustrate, by directoral action, the potential exercise of control by the shareholder majority.

The law in this respect is unsettled. The British view, expressed in Hogg v. Cramphorn[76] is that the issue of shares by the directors in order to prevent a take-over, is an "improper purpose" and thus impeachable, even though done honestly and in the belief that it was in the bests interests of the company. In Canada a different view has emerged. Berger J., in Teck Corp. Ltd. v. Afton Mines (N.P.L.),[77] declined to follow Hogg v. Cramphorn, and considered the option agreement for shares, which would nullify Teck's take-over, merely on the basis of whether it was a bona fide exercise of directoral discretion within the subjective test laid down in Re Smith and Fawcett Ltd.[78] In this view the only improper purpose is one which is not designed to serve the bes interests of the company in the honest opinion of the director

In his case comment on Teck[79] Barry Slutsky expresses the opinion that the Hogg v. Cramphorn rule proceeds from a false premise--namely that the directoral powers are given with particular restricted purposes in mind, when in reality they are not, thus making the process of judicial interpretation of the statute or articles essentially a fiction, one which the framers of articles can avoid simply by providing that all powers delegated to the board are exercisable for any purpose. However, Slutsky agrees that practically the rule, in the absence of any preemptive rights, can be used by the courts to prevent an abuse of the subjective "good faith" requirement in Re Smith and Fawcett Ltd. to prevent the directors from meddling with voting rights in general meeting

The essential question, using Slutsky's framing of Berger's J. words, appears to be whether, in the light of modern day commercial realities " the directors ought to be allowed to consider who is seeking control and why".[81]

fundamental policy issue, and a decision based on either "good faith" or "conflict of duty and interest" does not come to grips with it. Even if the "improper purposes" ratio of Re Smith and Fawcett Ltd. is an unsatisfactory one, the result in that case, I would submit, is correct; where a body corpor stakes its future on the open securities market, the trustees should not then be heard to say to the buyer in good faith, "We disapprove of your method and skills." If the Teck decision is to stand one can anticipate the directors of X Co. selling their shares at a premium above market price to Y, who is attempting to gain control, and then defeating this attempt by entering into a share option agreement with compan A. The directors of X could wind up having their cake and eating it too.

If we can concur with the Interim Report of the Lawrer Select Committee on Company Law [82] in Ontario that "probably the most important individual right accruing to the shareholde of an Ontario company is his right to elect the board of directors" [83] then surely the Teck decision amounts to an infringement of that right.

(3) Calling and notice

The calling of the meeting, strictly speaking, may be distinguished from the notice of the meeting which spells out a certain minimum of information about the meeting called. However, for most purposes the two acts of calling and giving notice occur simultaneously and may be treated as identical. Usually the notice is the only evidence of the calling.[84]

There are circumstances under which a meeting may be convened without a specific calling or notice, if there is a statutory provision enabling a company to hold an annual general meeting or class meeting at a fixed or certain date, at a fixed time, in a fixed place. This amounts to a standing call and notice in the governing documents of the company. Although perhaps more commonly used in the American states, the present Alberta Companies Act is sufficiently permissive to enable a company to make use of such standing call and notice. Subsection 133(4) specifically provides for this. However, as with any other annual general meeting of the company, if special business is to be transacted, proper notice thereof must be sent nonetheless. But since this is a provision which will benefit primarily small, closely held companies, a waiver of the notice requirement by all registered shareholders will probably not be difficult to obtain in practice in most cases. This may, however, lead to sloppy corporate procedures which could become the focal point of litigation later. Certainly care must be taken to assure that all proxies are currently valid and without any limiting instructions.

(4) Authority to convene a meeting

A meeting, to be duly constituted, must be summoned by the proper authority [85] but an irregularly summoned meeting may be ratified by the body having the authority to summon the meeting. In Hooper v. Kerr, Stuart and Co. Ltd.[86] the company secretary acting on a shareholder requisition of a meeting, sent out the notice for the meeting before the meeting of directors was held. The director's meeting, held on the next day, nonetheless ratified the secretary's action. In a brief oral judgement Cozens-Hardy J. refused the motion for an injunction restraining the holding of the meeting on the single ground "that the ratification of an act purporting to be done by an agent on your behalf dates back to the performance of the act. I must treat this as an exercise by the board of directors of duties under article 55."[87]

There is little doubt that this is a correct application of agency principles, but the case begs the very question whether agency principles ought to apply at all. If so, this must be treated as a case of sub-delegation, for the board themselves as the primary agents of the company. Is this a matter that they should properly be able to delegate where this is not stated expressly in the articles of the company? Consider the possible case of the plaintiff: as a director and shareholder of the company he might have been quite aware that the notice was originally unauthorized and that no valid meeting could be held thereon. In reliance upon this he does not attend at the meeting. If this the notice is void for all purposes he has acted correctly without injuring his own interests. Yet the decision in the Hooper case leaves open the possibility that his right to be heard and to speak can be impeded by a director's decision taken at the last moment before the opening of the shareholder meeting to ratify and validate the action of the company secretary. And such an act need not necessarily have been done in breach of the uberrimae fidei principle: the director might quite justifiably be concerned for shareholders who are attending the meeting or have incurred expenses on account of this meeting in ignorance of the irregularity of the call. In circumstances such as these it would appear desirable to

provide some statutory provision whereby meetings, if not all meetings then at least those properly requisitioned by shareholders, may be validly called by a designated officer of the company. Although the calling of meetings is generall a matter dealt with by each company in its articles according to its own particular requirements, in the case where the right to have a meeting called by requisition is given by statute, the statutory right should be fortified with statutory authorization to enable a designated officer to call the meeting without the express authority of the board.

There is no direct Canadian authority on the point raised in the Hooper case. American authorities on this point recognize that, unless the statute is restrictive on this matter, the company by-laws may authorize an officer, as well as the board of directors, to call a meeting of shareholders for any purpose.[88]

(5) Sufficiency of Notice

"Sufficiency" of notice has several connotations: it may relate to a sufficient period of time to allow the person receiving notice to give proper consideration to the matter; it may mean that the recipient is to be given sufficient knowledge of what is to be transacted to formulate an informed opinion on the matter; or it may mean that the notice is to be sufficient in a formal sense, in complying with the statutory requirements in respect to the minimum of information to be contained and the manner of giving it.

Under the older companies acts the question of sufficiency was a matter left largely to be determined by the articles or by-laws of each company. This is still the case in the present Alberta Companies Act, which requires in s. 135(1)(a) that notice be in writing, unless the articles provide otherwise. Articles 33 and 92 of Table A set out further particulars of content and manner of delivery, but, of course, neither s. 135(nor Table A need bind a company. The articles of a company might in fact provide that oral notice by telephone will be sufficient, provided of course that such notice communicates all the necessary particulars about the time, place and purpose of the meeting. Clearly, however, oral notice is practical only in the content of closely held corporations where the telephone can be a more effective means of communication. Generally in such situations the question of notice is subsumed by the waiver provisions, until a dispute arises: at that point an article providing for oral notice might place a difficult burden of proving sufficiency on the company, both in respect to proving that all essential matters of content were communicated in sufficient time and in proving that the communication was made directly to the person entitled to receive it. For this reason alone a statutory requirement of written notice is to be preferred, coupled with a requirement of individual notice to each shareholder. We are hopefully past the point of summoning meetings of shareholders by affixing notice on the parish church door as in Milot v. Perreault.[89] The newer Canadian companies legislation has in

fact cured this defect. The Canada Business Corporations Act[9] provides by s. 129 (1) that "notice shall be sent", a word used in the context of written communication normally, although there may be room for the argument that a message may be "sent" by word of mouth. The British Columbia Companies Act[91] clears this ambiguity by providing that the company " shall give . . . not less than twenty-one days' written notice of an general meeting."

Judicial attitudes as to what is sufficient notice in respect of the formalities of notice and the manner of giving it appear to be more liberal and less stringent than they are in respect to those matters touching on essential facts concerning the purpose of the meeting. Generally, in the absence of any formal requirements either by statute or article requiring requiring more, the form of notice is sufficient if it informs shareholders that a meeting has been called, giving the place and the time by day and hour of holding the meeting. In Milot v. Perreault,[92] as we have seen, this requirement could be satisfied by affixing notice on a church door. In other circumstances an accepted customary practice within a corporation may suffice. This was found to be so in O'Rourke Grand Opera House Co.,[93] which, although it involves a directors' meeting rather than a shareholders', may in principle be applicable to shareholders' meetings. O'Rourke, the former president of the defendant, was bringing an action on a promissory note executed in his favour by the defendant's board for money that he had expended for the benefit of the company. The company defended the action on the ground that the board of directors had not been formally assembled since no written notice, as required by the Montana statute under which the company was organised, was given. As was usual with this company, the board had assembled at the customary place on verbal notice. Brantly C. J. held the meeting valid nonetheless, because "This was the custom which had always been observed . . ."[94] and further:[95]

> While ordinarily the requirements of the statute cannot be dispensed with, formal notice is not necessary when all the directors attend and participate without object in the dispatch of the business in hand. "The only object of the notice is that the directors have an opportunity of being present at the meeting and taking part in its proceedings" quoted from Minneapolis Time Co. v. Nimocks 55 N.W. 546.

While at first impression this ratio incorporates no more than a unanimous waiver of formal notice, by accepting "custom", it leaves open the possibility that a form of notice other than that required by statute, so long as it accomplishes the same end, is valid. Taking the quotation from the Minneapo Times case into consideration, should a director or a shareholc who is given an oral notice complete in all essentials but who decides not to attend, be permitted to question the validity of the notice if he disagrees with the results of the meeting?

But this rather liberal reasoning too must, as a matter of practicality, be restricted to those situations in which a "customary procedure" can become truly established. This is possible only where the numbers are small, as with directoral boards or closely held corporations.

Failure of a notice to particularise the formal items usually required to complete the notice does not necessarily render the notice invalid if it nonetheless fulfills its principal purpose of sufficiently informing the shareholder. In the case of Walton Equitable Bank v. Cleek[96] the respondent was a shareholder in one of the banks that failed in 1933. The Kentucky State Banking Commission required the shareholders of the bank to cover the impairment of the capital before the bank might resume business. Upon a resolution by the board of directors the shareholder's meeting passed a resolution calling for a 100% assessment on the value of the shares. The respondent defended the assessment against her shares partly on the ground that the notice of the shareholder meeting had failed to specify the place of the meeting. The court held:[97]

> Technically, perhaps, the notice should have stated the place of the meeting, but in the circumstances of this case we do not think its failure to do so rendered the meeting of the board of directors sic void. The notice specified the time and purpose of the meeting "of the stockholders of the Walton Equitable Bank," and concludes with this language: "Please be present in person or fill out and return the enclosed proxy." Appellee being a stockholder of the bank, no doubt she understood that the meeting would be held at the bank, since the notice mentioned the bank and requested her to be present. Evidently, if the meeting was intended to be held at a place other than the bank, the notice would have so specifie and since no other place was specified it would be most unreasonable to presume that the appellee was prevented from attending the meeting, had she desired to do so, because the notice did not specifically stat the place of the meeting.

While a technical and accidental omission, which merely communicates a fact already impliedly within the knowledge of the person to be notified, should not be grounds for invalidati a meeting, I would submit that this ratio cannot be extended to excuse the absence of essential details concerning the purpose of the meeting, unless the meeting is to be confined to the ordinary business required to be transacted at an annual general meeting. Although Bell v. Standard Quicksilver Co.[98]

is held out as authority for the proposition that "Unless particular formal requirements are prescribed by statute or bylaws any form of notice which informs stockholders that a meeting has been called and of its time and place is sufficient provided the hour as well as the day is specified," [99] that proposition must be limited, as I have stated above, to ordinary business transactionable at the annual general meeting. The Bell case did not concern a shareholder's meeting, but a director's meeting. While the California statute did not appear to distinguish notice requirements for directors' or stockholders' meetings, and in the opinion of the court required no more than the notification of time and place of the meeting, --"The notice did not state the object or the purpose of the meeting. Neither the by-laws nor the Code required that it should."[100]--I would submit that it is in the very nature of a directors' meeting to have to deal with business of which it is not always possible to give notice because of the urgency of management action. The same consideration should not apply in respect to shareholder meetings, and indeed the whole trend of Canadian decisions on the sufficiency of notice relating to shareholder meetings requires a high degree of particularisation of the purpose of the meeting. Although the content requirements of notice in the present Alberta Companies Act are more clearly spelled out than those of the California Code in the Bell case (although only in Art. 33 of Table A), as early as 1886 did a Canadian court hold the contents of a notice insufficient for failing to state that the object of the meeting was to remove e isting directors and not merely replace them.[101]

Both the O'Rourke and the Walton Equitable Bank cases are cases where there has been notice in fact to the persons entitled to receive notice. The cases deal precisely with the question whether the notice, in respect to formalities, was "sufficient". What is the case where a shareholder receives no notice at all? In part we have dealt with this question under the question of closing the register and record dates.

The right to notice of meetings is part of the bundle of proprietary rights that attaches to membership in a company. While a shareholder may contract out of this right, or may waive it, it cannot be taken from him by a unilateral act of the company. Simply put, if the required notice has not been given, the corporate will cannot be expressed at a meeting at which all the shareholders who might wish to be present are not present or represented.[102] Since shareholding is essentially contractual in nature, it has been open to companies to protect themselves against the possibility of avoiding an otherwise duly called meeting through mere clerical error by having an article providing that

> The accidental omission to give any notice of any meeting of the shareholders shall not invalidate any resolution passed at such meetings.

This provision, verbatim, was in fact one of the by-laws of the Lewis Furniture Company, a judgement debtor of the plaintiff in Canada Furniture Co. v. Banning.[103] The defendant had been a director of that company and was seeking to protect himself against personal liability by relying on the provision set out above. In 1906 Banning had taken up 30 shares in Lewis Furniture Co., giving in payment a promissory note for $ 3000, of which $ 1600 was still owing in 1911. He was a director of the company from 1907 to 1915. In 1911 the directors passed a by-law for the payment to each of them for services to the company of an amount equal to the sum unpaid upon his shares. The by-law, to enter into effect, would have to be passed by special general meeting of the shareholders. Mathers C. J. K. B. found, and held:[104]

> No notice whatever of an intention to hold a shareholders' meeting was given either by advertisement or by post, but those present at the directors' meeting resolved themselves into a shareholders' meeting, having first signed a very ample waiver of notice of the time, place and purpose of the meeting. The by-law passed at the directors' meeting, if it can be so designated, was then read and unanimously approved.
>
> I find that W. J. Donovan was at that time a shareholder, and that he was not present at the meeting, nor had he any notice that such a meeting was to be held, and he did not waive his right to notice as required by the by-laws.
>
> The omission to give Donovan notice of the meeting was not, I find, accidental. The question of whether or not notice should be given him was discussed at the directors' meeting, and it was deliberately decided that notice should not be given to him on some suggestion that he was not a shareholder. A failure to give notice under such circumstances can not be described as an "accidental omission," and is not cured by this by-law.

Donovan only held one share, and that probably as trustee for one of the directors (hence the suggestion that he was not a shareholder). But since the Companies Act does not take notice of a trust, this is irrelevant to the question of notice, and no valid shareholder meeting was held. What, however, would have been the result if the board of directors had followed proper procedure in in giving full notice to Donovan of the meeting and the by-law to be approved? Prof. Gower clearly suggests that the board, on due disclosure might have achieved their aim, since as shareholders they are not bound to vote against their own interests.[105] This would be consonant with the theory of self-interested voting by shareholders that has been with us for at least as long as the case of North-West Transportation Co. Ltd. v. Beatty.[106] The Judicial Committee of the Privy Council held in that case that

> . . . great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, if they also stood in some fiduciary relation to the company.

However, Earl Sneed[107] has properly pointed out that the ratio of the North-West Transportation case should be limited by the court's finding that the price to be paid for Beatty's steamship was fair, that the company was in need of the ship, and that such a ship could not be procured elsewhere quickly.

This amounts to a finding that there was no fraud, no illegali and no oppression. In fact, Sneed would limit the formulation of the rule that a stockholder may vote as he pleases provided that either or both of these conditions exist: (1) that the interests of the challenged stockholder and of the corporation coincide to the extent that the transaction is fair, and (2) that the challenged vote is not a decisive factor in the corporate decision.

With the above considerations in mind, let us return tc the result in the Canada Furniture Co. v. Banning case, making some assumptions on the facts. Assuming that the shareholder meeting had been duly called with the proper notice, the critical question would be whether the ratificatio of the by-law represented any fraud, illegality, oppression or unfairness of any kind that could impeach it? Would the payments have represented fair compensation for directoral services rendered? On the latter question, it should be noted that six years of directoral service had been given. Furthermore, if Donovan was indeed trustee for one of the directors or for all of them, how is he prejudiced? Clearly, the actions of the board are explainable in an innocent light. Although we do not have all the facts, it appears clear that the actions of the board became coloured by an unfavourable aura of illegality because of the deliberate failure to give notice. Had there been a truly "accidental" omission the board might well have validly resolved itself into a shareholders' meeting: the validity of the by-law, of course, would still depend on whether it was illegal not only vis-à-vis the other shareholder or, for that matter, the creditors (quaere whether s. 89 of the present Alberta Compan Act, speaking only of "dividends"--even taking the extended meaning of s. 2(1) 15. including "bonus or any distribution to shareholders as such" my emphasis--would catch a payment for services rendered).

Another incident of the formality of notice is that it must be issued by someone having authority to do so. Otherwise the recipient may well be inclined not to go through the expense of attendence or representation at a meeting if he cannot be sure that the meeting has any validity at all. Although this question is also dealt with under a separate heading, we may deal with it here within the context of a recent British Columbia case. In Dalex Mines Ltd. (N.P.L.) v. Schmidt et al.[108] the requisitionists sent out the notice of the meeting on the failure of the directors to do so. This was done pursuant to the s.170 of the Companies Act then in force in British Columbia, which is substantially the same as s. 134(3) of the present Alberta Companies Act. The notice, however, was signed by only one of the four requisitionists, nor did the notice state that the meeting was being called pursuant to section 170, or on behalf of more than one-half of the total voting rights of the requisitionists. The president of the company attended the meeting, ruled that it was not properly called, and left, whereupon the insurgents carried on. Mr. Justice Rae, dealing first with the submission that the notice did not state the statuto authority, held:[109]

> Usually in corporate practice a general meeting is convened by the directors (the articles here so provide) and the notice of the meeting is issued by the secretary. It is usual for the secretary to indicate that the notice is issued under authority from the directors by including in the notice a statement to the effect that he acts "by order of the board". If, however, a notice were issued by the secretary, having authority of the directors to do so, but without so stating in the notice, I know of no authority which says that the meeting would not be properly convened by reason of that fact alone. So to hold, it seems to me, would be to treat form as if it were substance.
>
> Likewise, if requisitionists are properly acting pursuant to s. 170 in convening a meeting, although desirable practice indicates that one should set out the authority and the fulfillment of the pre-conditio for doing so, in the notice convening the meeting,

> it seems to me that failure to do that in specific terms would not of itself invalidate the meeting. There were documents accompanying the notice . . . which indicated that the meeting was being convened by certain shareholders as requisitionists for the purpose of replacing the directors. In fact, althoug not specifically stated in the notice, the condition precedent to the requisitionists convening a meeting had been met.

A letter and an "Information Circular" in fact provided the necessary information, and clearly this was decisive in holding the meeting validly called. However, Mr. Justice Rae's language makes it plain that even if there had been no such extra documentation, the fact alone of a proper act pursuant to the statute, without the formality of stating the authority, might have sufficed, or at least "would not of itself invalidate the meeting."

The other ground dealt with the fact that there was only one signature and no statement that he signed on behalf of more than one half of the voting shares of the requisitior This argument was disposed of by a concession by counsel for the company that the notice had to be read together with the accompanying documents, and that these could supply any deficiency in the notice. In fact, the four requisitionists and the ends they sought to accomplish (their own election to the board in place of the incumbents) were clearly named and stated in the documents. His Lordship held:[110]

> In my opinion, as to substance, the only reasona inference to be drawn from a perusal of these documen is that the meeting was in fact being convened by all four requisitionists.
>
> As to form, one looks at the documents as receiv by a shareholder from the standpoint of an ordinary business person: see Alexander v. Simpson (1889), 43 Ch.D. 139 at p. 147; Choppington Collieries, Ltd. v. Johnson et al., 1944 1 All E.R. 762 at p. 763. Such a person would conclude the same, i.e., that not only Currie, who signed the notice, but all four persons named, including Currie, were joining in convening the meeting.

As a rule, then, courts have recognised that failure to comply strictly with the formal requirements of notice will in many circumstances not be so grave as to provide grounds for invalidating a meeting. The statutes, too, permit articles to be drafted that take clerical oversight, etc., into account. While under the older companies acts the questi of notice is largely a matter left to be determined by the articles or by-laws, and more recent acts embody the notice requirement in the statute itself (e.g. s. 129 of the Canada Business Corporations Act, S.C. 1975, c.33), it is reasonable to expect that even under the newer legislation courts will hold substantial compliance with the formalities sufficient, and will permit a company to continue to rely on articles providing that an accidental omission to give notice will not invalidate a meeting. On the other hand, however, a deliberate avoidance of the formal requirements, as the court found in the Canada Furniture Co. case, obviously goes to the very root and substance of notice by keeping the shareholder ignorant of what is to be transacted.

Probably no single problem in the law of company meeting has as frequently come before the courts, although the fundame principles have been clearly enunciated from an early time, as to what constitutes a sufficiently substantial notice, in terms of the business to be transacted, of a meeting. We hav already seen that the Quebec Court of Appeal in 1886 was not prepared to hold that a notice of meeting for the purpose of replacing a board of directors was sufficient, when it did not also state that the meeting would first have to remove them.[111] This is an extraordinarily restrictive view of the notice requirement, but it sets the tone for the high standard that courts have required. Clearly the standard is to some degree dependent on the statutory wording respecting the contents of the notice. We may recall that in the California case of Bell v. Standard Quicksilver Co.[112] the absence of any notice of the business to be transacted was permitted on the basis

that neither the by-laws nor the Code requires that it should While this case appears to be accepted law in the United State: I submit that it would be doubtful law in Canada because the case fails to note the fine, and infrequently needed differentiation, between the calling of the meeting and the notice of i Notice, as we have seen earlier in this section, has a number of connotations which are further reaching than that of a bare call or summons. While shareholders might contract out of the right to attend or to vote at meetings, and thus of the right to receive a "call", I submit that it would be contrary to public policy that a member of a company be completely blin as to what that company is doing. Yet even in the Commonwealth the courts have been reluctant to infringe too far on the freedom of contract. In practice most articles would provide for the right of notice both in form and in substance (as especially in Articles 53 and 92 of our Table A), but limit this in some form to reasonable practicality. So Art. 92 deems service to have been effected on the day following the day of posting. In In re Warden and Hotchkiss, Ltd.[115] the articles provided that posted notice was deemed served when it would normally be delivered in the ordinary course of post. However, no notices at all were sent to shareholders who had their registered addresses in South Africa (the company was in the U.K.). The company asked the court to confirm a special resolution passed at the meeting: Uthwatt J. dismissed the petition, and the company appealed. The Court of Appeal allowed the appeal, feeling bound by the decision of Malins, V.-C. in Union Hill Silver Co., Ltd.[116] holding that it was not necessary to serve notice on shareholders who have chosen to reside outside the United Kingdom. The Vice Chancellor had sa that " a company cannot, without serious injury to itself delay the transaction of important business until every shareholder in every part of the world has had notice of the meeting at which the business is to be discussed. I think that such a construction would be entirely opposed to the spirit and intention of the Act."[117] Morton L. J. held that this "has been a convenient decision, and one which must have been acted upon over and over again."[118] Whereas

Morton L. J. based his decision , in following Mallins V-C., on a construction of the policy of the Act as being for the expedience of business, and thus finding no right to notice outside of the U.K., Cohen J., sitting in the Court of Appe held the narrower view that the right to notice depended not on public policy, but on the contractual rights created between the company and its members, on a true construction of the articles. If Cohen's J. view is correct, what is the effect of removing the notice requirement from the contractu sphere of the articles to the sphere of public policy in the Act itself. This is effectively what the newer legislation in Canada has done (e.g., ss. 129-130 of the Canada Busines Corporations Act, S.C. 1975, c. 33). And further, would the decision in the Union Hill Silver Co. case, as applied by Scott and Morton L. JJ., still govern? This issue is still open, but prima facie there is no authority in the Canada Business Corporations Act to derogate from the statutory requirements of notice except by waiver.

As a result, most of the extant decisions on what constitutes a proper substantive notice will depend in large measure on the words of the governing article. Alberta's article 33 of Table A is typical of similar provisions in the U.K. (their article 50) and Australia:

> **33.** Seven days' notice at the least, exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given, specifying the place, the day, and the hour of meeting, and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by ordinary resolution, whether previous notice thereof has been given or not, to such persons as are, under the regulations of the Company, entitled to receive such notices from the Company; but the non-receipt of the notice by any member shall not invalidate the proceedings of any general meeting.

The critical words of the article for our present purposes --"in the case of special business, the general nature of that business"--have been replaced by a more precise formulat in secton 129(6) of the new Canada Business Corporations Act:

(6) Notice of a meeting of shareholders at which special business is to be transacted shall state

(a) the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon; and

(b) the text of any special resolution to be submitted to the meeting.

The enshrining of these words in the statute itself provides a stronger safeguard to the shareholder than words of like effect in the articles. But there is no discernible consister in the newer companies legislation in this respect. The Ontario Business Corporation Act makes notice a mandatory statutory requirement, but uses the more general language of the older articles: [119]

> 108. The directors may at any time call a general meetin of the shareholders for the transaction of any business the general nature of which is specified in the notice of the meeting. (My emphasis.)

The British Columbia Companies Act makes notice as such man datory, but fails to specify what is required in the way of substantive notice, except in the case of requisitioned meetings, which requires "the purpose of the general meeting" to be stated. This wording reflects the influence of the U.S. Model Code, par. 29, requiring that "in the case of a special meeting, the purpose or purposes for which the meetin is called" be stated. What is required in the various U. S. jurisdictions is outlined in the exerpt below: [120]

> **¶ 3.01 Identical and identical in substance**
>
> Montana; South Dakota and Washington have provisions identical to the Model Act.
>
> Alaska, Iowa, Mississippi, Nebraska, North Dakota, Oregon, Texas, Utah and Wyoming provide that the notice of shareholders' meetings may be written or printed. In Wisconsin if the notice is mailed, it shall be addressed to the shareholder at his address as it appears on the stock record books or similar records of the corporation.

¶ 3.02 Comparable statutory provisions

Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Louisiana, Maryland, Missouri, New Jersey, New York, New Mexico, North Carolina, South Carolina, Tennessee, Virginia and the District of Columbia have comparable provisions.

Several jurisdictions require that notice be given of certain actions which are proposed to be taken at a shareholders' meeting. Connecticut provides that unless stated in the notice of the annual meeting, no action on a by-law or on a matter requiring the vote of shareholders pursuant to statute, except the election of directors, may be proposed at the meeting. New York states that notice must be given if action is proposed that would entitle shareholders to receive payment for their shares pursuant to statute. In Louisiana notice of the annual meeting need not state the purpose thereof, except as otherwise provided by statute if a specified action is to be taken at the meeting. Alabama and Arkansas require, respectively, that notice be given of any special action or fundamental change proposed to be taken at the annual meeting.

Indiana provides that the by-laws or articles of incorporation may require that the purpose of a meeting be stated in the notice thereof. New Jersey requires that the purpose of every shareholder meeting shall be stated in the notice thereof.

Whether the statutory wordings will be interpreted by the courts as requiring different standards of disclosure in the notices, is doubtful. From early on the courts have tended to require a very high degree of disclosure even where the wording of the article required only that the "general nature of the business" be stated. The essential difference between the wording of the requirement of the Canada Business Corporations Act and the Ontario Business Corporations Act would appear to be that the federal statute gives clearer guidelines to businessmen in respect of what the courts will in any event require. We can examine thi in a few relevant Canadian decisions.

In Pacific Coast Coal Mines, Ltd. v. Arbuthnot [121] a dispute had broken out between two factions and was settled by an agreement whereby the dissidents consented to the dismi of their court action in return for an agreement to buy out the shares of the controlling faction through a debenture iss The company was a party to the agreement since a reduction in capital was needed, for which the company had to apply to the B.C. Legislature for an Act authorizing it to reduce its capital, permit a surrender of shares and an issue of debentu The Act had to be ratified by a 75% majority of the sharehold present at the special meeting called. The articles of the company required the notice calling the special meeting to state the "general nature of the business." There was questionable, but ultimately valid, compliance with the formalities of notice, since notice was sent out before the passing of the Act, and the meeting was held just half and hour after passage of the Act. Ultimately, however, the issue revolved around the substance of the notice. Viscount Haldan rendering the judgment of the Judicial Committee, stated: [122]

> Having regard to the language of the private Act, their Lordships think that this anticipation of the passing of the statute was competent to the directors, but what remains to be seen is whether the notice gave the necessa information of the purpose of the meeting, and of the general nature of the special business for which it was called. The notice was to the effect that resolutions would be proposed that the company should ratify and adopt the agreement of February 11, and empower the directors to do all things that the Act authorized . . . Now the agreement had not been seen by the shareholders generally before the meeting. It is stated to have been filed with the registrar of joint stock companies at Victoria. Doubtless it could have been inspected there by shareholders who had hurried from Eastern Canada or the United States. But why should they think that it contained the serious matters it did contain?
>
> . . . .
>
> The absence of full notice was particularly inappropriate in the case of those shareholders who had given proxies prior to the agreement, when they could have known nothin of what it was to contain--proxies which were not the les on that account used by the directors at the meeting.

Viscount Haldane concludes: [123]

> Their Lordships are of opinion that to render the notice a compliance with the Act under which it was given it ought to have told the shareholders, including those who gave proxies, more than it did. It ought to have put them in a position in which eac of them could have judged for himself whether he would consent, not only to buying out the shares of directors, but to releasing possible claims against them. Now this is just what it did not do, and therefore, quite apart from the fact that the meetin was held in half an hour from the time the Act passe and before the shareholders could have a proper opportunity of learning the particulars of what the Legislature had authorized, their Lordships are of t opinion that the notice was bad, and that what was done was consequently ultra vires.

Although his Lordship here speaks of compliance with the Act, it was (as noted earlier) actually an article of the company that required the giving of notice of the "general nature" of the business. But clearly their Lordships have here extended the requirement for fulfilling the intandment of these words from the realm of the general to one of sufficie particularity on each issue raised by the agreement to be approved to allow the shareholder to come to a decision on the matter before attending the meeting.

Three years after the Privy Council decision, in McDougal v. Black Lake Asbestos and Chrome Co., Ltd.[124] Kelly J. of the Ontario Supreme Court heard a motion to enjoin the defendant company from carrying out an agreement which had been approved by the annual meeting. The notice of the meetir had included the phrase "and [to] transact such other business as may be properly brought before the meeting." This "other business"--the agreement--in effect provided for the sale of stocks and bonds and control of the company to one Jacobs, and for payment by the company of $ 10,000 to the then preside in satisfaction of all his claims against the company. The formalities of notice were observed and it appears that the

shareholder meeting was quite typical: 26 were present in person, 180 were represented by proxy--in total, somewhat less than 50% of the issued voting shares. There was a unanimous approval of the agreement. One of the defences raised by the company was that the agreement related to the management of the company. Kelly J. held:[125]

> The by-law enacts that the annual meeting shall be held for the election of directors " and for all other general purposes relating to the management of the company." If the consideration of the agreement now attacked does not fall within "general purposes relating to management," then there was no notice, express or implied, to the shareholders that Jacobs' proposal or agreement would come before the meeting. This was a matter of business of special and unusual importance to the company and to all the shareholders, and did not relate to the management of the company, in the sense intended to be conveyed by the by-law. If the notice issued, couched as it was in general terms only, was sufficient intimation to the shareholders that this important matter of business would or might be considered, then it is conceivable that any matter of business, no matter how special or unusual, is proper to be transacted at an annual meeting without further notice to the shareholders than the mere mention that the annual meeting will be held at a specified time and place. The purpose of the notice is, not only to inform them of the date and place of holding the meeting, but to bring to their attention with sufficient particularity the various items of business intended to be discussed and transacted thereat. (My emphasis

The question of what constitutes substantial notice is not limited to the document giving the notice alone. While as a matter of desirable procedure the notice itself should contain sufficient particulars of the business, the object of securing full notice of the particulars may be accomplished through documents accompanying the notice: so it was held obiter by Hyde J. in Carle v. Ranger.[126] Later in the same year, 1961, the issue was dealt with specifically in Garvie v. Arnith.[127]

In this case too the directors of a company, Rockwin Mines Ltd., called a special general meeting of shareholders to authorize the execution of an agreement with another company, Trans-Canada Explorations Ltd., whereby Rockwin undertook to buy all the assets (except shares in Rockwin itself) of Trans-Canada. Axmith was a director of Rockwin and a shareholder in Trans-Canada, and the validity of his voting as a director and interested party on the agreement depended on ratification by the shareholders in general meeti This was done. Althoug a number of claims were made against Axmith and the other directors, the plaintiffs succeeded only on the question of notice. The relevant portions of the judgment of Mr. Justice Spence, then of the Ontario High Court, follow:[128]

> I turn lastly to the objection set out in para. 10(1) of the statement of claim, *i.e.*, no proper or adequate notice of the matters to come before the meeting was given to the shareholders. As I have said, the materials supplied to the shareholders were produced at trial and marked as follows:
>
> Exhibit 1—The notice of the special and general annual meeting, with printed on the reverse side thereof the resolutions as to change in the number of directors, and the application for supplementary letters patent.
>
> Exhibit 2—An explanatory letter to the shareholders under date May 19, 1961, purporting to be signed by Murray Axmith, the secretary-treasurer of Rockwin Mines Limited.
>
> Exhibit 3—A form of proxy, with which I have dealt.
>
> Exhibit 4—A copy of the statement filed with the Toronto Stock Exchange and accepted for filing on May 18, 1961, together with the copy of the actual agreement, dated May 11, 1961. The balance sheet of Rockwin Mines Limited as of December 31, 1960, including on the reverse side a statement of revenue and expenditures for the year ending December 31, 1960; the balance sheet of Trans-Canada Explorations Limited as of December 31, 1960, and on the reverse side a statement of the operations for the 9 months ending December 31, 1960, and statement of surplus and the pro-forma balance sheet drawn up to represent the situation after the proposed agreement had been carried out.
>
> In the explanatory letter, ex. 2, it is plainly stated that the proposal is that for each ten shares of the present stock of Rockwin Mines Limited the shareholders should receive one new share, and that for each two and one-quarter shares of Trans-Canada Explorations Limited held by the shareholders of that company, they should receive one share of the new company. There is not in the explanatory letter any statement as to how this division of interest in the company after its recapitalization had been arrived at. It would, however, be plain to the shareholders of Rockwin Mines that it must have been done by a valuation of the assets of each of the

two companies. The shareholders of Rockwin therefore would turn to audited statements as to the assets and liabilities of each company set out in ex. 4. On looking at the Rockwin Mines Limited balance sheet he would find it was shown as having assets of $1,604,108, and liabilities of only $629, to give a net worth of $1,603,478, or a net worth of 40 8/10 per share for its 4,000,000 issued shares. Similarly, on looking at the Trans-Canada balance sheet you would find that it had assets of $6,954,509 and liabilities of $3,077,624 to give a net worth of $3,846,985. If he deducted from that 230,600 shares of Rockwin at the above 40 8/10 per share, he would find it still had a net worth of $3,752,901, or $1.35 per share for its $2,800,000 net shares. It is quite apparent that this is not the result arrived at by those who were negotiating the arrangement as their division of new shares for old is one for ten in the case of Rockwin Mines Limited, and one for two and a quarter in the case of Trans-Canada Explorations Limited. Now therefore it must be apparent that the values of the assets set out in the balance sheets of the two companies have not been the values adopted for the purpose of working out the comparative values of the assets of the companies, or else liabilities as shown in the balance sheets of the previous December 31st were not liabilities even closely related to the liabilities which existed at the time of the proposed transaction.

It is the forceful submission of counsel for the plaintiff that under such circumstances the letter of explanation should have set out how the values of these two corporations were worked out.

As I have pointed out, it is quite possible that the methods of valuation used in working out the comparative worth of the two companies are sound methods of valuation and, indeed, I am inclined to believe that is true. The issue here is whether those methods should have been outlined in the explanatory letter, so that the shareholders could have used an intelligent judgment in determining whether they would cast their shares in favour of the proposal or against it.

The material, of course, was available to the directors at the time the notice of meeting was sent out and had to be available to them before they could determine upon the arrangement which was to be set out in the draft agreement. Mr. Broadhead the auditor for Trans-Canada Explorations Limited prepared a set of figures and attended the meeting of directors on March 24th to read those figures. On the assets to which I have referred he worked on the information given to him by Mr. Axmith, who was the secretary-treasurer of Rockwin Mines Limited, and who had obtained that information, in part at any rate, from reports made to Rockwin Mines Limited by Mr. Wilfrid P. Markle, as to the Lingman Lake claims, and Mr. Melville W. Bartley as to the Olivier Iron & Steel Hypothec. Similarly, Mr. Arthur H. Mitchell had made the report to Trans-Canada Explorations Limited on December 22, 1959 as to the valuation of the oil and gas leases, the assets of that company calculated in the transaction at $1,300,000. It would seem that a summary, no matter how terse, of the opinion of these three valuable witnesses should have been included in the explanatory letter to shareholders and that summary would have enabled a shareholder to exercise intelligent judgment as to whether he should vote in favour of or against the proposed transaction.

Thus, despite the fairly extensive amount of explanatory material sent out along with the notices, failure to provide one key piece of information, without which "it was impossibl for any Rockwin shareholder to come to any intelligent conclusion as to whether he should favour or oppose the transaction, and that is a right of each shareholder and a right which he must have accorded to him in the notice of th special general meeting sent to him," resulted in the invalidation of the meeting. In the following words of his Lordship we find an underlying notion that complete disclosur is necessary in the notices because the meeting itself is either the rubber stamp or the last battleground of a decided issue, and that it has a largely formal, non-parliamentary function and is no longer suitable for open debate. The function of the meeting has been reduced to a polling place for decisions already made on the basis of full disclosure: [1]

> It is not, in my opinion, a sufficient answer to say either that the plaintiff Garvie was given that information in his two attendances upon Mr. Axmith, or that other shareholders could have had that information had they in turn attended Mr. Axmith. The shareholders might well be any place on the American continent, or overseas, and the shareholders should be able to sit down with the material and come to an intelligent conclusion.

While Judson's J. wording extends the requirement from one of a description of the "general nature" of the business, as stated in the Pacific Coal Mines case, to one requiring such particulars that the shareholder can come to an intelligent conclusion on his own, the facts of the case are such that we may take it to be a ratio of this case that the materials sent out with the notice must not leave any relevant questions unanswered on the business to be transacte nor must they themselves give rise to any unanswered issues.

The Garvie case was used to support a motion for an interlocutory injunction to restrain the defendant society from acting on two special resolutions passed at a members' meeting in Rudkin v. British Columbia Automobile Associatic This case may be taken as an extension of the Garvie decisic The headnote states in part that it was held that [131]

> the principle of full disclosure was to be broadly applied and was not to be limited to cases in which the majority shareholders were oppressing the minority . . .

I quote these words from the headnote because they are nowhere stated in these express terms in the case report itself however, they do accurately reflect the result of the case. The facts of the case are: The defendant society called a special meeting to approve a private bill of the B.C. legislature permitting it to incorporate the British Columbia Motorist Insurance Company. In conjunction with this there was given by newspaper advertisement (consonant with the by-laws of the society) notice and text of an extraordinary resolution to amend the constitution of the society by empowering the directors to invest the defendant's funds in the British Columbia Motorist Insurance Company.

At the meeting, which had been duly convened with all respects to formality, the society's insurance committee chairman presented his report along with two documents concerning recommendations and legal advice in respect of the incorporation of the Insurance Company. This brought about--at the meeting--the objection "that the members had not been furnished with sufficient information to give them an opportunity to consider what was involved in the resolution and reach any intelligent conclusions about it."[132]

In reply, the chairman stated: " . . . It would be impossi impractical, to give any member a detailed description of the cost factors, the financial factors, the legal factors and so

on. I think that the membership has to take--put some faith in the actions of the Board of Directors. . . ."[133]
I should be noted at this point that in Garvie there was an open question occasioned by the material comprising the notice itself, and furthermore, Axmith was financially involved with both companies. In the Rudkin case there was no question of a fiduciary breach or conflict and the notice disclosed no discrepancies. In fact, it is arguable that if the Directors had decided on this course of action without any outside assistance but had proceeded entirely on their own discussions and in the exercise of their managerial discretion, the applicant's motion would probably have failed because there would be nothing concrete of which disclosure could be required. But here the applica succeeded precisely because there was such concrete material available. What amount of material disclosure would have sufficed is not entirely clear. Mr. Justice Hinkson quoted from the Garvie case:[134]

> "It would seem that a summary, no matter how terse, of the opinion of these three valuable witnesses should have been included in the explanatory letter to shareholders and that summary would have enabled a shareholder to exercise intelligent judgment as to whether he should vote in favour of or against the proposed transaction."
>
> In the present case the reports upon which the directors reached their decisions were not available to the members before the resolutions were voted upon. Instead the members were informed that they must repose confidence in the judgment of the direct

Would it have sufficed to state in the notice that the incorporation was approved in a report to the Board of Directors and in an opinion by the Association's legal counsel? His Lordship does not enlighten us on this point. On the one hand, such information would have given a "terse summary" of the opinions. On the other hand, this would

surely not enable a member to conclude where his vote should fall. At a practical level the decision resolves itself only if there is a substantially complete disclosure of the underlying documents themselves. The net effect of these decisions is that the shareholders, when called upon to approve directoral decisions, will once again take the course of the company in respect to each specific action, into their own hands. In earlier times this might have been considered a usurpation of the management function by the shareholders. In the context of special resolutions, however, it amounts to no more than a reaffirmation of the power reserved to the shareholders in general meeting to determine questions of fundamental change in the company independently of the directors.

There was some authority for the view that an invalid notice would not necessarily invalidate the resolutions passed thereon, by applying the rule in Foss v. Harbottle [135] (as restated in Burland v. Earle [136]) that a plaintiff cannot complain of acts which are valid if done with the approval of the majority of shareholders or are capable of being confirmed by the majority. Applying this reasoning in Normandy v. Ind, Coope & Co.[137] Kekewich J. held that even though the notice was insufficient for failing to disclose that benefits would flow to the directors, the resolutions attacked were nonetheless capable of being adopted by the shareholders in general meeting, and that this had been done. However, the authority of this case must be doubted, for it treats as a mere irregularity what has usually been held to avoid a meeting ab initio,[138] although in most cases improper notice will be treated as merely giving rise to a right to avoid the meeting by the affected shareholder unless he has waived his right to notice.

However, the issue of whether a meeting convened on improper notice is void or voidable does not appear to have been clearly settled. Some support for the theory that such a meeting is void may be implied from the judgment of Harvey C.J.A. in Gray & Farr, Ltd. v. Carlile[139] in which the company was permitted to recover assets from a former shareholder-director, even though, as was contended, all the shareholders knew of the transaction and did not object. The defence failed, however, on the narrower ground that the individual assents of shareholders do not amount to a meeting. In the following year the same court provided support for the theory that improperly called meetings are merely voidable by varying a judgment to deny recovery for a declaration of dividends. McGillivray J. stated in McGuire & Forrester Ltd. v. Cadzow:[140]

> The fact that she gave a proxy to her husband to act for her at all directors' meetings serves to show that he was acting for her with her consent

in this and all matters connected with the company, even though the document had no legal effect as a delegation of a director's authority.

. . . .

On the other hand, it is equally clear that the meeting is described as a directors' meeting, that one of the directors, Mrs. Cadzow, was not present and that no shareholders' meeting so designated, was called to deal with the declaratic of a dividend in accordance with the requirements of the articles of association.

. . . .

The determination of the whole question involved in this phase of the case as I see it, is as to whether or not because the meeting is styled a directors' meeting and not a shareholders' meeting the profits distributed at that time must be retur to the company.
I cannot think that the intention of all the shareholders and directors should be defeated by a wrong description as to the capacity in which they met.
In Re Express Engineering Works Ltd. 1920 1 Ch. it was held that where the directors were the sole shareholders of a company and they entered into a contract authorized at a meeting described as a board meeting, the contract was valid notwithstand that it could only have been entered into by the shareholders on the ground that it was the act of the incorporators and they must be assumed to hav waived formalities and to have constituted a meeti of shareholders.

(6) Assent and Waiver

There is older authority for the proposition that a meeting need not even be held at all if all of the members assent in writing the resolution.[141] This proposition came to be doubted in later decisions holding that such assents cannot be equivalent to a meeting although they act as estoppels against the shareholders. Lindley, L.J. stated in Re George Newman & Co.:[142]

> Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by resolution properly considered and carried and duly recorded.

The quotation was approved by Harvey C.J.A. in Gray & Farr, Ltd. v. Carlile.[143] And there was even earlier Canadian authority to support that proposition.[144]

However, the question surfaced again, and this time before the Supreme Court of Canada, in Walton v. Bank of Nova Scotia.[145] In an action by the trustee in bankruptcy of Rideout Real Estate Ltd. to recover sums realized on securities given by the company, the question arose whether the irregular acts (without board or shareholder sanction) of the former president could bind the company. Spence J. was directly confronted by the decision in Re George Newman & Co. and a number of other decisions finding in the other direction. The general trend of the decisions was to deny a company the right to complain of actions taken irregularly if there was unanimous shareholder consent, in whatever form. The Re George Newman Co. doctrine was restricted to the facts of the case, which revolved around an ultra vires action of the company, so that the remarks of Lindley L.J. quoted above must be considered as doubtful

obiter. Spence J. held:[145]

> Therefore, upon a consideration of the above authorities, I have been led to the conclusion that a corporation, when a matter is intra vires of the corporation, cannot be heard to deny a transaction to which all the shareholders have given their assent even when such assent be given in an informal manner or by conduct as distinguished from a formal resolution at a duly convened meeting.

I would submit that failure to object or to take steps by a shareholder who has come into knowledge of an otherwise irregular and voidable transaction is acquiesce and consent to such an action. By the ratio in Walton v. Bank of Nova Scotia it is not open to a later shareholder or liquidation to attempt recovery for prima facie unauthorized acts if in fact all prior shareholders had full knowledge of the act and acquiesced. It must be taken to have been an act of all the incorporators.

The question of waiver thus connects to the question of individual shareholder assent, or may be seen as a question in two branches: (1) waivers of notice of meetings and (2) waiver of meetings and formal resolutions. There would appear to be at least one point on which to distinguish critically between the two; notice, as we have seen, involves separate considerations in respect of formality and particularity in substance. Waiver of notice similarly can be taken to involve both waiver of timeliness and waiver of particularity. The first need not necessarily extend to the other.

Thus waiver of time may not indicate a waiver of substantial notice, if in fact the waiver amounts to an acceptance of shorter notice only--for example, waiving the 21 days' notice provision if notice is given, say, 10 days before the meeting. If the notice that he does receive is defective in substance by failing to disclose with suffici

particularity the business to be transacted, it is question whether his waiver should be taken to extend that far if he appears at the meeting, participates, and only in the course of the meeting discovers that there was a failure to disclose a material particular. If my analysis is correc a timely objection at the meeting to proceeding with that business should suffice to make any resolution in respect thereof irregular and invalid. Such an objection should not, however, amount to a withdrawal of the waiver in respect of business of which adequate particulars were given in the short notice, and the meeting ought to be able to proceed to deal with those matters.

However, in the more likely case--since waiver is only a practical consideration where a small number constitute all the shareholders--waiver will extend to both time and particulars if the meeting is convened by telephone and the general nature of the business to be transacted is made known. It is doubtful if the same high standards of disclosure can, as a matter of particularity, be required in such cases. But this is not to say that a person who attends a shareholder's meeting even on these terms is deprived of his right to object if the meeting proceeds to deal with a matter which he believes was misrepresented or the ramifications of which were insufficiently disclosed to him. His salvation, however, must be in a prompt objection and refusal to participate further. It is likely that in all too many cases a shareholder who harbors an objection in his heart will feel sheepish and cowed by others and fail to avail himself of his remedy.

It is clear that a proper objection taken at a meeting is itself capable of a waiver if the shareholder participate further. In Gray v. Yellowknife Goldmines Ltd.[146] the chairman was alleged to have improperly adjourned the annual meeting, over the objections of some shareholders. The same shareholders participated at the reconvened meeting and were deemed thereby to have waived the irregularity.

In cases where the waiver is not to notice but to the meeting itself, it is clear that all the shareholders must be taken to have a transaction, the essentials of which were known to them. In the Walton v. Bank of Nova Scotia case the president was the sole beneficial shareholder. In the various cases discussed therein, the shareholders were invariably completely familiar with the nature and effect of the transaction. In principle, then, there can be no assent to that of which one does not have knowledge.

The question arises herein, whether, if a minority shareholder assents to a directoral action, which is not disclosed to him, the company is then not bound by the transaction. I would submit that a shareholder who assents or acquiesces without taking advantage of the company meeting procedure ought to be taken to have inquired sufficiently into the matter to be certain of the thing he is assenting to, so that only a deliberate deceit and not "innocent non-disclosure". can vitiate his consent. This would effectively place him in the same position as he would have been at the proper meeting if he had asked the appropriate questions to clear up any areas of concern or uncertainty.

Clearly the law relating to waiver is important parti ularly for small, closely-held companies. With this in mind sone of the newer companies legislation has incorporated specific waiver provisions, the Canada Business Corporations Act again leading the way. The Alberta Companies Act does not make specific provisions for waiver, nor does Table A, although, of course, the articles of a company may so provide. The Alberta Companies Manual states that a "waiver in writing" [147] is required, but there is no statutory authority for this. It should be remembered, however, that the waiver provisions as discussed in Walton v. Bank of Nova Scotia are common law principles which are not in any way overridden by the present act. They

apply equally in the other jurisdictions, insofar as they are not inconsistent with the statutory waiver provisions. Thus the new B.C. Companies Act provides in s. 166:

> **166.** Every company shall give to its members entitled to receive notice of a general meeting, not less than twenty-one days' written notice of any general meeting of the company; but those members may waive or reduce the period of notice for a particular meeting by unanimous consent in writing.

It would appear that only waiver in writing will be a proper waiver of notice. Quaere , however, if no meeting at all is called, and a transaction otherwise requiring shareholder consent is unanimously assented to. This is not waiver of notice, but waiver of a meeting and formal resolution, and would seem to be caught by the ratio in the Walton case.

The B.C. Act generally shows a large indebtedness to the U.S. Model Business Corporations Act. Similar wording, in more circumscribed form, is found in s. 144:

> SECTION 144. WAIVER OF NOTICE
>
> Whenever any notice is required to be given to any shareholder or director of a corporation under the provisions of this Act or under the provisions of the articles of incorporation or by-laws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice.

There are a number of states that have adopted similar legislation, as set out in the following extract. Note that Ohio and Oklahoma go beyond waiver in writing:[148]

(7) *Waiver of notice.* Florida, Idaho, Kentucky, Massachusetts, Michigan, Minnesota, Nevada. Ohio and Oklahoma state the notice of a shareholders' meeting may be waived by written assent. See generally section 144, Waiver of Notice.

Ohio and Oklahoma also provide that notice may be waived by the shareholder if he attends such meeting. Ohio expressly states that notice shall not be waived if the shareholder protests his lack of notice prior to the commencement of the meeting.

An important addition to the 1969 Revision of the Model Business Corporations Act was s. 145, which was substantially adopted in the new Canada Business Corporatio Act:

SECTION 145. ACTION BY SHAREHOLDERS WITHOUT A MEETING

Any action required by this Act to be taken at a meeting of the shareholders of a corporation, or any action which may be taken at a meeting of the shareholders, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the shareholders entitled to vote with respect to the subject matter thereof.

Such consent shall have the same effect as a unanimous vote of shareholders, and may be stated as such in any articles or document filed with the Secretary of State under this Act.

The source of this section may be in the California Business Corporations Code, where section 2209 provides a comprehensive waiver statement, always, however, requiring approval in writing:

§ 2209. Validation of meeting defectively called or noticed; waiver, consent, approval of minutes. The transactions of any meeting of shareholders, however called and noticed, are as valid as though had at a meeting duly held after regular call and notice, if a quorum is present either in person or by proxy, and if, either before or after the meeting, each of the persons entitled to vote, not present in person or by proxy, signs a written waiver of notice, or a consent to the holding of the meeting, or an approval of the minutes thereof. All such waivers, consents, or approvals shall be filed with the corporate records or made a part of the minutes of the meeting. Executors, administrators, guardians, trustees, and other fiduciaries entitled to vote shares may sign such waivers, consents, and approvals. (Stats.1947, c. 1038, p. 2342, § 2209.)

Finally, the Canada Business Corporations Act provides in s. 130:

> **130. Waiver of notice.**—A shareholder and any other person entitled to attend a meeting of shareholders may in any manner waive notice of a meeting of shareholders, and attendance of any such person at a meeting of shareholders is a waiver of notice of the meeting, except where he attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

This section eliminates the restrictive wording of "written waiver" by providing for waiver "in any manner". However, the Act deals more restrictively with waiver of meeting and formal resolution by providing specifically for resolutions in writing signed by all the shareholders. This may be taken to occupy the whole field and thus override the Walton decision:

> **136. (1) Resolution in lieu of meeting.**—Except where a written statement is submitted by a director under subsection 105(2) or by an auditor under subsection 162(5),
>
> **(a)** a resolution in writing signed by all the shareholders entitled to vote on that resolution at a meeting of shareholders is as valid as if it had been passed at a meeting of the shareholders; and
>
> **(b)** a resolution in writing dealing with all matters required by this Act to be dealt with at a meeting of shareholders, and signed by all the shareholders entitled to vote at that meeting, satisfies all the requirements of this Act relating to meetings of shareholders.
>
> **(2) Filing resolution.**—A copy of every resolution referred to in subsection (1) shall be kept with the minutes of the meetings of shareholders.

One final provision of interest ought to be dealt with under this heading. Below is an amendment to the Delaware Corporations Act of 1969 that goes further than any of the other sections quoted above, by getting rid of the need for unanimous consent, so long as a required majority of shares consent and the rest are immediately notified:

§ 228. Consent of stockholders in lieu of meeting

Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders who have not consented in writing. In the event that the action which is consented to is such as would have required the filing of a certificate under any other section of this title, if such action had been voted upon by stockholders at a meeting thereof, the certificate filed under such other section shall state, in lieu of any statement required by such section concerning a vote of stockholders, that written consent has been given in accordance with the provisions of this section, and that written notice has been given as provided in this section.

(As amended by Ch. 148, Laws of 1959.)

A similar provision is contained in the New Jersey General Corporations Statute. However, this provision was substantially amended to provide for precise mechanics in its functioning, and to make it clear that it was not a replacement for the annual meeting:

14A:5-6. Action by shareholders without a meeting

(1) Any action required or permitted to be taken at a meeting of shareholders by this act or the certificate of incorporation or by-laws of a corporation, may be taken without a meeting if all the shareholders entitled to vote thereon consent thereto in writing, except that in the case of any action to be taken pursuant to Chapter 10 of this act, such action may be taken without a meeting only if all shareholders consent thereto in writing or if all shareholders entitled to vote thereon consent thereto in writing and the corporation provides to all other shareholders the advance notification required by paragraph 14A:5-6(2)(b).

(2) ~~Except for actions required or permitted to be taken at a meeting of shareholders by Chapter 10 of this act, any action required or permitted to be taken at a meeting of shareholders by this act or the certificate of incorporation or by-laws of a corporation may be taken without a meeting upon the written consent of less than all the shareholders entitled to vote thereon, if~~

~~(a) the use of such consent is permitted by the certificate of incorporation; and~~

~~(b) the shareholders who so consent would be entitled to cast at least the minimum number of votes which would be required to take such action at a meeting at which all shareholders entitled to vote thereon are present.~~

~~Prompt notice of such action shall be given to all shareholders who would have been entitled to vote upon the action if such meeting were held.~~

(2) Except as otherwise provided in the certificate of incorporation and subject to the provisions of this subsection, any action required or permitted to be taken at a meeting of shareholders by this act, the certificate of incorporation, or by-laws, other than the annual election of directors, may be taken without a meeting upon the written consent of shareholders who would have been entitled to cast the minimum number of votes which would be necessary to authorize such action at a meeting at which all shareholders entitled to vote thereon were present and voting.

(a) If any shareholder shall have the right to dissent from the proposed action, pursuant to Chapter 11 of this act,[2] the board shall fix a date on which written consents are to be tabulated; in any other case, it may fix a date for tabulation. If no date is fixed, consents may be tabulated as they are received. No consent shall be counted which is received more than 60 days after the date of the board action authorizing the solicitation of consents or, in a case in which consents, or proxies for consents, are solicited from all shareholders who would have been entitled to vote at a meeting called to take such action, more than 60 days after the date of mailing of solicitation of consents, or proxies for consents.

(b) Except as provided in subsection 14A:5-6(2)(c), the corporation, upon receipt and tabulation of the requisite number of written consents, shall promptly notify all non-consenting shareholders, who would have been entitled to notice of a meeting to vote upon such action, of the action consented to, the proposed effective date of such action, and any conditions precedent to such action. Such notification shall be given at least 20 days in advance of the proposed effective date of such action in the case of any action taken pursuant to Chapter 10 of this act, and at least 10 days in advance in the case of any other action. Any shareholder who did not consent, personally, or by proxy, to any action which he has a right to dissent from as provided in Chapter 11 of this act shall in such notice also be informed that he has the right to dissent and to be paid the fair value of his shares, provided he files with the corporation a written notice of dissent as required by subsection 14A:11-2(1) within 20 days from the date of giving of the notice, or such greater period of time as may be granted by the corporation, and outlining briefly, with particular reference to the time periods within which actions must be taken, the procedures set forth in Chapter 11 of this act with which he must comply in order to assert and enforce such right.

(c) The corporation need not provide the notification required by paragraph 14A:5-6(2)(b) if it

(i) solicits written consents or proxies for consents from all shareholders who would have been entitled to vote at a meeting called to take such action, and at the same time gives notice of the proposed action to all other shareholders who would have been entitled to notice of a meeting called to vote upon such action;

(ii) advises all shareholders, if any, who are entitled to dissent from the proposed action, as provided in Chapter 11 of this act, of their right to do so and to be paid the fair value of their shares, provided they file with the corporation before the date fixed for tabulation of the written consents a written notice of dissent as required by subsection 14A:11-2(1), and outlining briefly, with particular reference to the time periods within which actions must be taken, the procedures set forth in Chapter 11 of this act with which they must comply in order to assert and enforce such right; and

(iii) fixes a date for tabulation of consents not less than 20 days, in the case of any proposed action to be taken pursuant to Chapter 10 of this act, or not less than 10 days in the case of any other proposed action, and not more than 60 days, after the date of mailing of solicitations of consents or proxies for consents.

(d) Any consent obtained pursuant to paragraph 14A:5-6(2)(c) may be revoked at any time prior to the day fixed for tabulation of consents. Any other consent may be revoked at any time prior to the day on which the proposed action could be taken upon compliance with paragraph 14A:5-6(2)(b). No revocation shall be effective unless in writing and until received by the corporation at the place fixed for receipt of consents or, if none, at the main business office or headquarters of the corporation.

(3) Whenever action is taken pursuant to subsection 14A:5-6(1) or 14A:5-6(2), the written consents of the shareholders consenting thereto or the written report of inspectors appointed to tabulate such consents shall be filed with the minutes of proceedings of shareholders.

(4) Any action taken pursuant to subsection 14A:5-6(1) or 14A:5-6(2) shall have the same effect for all purposes as if such action had been taken at a meeting of the shareholders.

(5) If any other provision of this act requires the filing of a certificate upon the taking of an action by shareholders, and such action is taken in the manner authorized by subsection 14A:5-6(1) or 14A:5-6(2), such certificate shall state that such action was taken without a meeting pursuant to the written consents of the shareholders and shall set forth the number of shares represented by such consents.

Amended by L.1969, c. 102, § 5; L.1973, c. 386, § 12, eff. May 1, 1974.

[1] Section 14A:10-1 et seq.
[2] Section 14A:11-1 et seq.

The commentary provided in the annotated Code to the original section provides as justification only business utility for corporations in which there are controlling blocks of shares:

Commissioners' Comment—1968

Subsection 14A:5-6(1) is identical in substance with section 138 of the Model Act and C. 14:10-9.1, added to Title 14 in 1964.

Subsection 14A:5-6(2) has no counterpart under either Title 14 or the Model Act. It is similar in substance to the Delaware Act. It authorizes a corporation to insert a provision in its certificate of incorporation permitting any corporate action requiring the vote of shareholders, except action required or permitted under Chapter 10 of the Act (Merger, Consolidation, Acquisition of all Capital Shares of a Corporation and Sale of Assets), to be taken on the basis of the written consent of less than all of the shareholders entitled to vote on such action, provided the number of consents received would be sufficient to authorize such action at a meeting at which all shareholders entitled to vote were present.

The provisions of section 14A:5–6 should be of particular utility for the close corporation and to other corporations which have a consolidated block of shares comprising majority control. The provisions of subsection 14A:5–6(2) may also be useful to widely-held public corporations since under section 14A:5–19(1) a written consent may be given by proxy.

For other provisions of the Revision which will be useful in organization and operation of the close corporation, see the comment to section 14A:5–12.

Although some modifications were made to the sweeping nature of this provision in the 1972 amendments (commentary below), it is clear that the policy behind this section has survived:

Commissioners' Comments—1969 Amendments

Paragraph 14A:5–6(2)(a) has been modified to make it clear that a provision in a certificate of incorporation permitting the use of a written consent of less than all shareholders is sufficient to permit such a consent as to all matters requiring shareholder approval. The words "such action" in the original text were ambiguous: they could have been construed to indicate that the provision in the certificate of incorporation permitting the use of a consent must specify each shareholder action for which such a consent may be used in lieu of a vote at a meeting.

Commissioners' Comment—1972 Amendments

This section has been substantially modified to permit the use of a non-unanimous consent of shareholders, in lieu of a shareholders' meeting, unless otherwise provided in the certificate of incorporation. As originally enacted, this section permitted the use of non-unanimous shareholder consents only if specifically provided for in the certificate of incorporation. Del.G.C.L. § 228 is similar. In addition, the unanimous consent section has been revised to require either consent from, or advance notice to, holders of non-voting shares in the case of mergers, consolidations, or sales of substantially all assets. See sections 14A:10–3 and 14A:10–11.

Unlike the Delaware Act, subsection 14A:5–6(2) does not permit a non-unanimous consent to be used in lieu of an annual meeting of shareholders, and it requires that notice of any corporate action to be taken pursuant to a non-unanimous consent be given to non-consenting shareholders in advance of the actual date on which the action will be taken. The notice to be given is keyed to the notice required for calling shareholder meetings. See sections 14A:5–4; 14A:10–3; 14A:10–11.

This new subsection departs from the Delaware Act in that it sets out specifically the mechanics to be followed in obtaining and tabulating consents and is tied in specifically to Chapter 11 which deals with dissenters' rights. The board is authorized to fix a date for tabulating of consents, and consents which are received more than 60 days after the date of solicitation of consents may not be counted.

Ordinarily, subsection 5–6(2), as amended, requires two separate communications to shareholders in order to effect corporate action: the first, to obtain the requisite consents and the second to notify all non-consenting shareholders. Paragraph 14A:5–6(2)(c) eliminates the necessity of subsequent notification if all shareholders who would have been entitled to notice of a meeting called to approve the proposed action have in effect been notified of the proposal either by a solicitation of their con-

sents or by ordinary notice, in the case of shareholders not entitled to vote. The Commission was of the opinion that subsequent notification should not be required where all shareholders entitled to notice are advised initially—just as they are in the case of a proxy solicitation—of the proposed action.

Paragraph 14A:5-6(2)(d) permits the revocation of a written consent within certain limitations. It should be compared to the provision in subsection 14A:5-19(1) permitting revocation of proxies.

Subsection 14A:5-6(3) has been modified to permit a written report of inspectors to be filed in the corporation's minute book in lieu of filing the actual consents.

It may be argued that such a policy is favorable to closely-held corporations because it corresponds with the reality of the nature of controlling blocks and avoids the expense of meetings. However, I would submit that this takes an overly cynical view of the purpose of shareholder meetings. A minority shareholder may well know that in voting power he is bound to lose his cause, but an essential incidence of ownership with voting rights (and, as I have previously argued, of equity participation per se) is a right to question, to speak and be heard, to proceed in the hope that one may sway the minds of one's fellow shareholders.

III. CONDUCT OF THE MEETING

1) Parliamentary Procedure

The actual conduct of company meetings must be seen as quasi-parliamentary in nature, and although the same level of formality need not be present, the meeting must nonetheless be conducted according to accepted usage and common practice, with all those entitled to take part being treated with fairness and good faith.[149] While strict compliance with parliamentary procedure is not necessary,[150] nonetheless, to the extent that he is not guided by provisions in the statute, memorandum or article, a chairman should follow as nearly as practicable the procedu of municipal and parliamentary bodies.[151]

One of the several grounds of judgment in Lumbers v. Fretz[152] dealt with the question of parliamentary procedure in relation to the claim that after the plaintiff withdrew from the meeting there was no longer a quorum as required by the articles of the company. The relevant article read:

> 4. Quorum: At all meetings of shareholders a quorum sufficient for the transaction of business shall consist of not less than five shareholders present in person and representing in person or by proxy a majority in interest of the company.

In fact, after the withdrawal of the plaintiff and the proxie he held, less than one-half of the issued shares remained represented. Although counsel for the defendants argued that a withdrawal of some shareholders would not operate to break the quorum, Wright J. held:[153]

> My view is that meetings of shareholders are to be governed by the same rules as to quorum and procedure as apply to parliamentary and municipal bodies except where the statute or by-laws otherwise provide.

On appeal the defendants argued that the shareholders had acquiesced and should now be estopped from denying the validity of the by-laws,[154] alleging [155]that the plaintiff were inactive in repudiating what was done at the meeting in the period from the 15th of July to December. The appeal was dismissed. The trial judge had in fact found that there was active protest. While this and other findings went against the defendants, it might well be questioned whether in a proper case such laches and acquiescence should not constitute a waiver of formal meeting and formal resolution.

2) Chairman

In view of the quasi-parliamentary nature of the meeti the chairman is under a duty to act judicially. This, at l appears to be the law in Canada, and it appears to be a peculiarly Canadian developed branch of Company Law. The l case is Bluechel and Smith v. Prefabricated Bldgs. Ltd. and Thomas.[156] Plaintiff Smith was of German origin, but naturalized Canadian. He came to the meeting of the compan in 1943 to vote his own shares and as proxy holder for Blue The chairman had received a letter from the Burnaby police sergeant-in-charge that Smith was reporting as an enemy alien--a class of shareholder disentitled from exercising voting rights. On this statement being made at the meeting, Smith did not deny this, but alleged that Thomas--the chairman--knew that he was naturalized as a British subject. Thomas did not recall the conversation. A special resolutio was passed at the meeting which, if the plaintiffs' votes votes were counted, would have failed. It was later admitte by the company that the plaintiffs' votes should have been counted and that the resolution should be declared null and void. The plaintiffs now sought general damages against Chairman Thomas. MacFarlane J. found no malice in Thomas'

action, but an honest attempt to do his duty in what he considered the best interests of the company. The claim was founded on the property right in the vote, an impingement of which presumed damage.[157] The defence, which succeeded, was that a chairman of a shareholders' meeting, is acting in quasi-judicial capacity, and that no action for damage (where there is no malice) lies against such a person. His Lordship considered the duties of the chairman to arrive at that conclusion:[158]

> "Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner, and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting:" *Vide* Chitty, J. in *National Dwellings Society v. Sykes* [1894] 3 Ch. 159, 63 L.J. Ch. 906.

> If he is to see that "the cause of the meeting is properly ascertained with regard to any question which is properly before the meeting," he can do this only by seeing that only the persons entitled to vote, vote. Ordinarily the right to vote is determined by reference to the register of shareholders, but it is clear here that if the plaintiff were an alien enemy, his right could not be exercised: *Robson v. Premier Oil and Pipe Line Co.* [1915] 2 Ch. 124, at 136, 84 L.J. Ch. 629. It was the duty of the chairman then to make this decision. It was a duty imposed on him by virtue of his office. That is not contested. The complaint is that he erred in the decision that he made with the result that the votes of the plaintiff were improperly excluded from the count.
>
> The next question which arises is whether the chairman, in the particular duty being performed by him, was acting in a judicial or *quasi*-judicial capacity and whether if he was so acting he is entitled to immunity, where it is found as I have found here that he acted without malice. I have not been referred to any cases in which it has been held that a chairman of a company meeting is so entitled. In *Dickson v. McMurray* (1881) 28 Gr. 533, at 537, Vice-Chancellor Proudfoot in Ontario held that scrutineers who were called upon to consider an agreement affecting the right to vote of shareholders of a company were acting in a *quasi*-judicial capacity:
>
> > "As scrutineers they had to determine what votes they would receive or that were entitled to be cast. Their duty was to some extent a judicial one. It was not merely

> ministerial, for, if so, they would have received or given effect to the vote of the plaintiff on his 1,071 shares, while they only allowed him to vote on 271 shares, a vote that would have overcome those on the opposite side. They also determined, it must be assumed judicially, that they were not bound to regulate the votes by the stock book, which would have been equally decisive in favor of the plaintiff's contention, but deemed themselves at liberty, and bound, to peruse and construe, under the advice of counsel, the agreement of 6th July, 1880, and to decide that there was a present trust for the benefit of McMurray, Scarth and Smith, and also to determine that these *cestuis que trust* were entitled to vote in respect of the shares so held in trust."
>
> In that case the election was set aside on the ground that the duty of the scrutineers was in conflict with their interest as candidates for re-election and the question of their immunity from a claim for damages was not discussed.
>
> I do not think that the liability of a chairman at a general meeting should be put on any higher basis than the liability of a returning officer.

His Lordship was confronted by the fact that the office of the chairman is not concerned with public rights or public duties. He found support in the fact that the area o mixed administrative judicial acts was expanding in law: [159]

> It was contended before me that *Tozer v. Child, supra,* applies only where there has been a statutory authority given to a public officer. I agree that on the facts that case is so limited. The question then arises as to whether protection is to be afforded on the basis of the nature of the act done or required to be done, or on the nature of the tribunal. There are, of course, tribunals of the nature of a Court "in law" to whose officials absolute immunity is extended. There are also bodies whose duties are purely administrative and to the officials of these no degree of immunity is afforded. But there is an intermediate class. The learned editor of *Smith's Leading Cases,* 13th ed., at p. 442, says that the precise area occupied by cases of this class has not been exhaustively defined and can probably be only marked out by the accumulation of decisions upon various states of fact.

(In Tozer v. Child[160] an action for damages against a churchwarden having refused an eligible person the right to vote in an election of vestrymen was dismissed because the duties of the warden were "neither entirely ministerial nor wholly judicial") MacFarlane J. found further support in the definitions by Lord Atkinson in Everett v. Griffiths[161] to extend the meaning of "judicial":[162]

> * * *. In this connection the term 'judicial' does not necessarily mean the acts of a judge or of a legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by a competent authority, upon consideration of the facts and circumstances, imposing liability and affecting the rights of others * * * "
>
> I am not unaware of the fact that in *Everett v. Griffiths, supra,* several of the learned members of the House in terms limit what they say to persons acting in the exercise of a public duty. If it were clear that a chairman of a general meeting of a company were presiding under the provisions of a statute which in terms prescribed his duties, then it would appear that there would be no doubt that a decision such as the one he made here, if made in good faith, would be protected.
>
> I have already dealt with the duties of the chairman. I confess, when I apply the definition of a judicial act above set out, I can see no substantial difference between the position of a chairman of a general meeting of a company incorporated under the provisions of a statute such as the *Companies Act* required to make decisions of a judicial nature and that of a chairman presiding at an election of vestrymen as in *Tozer v. Child, supra.*
>
> I do not know that I need go further in this case than to say that I think the act of the chairman is in the nature of a judicial act and that he should be entitled, if he acts in good faith and without malice, as I have found he has in this case, to be protected from liability.

One senses just the slightest uneasiness in this decisi in the second full paragraph above, because the companies st utes then extant, like our present Act, did not put the chai man under a statutory duty. Clearly this is an area in whic

any doubt can be removed by statutory enactment.

The Bluechel and Smith case was followed in a subsequent British Columbia case, Johnson et al. v. Hall et al. [163], in which the chairman was held to have failed to act judicially. When finally after 3 years the board called an annual shareholders meeting under the threat of l action, the chairman had a legal opinion prepared beforehan which disputed the validity of a proxy given before the meeting by the Canada Trust Co. By rejecting the proxy at the meeting the chairman was able to assure election of his cronies as directors. Wilson J. held that the proxy was valid, and that the chairman, Hall, failed to make a proper inquiry[164] " . . . if he were a chairman honestly concerned as to the validity of the proxy he would make some inquiry." He continued:[165]

> A chairman who delighted in technicality, or who wanted to retain control of the company, might rule that such a proxy was not acceptable because he had no means of knowing that the statement regarding authorization was correct. But, if he were a chairman honestly concerned as to the validity of the proxy he would make some inquiry.
>
> When he saw the seal of the company, knowing it was a shareholder, he would not assume that it had been illegally affixed but would, at the worst, inquire. As said by my brother Macfarlane, J. in *Bluechel and Smith v. Prefabricated Buildings Ltd. and Thomas* [1945] 2 W.W.R 309, at 317, the chairman of a meeting of a company incorporated under the *Companies Act* of British Columbia acts in a judicial capacity. Therefore he must proceed judicially. The chairman did not do so. He acted without any consideration whatever of the main point in issue, whether the seal of Canada Trust Co. had been affixed to the proxy by authorized persons. He assumed that it had not when the most casual sort of inquiry would have elicited the information, now before me and uncontradicted, that the contrary was the case. I am bound to say, although fraud is not pleaded here, that, under the circumstances of this case such an act smacks of bad faith. If it is to be affirmed the affirmation will have to proceed from some other source than me.

The case is illustrative of the paradox that the person who is potentially the most interested party is a control struggle, for example, should also be exp to perform judiciously. There is an inherent conflict in th notion that cannot be resolved unless the chairman is a relatively disinterested minority shareholder elected at the meeting from the body of the shareholders--but this is pater impractical as the position requires considerable skill whic can only be gained from experience. Gower has written:[166]

> Good chairmen are as rare as good statesmen--and almost as valuable, for whether the meeting will be long and drawn out and inconclusive or short an decisive, depends upon them.

Considerations such as these must have been in the mind of O. E. Lennox, K.C., Assistant Master of the High Court of Justice of Ontario, who determined the reference submitted b the Court of Appeal to determine "who are the duly elected directors of Yellowknife Gold Mines Limited at present holding office" in Gray v. Yellowknife Gold Mines Ltd. and Bear Exploration and Radium Limited (No. 1).[167]

The Assistant Master considered the decision in the Bluechel and Smith case, but carefully avoided the exact wor in determining the nature of the chairman's position. It is to be noted that he limits it to one that "approximates . . a quasi-judicial position" but that this standard may be "too high when matters in which the chairman is actually interested are being debated":[168]

> The third question I have to decide is whether Mr. Swanson disqualified himself as chairman, thus justifying the action of the shareholders in electing a chairman in his place and proceeding with the election of directors. Before reviewing the facts

> leading up to the action of the shareholders, I propose to consider briefly the requirements of the position of chairman. It was laid down by Chitty J. in *National Dwellings Society v. Sykes,* [1894] 3 Ch. 159, that the duty and function of a chairman is: (1) to preserve order; (2) to take care that the proceedings are conducted in a proper manner; (3) to take care that the sense of the meeting is properly ascertained with regard to any question properly before the meeting. Mr. Gale classifies the position of chairman as quasi-judicial. That may be placing the standard too high when matters in which the chairman is actually interested are being debated, but in the exercise of the discretion vested in him, and in making rulings in the course of his conduct of the meeting, the position at least approximates that of a person occupying a quasi-judicial position. Due, no doubt, to the high standard required of a chairman, he is afforded some protection in the performance of his duty. In *Bluechel and Smith v. Prefabricated Buildings Limited and Thomas,* 61 B.C.R. 325, [1945] 2 W.W.R. 309, [1945] 2 D.L.R. 725, a chairman successfully raised the defence of qualified privilege in an action claiming damages for defamation of character. The powers of a chairman are extensive, but the shareholders have at least one notable safeguard provided by statute, in that s. 49 of the Act prevents a chairman adjourning without the consent of the meeting.

Although Swanson had properly been elected to the chair the meeting, he was no longer sure of his tenure on the chai and was relying on his "statutory right" as vice-president (replacing the president) to hold the chair (he was, in fact only a de facto director). However, by refusing to appoint scrutineers on a poll, "Swanson had abandoned any idea of exercising a proper discretion".[169] On a motion to adjourn Swanson in a quandary-- simply sat down for 30 minutes. Swanson having failed to take an action, the dissidents elected their own chairman and proceeded with the election of directors. This was held to have been validly done; for "the chairman should not be permitted to defeat the purpose for which the meeting was called by stopping the mee or stopping the procedure provided for the transaction of th business before the meeting." [170]

One further Ontario case deals with the quasi-judicial nature of the chairman's position, and recognizes that he cannot make use of his peculiar powers to gain for himself as director and shareholder an advantage he would not otherwise gain. It should be noted that although the court was directed to the quasi-judicial nature of certain directoral acts, the decision is based (1) on the narrow grounds that the directors are trustees of the corporation, and (2) that a chairman's tie-breaking vote to his own benefit at a share holder's meeting is a breach of duty as a director. The cas Re Bondi Better Bananas Ltd.[171] concerned a motion for winding-up on "just and equitable" grounds of a retail compa whose two shareholders were deadlocked about the future of the business:[172]

> Counsel for Bondi contends that when a shareholder submits a transfer of shares to the Board for its approval, the directors must consider such application in a quasi-judicial capacity. They are, for the purpose of considering the application to transfer, trustees of the corporation, and have no right unreasonably to refuse the application to transfer. In fact they have no right to refuse the transfer on any ground unless it be on grounds personal to the transferee.
>
> Counsel for Bondi contends that if there is a deadlock in the company's affairs that deadlock can be broken by the following route. He proposes to call a meeting of the shareholders of the corporation and, by virtue of the provision of the by-laws which enables the shareholders to remove a director during his term of office, to move at the meeting a resolution removing the Vallarios as directors and if there were, as no doubt there would be, a tie vote on such motion, to use the chairman's casting vote to carry the motion. As Bondi is the president he would be chairman of the shareholders' meeting, and would cast the casting vote in favour of the motion. The Vallarios thus being removed from office, it is proposed that the two new shareholders be appointed in their place and stead, following which Frank S. Bondi would have control of the Board, and would be free to carry out his views and methods of doing business without hindrance on the part of Vallario. In this way the so-called deadlock in the management of the company can be broken. It is contended that so long as there is a way open to break a deadlock, the company cannot be wound up on the ground of deadlock. There are many reasons which make it, to my mind, doubtful whether Bondi can secure control of the Board by this route. For Bondi to use his casting vote as the means of giving himself control of the company is a greater breach of duty as a director than the unreasonable refusal to consent to a transfer.

3) Selection of a Chairman

The Gray v. Yellowknife Gold Mines case, discussed above, is illustrative of the problems involved in selecting a chairman for the meeting, for he can be electe by the meeting or hold the office as of right by statute or by-law. In that case, in the first instance Mr. Swanson was elected by both the annual meeting of May 17, 1946, and the special general meeting to confirm a by-law increasing the number of directors, which was held immediately upon adjourning the annual meeting. The annual meeting, for the purposes of electing directors, was adjourned over to September 12, 1946. The validity of the adjourned meeting was contested by the insurgents, w obtained an injunction prohibiting the defendants "from acting or purporting to act in any way as directors or officers . . . except for the purpose of calling a general meeting of the said shareholders, . . . of doing any acts t facilitate the convening of a meeting by the shareholders . . . or of reconvening the annual meeting of the said shareholders."[173]

The Assistant Master held that the calling or convening of a meeting, in the ordinary meaning of the words, does not include the right to preside at the meeting.[174] It was contended, however, that once the meeting was convened, the Ontario Statute and the by-law of the company, conferred a right on Swanson to preside as chairman since he was vice-president of the company (the president had resigned). This was dismissed on the grounds that the injunction was imposed on the definite finding that Swanson and his associates were merely de facto directors, and that the provisions of the statute do not operate in favor of de facto directors nor in favorof officers whose office depends upon their being directors de jure.[175] So in fact, the status of Swanson remained that of an elected chairman at the adjourne

meeting, even though he insisted on his (non-existent) statutory right to preside. It was held, however, that he was not precluded from presiding at the meeting, even though he had ruled as out of order a motion to appoint another chairman. The referee did not have to deal with that question, since he found that Swanson had disqualified himself by failing to act as chairman, thus allowing another to be validly elected in his place.

The rule that, absent any other provision, any member of a meeting may be elected chairman thereof by the members present is expressed in s. 135 (1)(e) of our present Companies Act. Since the members must be present in order to elect, there will not be a poll, but a mere show of hands by shareholders only (if no shareholding qualification attaches to proxyholders). This appears to be a minority view in the U.S. although it is supported by some authority.[174]

However, Article 37 provides specifically that the president or, in his absence, the vice-president, shall preside as chairman at every general meeting of the company. Article 38 provides that if there is no such officer, or he has not appeared within 15 minutes of the appointed time, or is unwilling to act as chairman, the members present shall choose someone of their number to be chairman.

The Model Business Corporations Act does not legislate the matter, nor, it would appear, do the principal American corporation statutes.[175] As in Canada, this is a matter generally left to the corporation's by-laws.

The right of the president to preside at a shareholder' meeting, unless excluded by the by-laws, was affirmed by the Ontario Court of Appeal in Fremont Canning Co. v. Wall & Finefoods of Can. Ltd.[176] At a meeting of shareholders Wall had taken the chair, called the meeting to order, and ruled out of order a motion nominating the Chairman of the

Board as chairman of the shareholder's meeting. This was attacked as wrongful and illegal.

Masten J. A. held(Robertson C. J. O. concurring,[179]), that the powers conferred on the president by by-law "to have general charge and control of the business and affairs of the company" include the right to preside at meetings, since the phrase extends to cover the business of the annual meetings of shareholders. He found further support in the definition of president in Murray's and Webster's dictionaries. There is thus an implicit devolution of this right to the office of president. This case, if followed, in effect limits the right to elect a chairman to cases where there is clearly neither president or vice-president (by natural extension) in office, or where the statute provides for a residual right to elect, as does our s. 135 (1)(e).

As a result of this decision, it is clear that unless th articles specifically exclude the power to preside, the meeti cannot without cause oust the chairman and appoint another in his stead, as was attempted in Re LeMay Ltd.[180] In that case the insurgents(5 of a testator's children wanting a winding-up as against 3 children wishing to continue the business), lost by following the wrong procedure. The findin of the court, below, should be read with regard to the restra implied by the Fremont Canning decision. The court held:[181]

> On the 9th June, the annual meeting of shareholders was held. Oscar LeMay as president took the chair, in accordance with a by-law of the company; but one Pennefather, representing the trust company, insisted upon the right of the assembled shareholders to elect a chairman, and a vote was taken. Pennefather declared himself elected chairman, and (without a vote of the shareholders) declared the meeting adjourned till the following day. He and two others then left the warehouse of the company, where the meeting was held, and those who remained passed a resolution cancelling the resolution for winding-up passed at the special meeting.

> The general by-law of the company requiring that the president should preside stood in the way of Pennefather being appointed chairman by vote, and the body of shareholders was governed by the by-laws until repealed. The declaration of Pennefather that the meeting was adjourned till the following day and his departure amounted to a withdrawal from the meeting, and left those who remained—two shareholders being a quorum—in a position to transact business; and the decision of the meeting to abrogate the previously passed resolution took the company out of the present application.

There are sound reasons for cloaking a named officer with the chairman's robe and burden. Wetzel writes:[182]

> Election of the chairman at the meeting should be avoided whenever possible since it invites a division at the outset. This may mean that before any business is conducted, before any order can be established, a battle will be waged between opposing factions, followed by the delay of a stock vote. There is no better way to assure that the meeting gets off on the wrong foot.
>
> Some companies follow the practice of selecting an independent outsider, someone well known for his experience and stature in such role, to preside at the meeting, although this custom of earlier years is becoming increasingly rare.[17] There is something to be said for it if past meetings have been unusually difficult but it would seem better usually for the chief executive officer to preside at his own meeting even in that situation. The use of an outsider does have the advantage of insulating the management from charges of prejudice on the occasion of difficult procedural rulings by the chair.

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17. In early nineteenth century Philadelphia, when the same prosperous citizens and a sprinkling of outlanders owned most of the stock of the few publicly held companies it was not unusual for a leading citizen to preside at the annual meeting when the owners would consider how their managers had conducted themselves during the past year. Unhappily this is no more a picture of today's meeting than is the sherry, terrapin and wild duck that the managers served at lunch to induce a sense of well-being among the owners. On one occasion a group arrived from New York, determined on control, but before they could vote on anything or even say anything the chairman simply declared the meeting in recess for a few hours to give an irate citizenry time to pack the meeting. This was very effective since voting was weighted in favor of the smaller holder, as often occurred in those days. For example, in one company the holder of one share had one vote, the holder of one hundred shares ten votes, five hundred shares thirty votes and above that three votes for every hundred shares. At least one Philadelphia company still votes that way today.

4) Procedure at Meetings

In view of the difficulties standing in the way of an elected chairman of the meeting, we will assume that he is known before the meeting commences. In normal procedure the chairman will follow an agenda such as is found in the various company law manuals. The example below is taken fro an American source: [183]

"OPENING OF MEETING
- Meeting called to order - (state time)
- Appointment of inspectors to examine and count the votes
- Establishment of a quorum
- Reading of the minutes (omitted from agenda by some companies)

"REMARKS BY CHAIRMAN AND PRESIDENT
- Discussion

"ELECTION OF DIRECTORS
- Nominations for directors
- Discussion
- Balloting

"INDEPENDENT PUBLIC ACCOUNTANTS
- Announcement of appointment of auditors
- Discussion
- Balloting

"MANAGEMENT PROPOSAL
- Presentation of management proposal
- Discussion
- Balloting

"STOCKHOLDER PROPOSAL
- Presentation of stockholder proposal
- Discussion
- Balloting

"GENERAL DISCUSSION
- Stockholders are invited to raise questions or comment on the affairs of the Company.

"REPORT OF INSPECTORS
- Election of Directors
- Ratification of appointment of independent auditors
- Management proposal
- Stockholder proposal

"ADJOURNMENT OF MEETING"

[Note: It is also possible to vary balloting procedure so that only one ballot is cast as to all items noticed for stockholder action.]

In its general outline the precedent contained in the Alberta Companies Manual [184] is much the same, although under the "Opening of the Meeting", the actual notice of the meeti is read out again immediately after the appointment of scrutineers, followed by a declaration of due mailing of notice. After the quorum is established, the meeting is dec duly constituted, and the financial statements, reports by the auditors and directors are read. The remarks by the president are followed by a motion to adopt the auditor's ar director's reports. Then, before the election of directors, the scrutineers report on the number of voting shares present, etc. In all other respects the outline is similar in substance.

Neither of these precedents are, of course, binding on on the chairman--they only present workable models for an efficient meeting. The reason, for example, for placing the appointment of scrutineers at the top of the agenda is purel procedural and in the interests of efficiency. Wetzel writes: [185]

> If the appointment of judges or inspectors of election has not been made prior to the meeting, the appointment should be made at this point. Here again it is better to have settled procedural and organizational matters prior to the meeting to avoid any disruptions which their settlement at the meeting might cause. The chairman should then call upon the secretary to report whether there is a quorum present. Stockholders attending the meeting should have been required to identify themselves on arrival in order to determine the number of votes present in person. Individuals holding proxies should have been asked to disclose those proxies in order to determine the number of shares represented at the meeting. Shares represented by undisclosed proxies in somebody's pocket are obviously not present for the purpose of a quorum. If these two steps are not taken there is likely to be confusion and uncertainty as to the number of shares present. After the secretary has indicated that a quorum is present in person and by proxy, the chairman declares the presence of this quorum and that the meeting is open for business.

Wetzel adds further that the chairman should now lay the ground rules that he plans to follow in the meeting be the shareholders to avoid confusion and maintain order:[186]

> Before proceeding further, it would be well for the chairman to allude to the agenda and to advise the shareholders of the policy he plans to follow in conducting the meeting. What he says now will have a significant effect on the balance of the meeting. In whatever way is most appropriate to the occasion he should make several points. He should clearly indicate his intent to follow very closely the order of business proposed in the agenda. He should impress upon the shareholders his firm resolve to avoid confusion and to maintain order. Shareholders should be informed that only questions which are relevant and pertinent to the business at hand will be entertained and that, in the interests of giving all shareholders a fair opportunity to be heard, the time available for any one speaker cannot be unlimited. The chairman should ask for the cooperation and support of all the shareholders present and their indulgent consideration of the rights of each other. In making such a statement, the chairman puts the stockholders on notice of what to expect and in effect secures their tacit consent to follow the agenda and the ground rules he has proposed.

5)Quorum Requirements

It should be noted that the establishment of a quorum should have been carried out by the secretary as the shareholders arrived. What constitutes a valid quorum has been subject of some development in the law.

Quorums to establish a valid meeting depend upon the minimum requirements set in the statute and in the articles the company. At common law, of course, no meeting can take place if fewer than two persons are present. Whether, in t case of shareholders, the persons present must also be entitled to vote in order to constitute the quorum, is not clearly decided at common law. The question has twice aris In Young v. South African & Australian Exploration Syndicat Kekewich J. commented:[187]

I say nothing here about the distinction between

> "members" and "a member entitled to vote". This distinction is certainly to be found in the face. of the Act and it may be, I do no not pause to consider it further, that members who are not entitled to vote may be members who are entitled form a quorum. This seems a practical absurdity but I pass on it for the present purpose.

This quotation was used by Macdonald J., without deciding the issue, in Doey et al. v. Mathews et al.[188] In that case the relevant Article (Art. 51 of the then Table "A") required a quorum of three members. At the disputed meeting 8 shareholders, but only 2 voting shareholders, were present. The application for the injunction was refused, however, on other grounds.

Dealing directly with the comment by Kekewich J., howe I submit that it is not such a "practical" absurdity. The meeting, after all, is not entirely dependent on voting rights, and it is not essential (although practical and desireable) that matters be decided. I reiterate my earlie position that it is a fundamental right of a shareholder to be informed at meetings, and to have his own views heard, irrespective of a voting right. As an equity holder in the company he has a legitimate interest in the conduct of the company's business irrespective of his right to vote on certain matters. Furthermore, proxy holding is not necessar contingent on the proxy-holder himself having voting rights, so that it is still quite possible to accomplish business at a meeting where there are no voting shareholders if the voting shareholders are represented by proxy.

There may, however, be added to the basic common law quorum requirement of two "members", a stipulation that a fixed number of the outstanding shares capital of the compan be represented. This has been a clear trend in the law.

Whereas the basic quorum requirements in Alberta are two members "personally present" for a private company and 3 for a public company under s. 135 (1)(d), Art. 35 varies this to provide as well for the representation of at least one-tenth of the issued capital.

> **35. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, a quorum shall be members personally present, not being less than two in number, and holding or representing by proxy not less than one-tenth of the issued capital of the Company.**

However, where class rights of shares are involved, even greater protection is given in that any alteration of class rights at a separate class meeting requires a quorum of at least two and one-tird of the issued shares of the class: s. 69 (6).

Generally higher quorums are required in the U.S. than the English and Commonwealth jurisdictions, and the influence is noticeable in the Canada Business Corporations Act, which provides (with the company's right to opt for other provisions) that there need not be personal presence of members to form a quorum, but a majority of the shares entitled to vote:

> **133. (1) Quorum.—Unless the by-laws otherwise provide, the holders of a majority of the shares entitled to vote at a meeting of shareholders present in person or by proxy constitute a quorum.**
>
> **(2) Opening quorum sufficient.—If a quorum is present at the opening of a meeting of shareholders, the shareholders present may, unless the by-laws otherwise provide, proceed with the business of the meeting, notwithstanding that a quorum is not present throughout the meeting.**
>
> **(3) Adjournment.—If a quorum is not present at the opening of a meeting of shareholders, the shareholders present may adjourn the meeting to a fixed time and place but may not transact any other business.**

(4) One shareholder meeting.—If a corporation has only one shareholder, or only one holder of any class or series of shares, the shareholder present in person or by proxy constitutes a meeting.

New Jersy similarly provides that unless otherwise provided "the holders of shares entitled to act a majority of the votes at a meeting shall constitute a quorum" and al provides that an opening quorum is sufficient (s. 14A: 5-9(New York has similar wording, but provides a statutory minimum of 1/3 of the shares entitled to vote(s. 608). Delaware, however, does not have statutory quorum requirements. The provision of the Model Business Corporations Ac appears to be the model followed in New York and North Carolina:

SECTION 32. QUORUM OF SHAREHOLDERS

Unless otherwise provided in the articles of incorporation, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one-third of the shares entitled to vote at the meeting. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number or voting by classes is required by this Act or the articles of incorporation or by-laws.

It might be noted at this point that the new federal Act does not go so far as the American Statutes by failing t provide a bottom of share representation. This seems to overlook one of the most salutory aspects of the American law--namely that the action of the meeting is going to be

at least some substantial way representative of the wishes of the shareholders since a reasonably high level of participation is required by statute.

Surprisingly, the British Columbia Act makes no reference at all to a minimum level of share participation, and indeed goes so far as to provide that a company may have a quorum of one, quite irrespective of whether there is only one member or not, if the following two sections are read together:

One member at a meeting

164. One member of a company may, if the company has a quorum of one, constitute a meeting of the company.

Quorum for general meeting

167. The quorum for the transaction of business at a general meeting of a company is two persons, unless

(a) the articles otherwise provide, in which case the provisions of the articles shall govern; or

(b) the company has only one member, in which case the quorum shall be one person, and any provision of the articles inconsistent with that quorum has, to the extent of that inconsistency, no force or effect.

On the other hand, the B.C. Act does contain one salutc provision making it impossible for the management of a parent company to vote shares of a subsidiary at its own shareholder meetings in order to outvote the beneficial owners of the subsidiary:

Subsidiary not to vote shares in holding company.

182. Where a subsidiary is a member of its holding company and the holding company is incorporated within the Province, the subsidiary shall not form part of the quorum at, or vote its shares or permit its shares to be voted at, a general meeting of the holding company.

The new provisions in the federal Act and in the B.C. Act permitting a single shareholder to constitute a meeting are in general a correction of the anomalous situation

whereby majority shareholders could be frustrated by the failure of a minority shareholder to appear. The danger, however, which appears to be foreseen by the Model Code provisions, is that in a company having 5 equal shareholde: it is fortuituously possible for only one of them to hold valid meeting and determine the course of the company's affairs.

It is further well provided in all the relevant provisions that the opening quorum suffices even if members leave the meeting. Gower notes that there appears to be nc English authority on the common law position in this respec and that American authority is divided, but tending in favc of the view that a quorum need not remain throughout.[189] There is, however, Scottish authority to the contrary.[190] Parliamentary practice, if the analogy may be drawn, is to adjourn if the membership falls below the quorum, but unles the question of a non-quorum is drawn to the Speaker's attention, business may be validly transacted.[191] This would indicate that the withdrawal of a quorum leads at best to suspension of business, not to a nullity of the business transacted after withdrawal of the quorum.

6) Failure to Establish Quorum

On strict principle, where no quorum is established at the beginning of a meeting, no meeting has taken place and the assemblage is not capable of doing anything that is the nature of business to be transacted at a meeting. The obvious inconvenience of this principle is that it would pu companies to the expense and effort of going through the whole calling and notification procedure again, with perhaps the same result, or applying to court for an order permitting a meeting with less than a quorum to be held. The latter might be achieved by an application under the Alberta Companies Act, s. 135(2), which gives the court a discretionary power to order a meeting called, held and conducted in any manner the court thinks fit where "for any reason it is impracticable" to follow the procedures laid down in the Act or Articles. However, the courts appear reluctant to invoke these powers[192] , and in any event the section has not been extended to allow a court to direc that one shareholder may constitute a quorum where the articles require two and the common law also requires two.[193]

The problem is also dealt with by Art. 36 of Table A. The wording that the "meeting" shall stand "adjourned", although practical, must be questioned as to its accuracy, since in fact no meeting has yet taken place to be adjourne While this article would appear to override other quorum requirements, it might be noted that Gower questions whethe this would permit an adjourned meeting to be constituted with a quorum of one:[194]

> **36.** If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

There are, of course, circumstances where one person of necessity has been held to constitute a quorum, as in cases where one person is the sole member in a class of shares.[195] However, apart from this special case, the new federal Act has seen fit to extend the wording of our s. 135(2) so that it now appears that the court has power to order a quorum of one:

> **138. (1) Meeting called by court.**—If for any reason it is impracticable to call a meeting of shareholders of a corporation in the manner in which meetings of those shareholders may be called, or to conduct the meeting in the manner prescribed by the by-laws and this Act, or if for any other reason a court thinks fit, the court, upon the application of a director, a shareholder entitled to vote at the meeting or the Director, may order a meeting to be called, held and conducted in such manner as the court directs.
>
> **(2) Varying quorum.**—Without restricting the generality of subsection (1), the court may order that the quorum required by the by-laws or this Act be varied or dispensed with at a meeting called, held and conducted pursuant to this section.
>
> **(3) Valid meeting.**—A meeting called, held and conducted pursuant to this section is for all purposes a meeting of shareholders of the corporation duly called, held and conducted.

7) Irregularities in the Conduct of the Proceedings

Except for specific actions of meetings, such as adjournment (Art. 39), per capita voting and polling demands (Arts. [illegible] Arts. 42-5), suspended voting rights (Arts. 45-47), there is little statutory guidance for the conduct of meetings. Shackelton writes:[196]

> There is no codified law regarding meetings and, furthermore, the common law does not even recognise the right of public meeting. The right, as it is known today, has arisen out of custom, and is simply the freedom enjoyed by an individual citizen of speaking and acting as he pleases, and the right of other citizens of speaking and acting in a similar manner. Such meetings, if they are for a lawful purpose, may be held in any place on any day and at any hour, provided they satisfy certain provisions for the safety of persons attending.

The lack of a coherent body of law in relation to the procedure of meetings (Shakelton's statement applies equally well to meetings of private bodies not otherwise governed by by-laws) has meant that courts have resorted to deciding on the validity of acts at a company meeting not by reference to legal principles as much as by referen explicitly or implicitly, to a "common usage" standard as set forth in the following note from the Virginia Law review:[197]

> THE COMMON USAGE STANDARD
>
> Common usage is the traditional measuring stick for the legality of actions taken at a shareholders' meeting.[52] The standard applies only in the event that there is no bylaw governing the meeting procedure involved. If there is a procedural bylaw, it will be strictly enforced.[53] The determination of what constitutes common usage in any given situation seems largely to have been made ad hoc for each particular fact situation. Certainly the old cases do not show any clear analysis of the source of common usage and suggest rather that the invocation of "common usage" may simply disguise the exercise of rough notions of equity.

The courts will thus not hold a chairman to strict standards in the performance of his duties, and in fact are inclined to uphold the validity of actions taken by a shareholder meeting, as in the example from the same note quoted below:[198]

> *Duffy v. Loft, Inc.*[61] extended the standard of common practice explicitly to favor *faits accomplis*. When, at a turbulent meeting, the president refused to allow the election of a chairman, dissident stockholders took matters into their own hands and selected a new chairman. At that, the president's faction departed in an effort to break the quorum, and the dissidents elected their own slate of trustees. The Supreme Court of Delaware affirmed the chancellor's decision that the meeting was valid on the grounds that the corporations statute required an election of directors every year and that the meetings held should be given the benefit of the doubt as to procedure. In a passage quoted by the Delaware Supreme Court, the chancellor wrote:

> Reasonable rules ought to prevail in aid of the accomplishment of the statute's purposes, and a certain degree of liberality in favor of a meeting ought to prevail. To take any other view would be to encourage the prolongation of internal strife between rival factions and keep the corporation's affairs in such a state . . . that the business which it was organized to conduct will inevitably suffer to the damage of its stockholders.[65]

This bias in favor of supporting the results of a meeting makes a good deal of sense in terms of what is practical for a court to try to do in the intra-corporate squabble.[66] Only if there is gross miscarriage is a court likely to upset the results of a meeting once it is validly convened. An example of this judicial activism is *Chapman v. Barton*.[67] There the chairman had become confused and refused to put anything to a vote. In the imbroglio, a minority shareholder took over and, either in the confusion or subsequently, presided over an election in which he declared the minority interests to be winners. All of the old management was fired. In affording them relief, the court noted that it did not "look with favor upon attempts of a minority group to seize control."[68]

The gist of these cases is that courts seem to favor majority control and business efficiency and are inclined to look past form to reach the substance of a meeting's validity.

The writer concludes:[199]

> The common usage cases lead to the conclusion that there is no particular usage upon which courts will insist. Thus, there is no standard that has any degree of predictability. The common core of the decisions may be acquiescence of the shareholders in what was done. For example, in the *Sheip* case[71] relief was denied to the relator because he failed to appeal the chairman's decision on his procedural objection to a vote of the shareholders. The consent of the majority to the chairman's action was therefore implied. The only thrust of the common usage cases is that the shareholders, either through action or acquiescence have the last say as far as is practical.

The general tendency in favor of a presumed validity of the proceedings is to be found in the Earl of Selborne's, L.C., statement about the chairman's prima facie authority to decide all emergent questions which necessarily require a decision at the meeting, in Re Indian Zoedone Company.[200] Note, however, that the authority is not necessarily conclusive, and only shifts the onus of proving any irregularity

in ruling or recording on the other side.[201]

> The clause in the Act to which Mr. *Marten* referred shews that all appointments are presumed to be good until they are shewn to be invalid, at all events when they have been *primâ facie* made and acted upon; and that the minutes in the books are to be received, not as conclusive, but as *primâ facie* evidence of resolutions and proceedings at general meetings; and also it may be added, and I think correctly, that inasmuch as the chairman who presides at such meetings, and has to receive the poll and declare its result, has *primâ facie* authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minute in the books; and, though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute-book, following the decision of the chairman, that the result of the poll was different from that there recorded.

A similar attitude to that claimed in the E. D. R. not has at times manifested itself in Canadian courts. In this context, a misapplication of the rule in Foss v. Harbottle, as, I would submit, occurred in Watson v. Barrett,[202] in which an injunction against the defendant directors, to restrain them from acting as such, was dissolved on the grounds that irregularities in the conduct of the meeting at which they were elected, could regularized by passing fr and effective resolutions, and the court would not interfer in the internal management of the company. But the court, in applying Foss v. Harbottle appeared to overlook complete that the nature of the acts complained of--the meeting had ceeded in an inner room while to the knowledge of the defen ants some shareholders were waiting in an outer room--appea to fall within the clear exceptions of the rule. If such action was not outrightly oppressive or fraudulent, it was colored by bad faith, and this had been recognized earlier

as sufficient ground for invalidating proceedings. Indeed, earlier Quebec case had held the procedure to stricter standards and even found that actions contrary to good faith were "illegal". In this case, Armstrong v. McGibbon[203] the plaintiff was president of the company, and practised on the opposite side of the street from the company offices. The meeting was called for noon "exactly". Shortly before noon, McGibbon, who was an invalid, sent his secretary across the road to inquire whether the meeting could be moved into his offices. Armstrong, who had the chair, refused, and was thereupon told by the secretary that McGibbon would come immediately. Arriving at ten minutes after twelve, he found that the meeting was finished and the participants had left. In his decision, Mr. Justice Lemieux did not refer to any cases, but stated (my translation from the French):

> The rule, according to common usage and doctrine, in like cases is to grant a reasonable time after the opening of the meeting to allow directors and other interested persons to be present.

In the circumstances, the judge found this precipitous to be a fraud on the shareholders, and thereby illegal.

The question of an irregular procedure by the chairman has arisen at several times in relation to the validity of proxies. Often such a ruling is in bad faith prima facie, if it amounts to an attempt to shrink the voting power of the dissidents. So, for example, in Johnson v. Hall[204] in which the prepared legal opinion disputing the validity of a proxy delivered prior to the meeting, without further inquiry of the proxy-giver as to the validity, was held to smack of bad faith. An even more blatant misdeed occurred

in Re Routley's Holdings Ltd.[205] in which the president (and minority shareholder, holding 26 of 158 issued shares) calle a meeting under threat of legal action and simply refused to admit the proxy holders to the meeting, not even inspect the proxies. He then purported to hold a meeting without a quorum; approving his own bill for professional services. The court ordered a new meeting held under the chairmanship the master. Even where allegations of bad faith cannot readily be made, failure to allow valid proxies to vote may nullify the proceedings. The chairman in Colonial Assurance Co. v. Smith[206] seems to have proceeded on an erroneous interpretation of the articles in refusing to let a sharehol who was in arrears on the calls on his shares act as proxy holder. While, strictly speaking, that shareholder Simpson could not vote his own shares, he was still a member entitled to attend meetings and thus to act as a proxy holder. Interestingly, Mathers C. J. K. B. comments that the refusal to let Simpson vote his own shares "may, under the circumstances, be regarded as a piece of sharp practice".[207] This case may stand for the proposition tha where there is a procedure set out, it must be strictly followed. The chairman erred twice, in fact, for he did not take a ballot or call for a vote, as required by the article on the election of directors, when only five were nominated for five vacancies. He declared them elected:[208]

> This he had no power to do. A majority of the shareholders present might have voted against the defendants, although there were not more than the requisite number nominated.

Thechairman's position is a difficult one even with proper legal advice. It would appear that if an objection

is taken to a chairman's bona fide ruling, and it is upheld by a court of law, the business relating to that objection at least is invalidated, if not the whole meeting. In Henderson v. The Bank of Australasia [209] a chairman refused to put an amendment to the meeting after receiving legal advice. This was an erroneous ruling invalidating the resolution adopted to which the amendment had been proposed Nor did the fact that the mover of the amendment voted against the resolution amount to acquiescence in the ruling The Court of Appeal found, in effect, that by not allowing the amendment to be brought before the meeting, the chairma had "prevented a material question from being brought befor the meeting." [210] Similarly, Fry L. J. held: [211]

> The meeting was called to consider certain propos amendments in the deed of settlement, and to cond it on the plan that no amendment should be propos to any of the proposals, so that each resolution should be taken as it stood or rejected, was to conduct the meeting under a very serious misappre hension of the rights of the shareholders and of their powers of discussion.

In general words then, it might be said, that the chairman of the meeting must fairly elicit the opinion of the meeting. He must not attempt to stifle discussion by his rulings.

Even a judicious chairman can be caught in a struggle the floor when two factions are hotly contesting an issue, both sides are fairly fixed in their minds. We may consider the position of Mr. Wall, the dissident minority shareholder in Wall v. London and Northern Assets Corporation. [212] At issue was the sale of the company's assets to another company in return for shares: [213]

> An extraordinary general meeting of the Assets Company was held on February 22, 1898, at which a resolution approving of the agreement of the 11th was moved and seconded. The meeting was adjourned to March 22, when, after the chairman had addressed the meeting, Mr. Wall entered into an explanation of his objections to the scheme. Mr. Parker pointed out the advantages of the scheme, and the objections to the schemes outlined in a circular of Mr. Wall. A Mr. Rowley was speaking against the schemes, both of the directors and of Mr. Wall, but was interrupted by cries of "Vote." The chairman then, supported by others, put a motion that the debate should then close, and there voted 24 in favour of the motion and 2 against it. The chairman then put the resolution, which was carried by 35 to 3. Mr. Wall expressed his wish for a poll, but could not obtain the support of four other members present for demanding it, and the chairman declared the meeting closed. The above is the substance of what appears in the minutes of the meeting. Mr. Wall deposed that, "Shortly after the discussion of the scheme had begun, and while I and other shareholders were desirous of addressing the meeting, the chairman put a resolution to the meeting that the discussion should be terminated. This resolution was carried, and those shareholders who were desirous of speaking were thus prevented from so doing."

Another extraordinary general meeting was held for the purpose of confirming the resolution, and after an amendment Wall was ruled out of order, the confirmation of the resolut was moved:[214]

> This motion was seconded. The [illegible] of the meeting proceeded as follows: "Mr. Rowley [illegible] his views against the resolution, and also against the suggestions made by Mr. Wall in his circulars. Mr. Timmis moved the adjournment of the meeting for a fortnight or three weeks. Major Baker objected to any adjournment, pointing out that the resolution had been before the shareholders since February 22, and pressed for the vote of the shareholders to be taken at once. Mr. Wall spoke in favour of adjournment, when certain

> shareholders suggested that further discussion on the question of adjournment should be terminated, and the voting on the motion for adjournment taken at once. The chairman left this to the meeting to decide, and 16 members voted that the discussion be terminated, and 8 against. Thereupon a demand for a poll was handed in by Mr. Wall, who claimed that discussion on the question should not be suppressed. The chairman ruled that no poll could be demanded. Mr. Wall, having protested against the decision of the chairman, continued his remarks at some length upon the desirability of an adjournment, and seconded the motion of Mr. Timmis. The chairman put to the meeting the motion for the adjournment, when there voted 8 in favour of the adjournment, and 19 against. The chairman thereupon declared the motion for the adjournment lost. The chairman then put the original resolution, of which notice had been given, as moved by him, when there voted 20 for the resolution, and 5 against, and the chairman declared the resolution carried."

Wall also lost the subsequent poll and brought an actic to have the special resolution declared invalid. Chitty L. J. dealt with this matter in the following passage:[215]

> As to the closure, I think if we laid it down that the chairman, supported by a majority, could not put a termination to the speeches of those who were desirous of addressing the meeting, we should allow a small minority, or even a member or two, to tyrannize over the majority. The case has been put by Mr. Cozens-Hardy as the terrorism of the majority. If we accepted his proposition we should put this weapon into the hands of the minority, which might involve the company in all-night sittings. That seems to me to be an extravagant proposition, and in this particular case there seems to have been nothing arbitrary or vexatious on the part of the chairman or of the majority. I am not, of course, saying that the majority must not listen to reasonable arguments for a reasonable time. I will advert only to one other point, and must be excused for not going into the other "irregularities" which Mr. Cozens-Hardy has mentioned. He said that it was wrong of the chairman to refuse to put to the meeting, merely held for the confirmation of the original resolution passed by three-fourths of the proprietors, another resolution by way of amendment. His refusal, in my opinion, was right, because that meeting

was called for one purpose only, and that was to confirm or reject the original resolution which had been passed, and any amendment would be wholly irrelevant, because the single purpose of the meeting was to say Aye or Nay, is the original resolution to stand or fall?

8) Voting procedure

Assuming that the chairman, after giving fair hearing, has stopped discussion on a motion, that motion, or resolutio will have to be brought to a vote.

We are not concerned here with the exercise of the various types of voting rights that may attach to share ownership, but with the procedure of voting as part of the conduct of the meeting. To some extent, however, the procedu set out in the statute or articles governing a company may quite seriously affect the substantive rights of a shareholde

(a) Scrutineers

The propriety of the voting count, if left in the hands of the chairman alone, or persons acting under his direction, is always open to question. It is therefore normal procedure to appoint scrutineers representing the two conflicting sides to supervise and agree on the count of a poll. However, there is no direct authority in the present Alberta Companies Act or in the case law placing the chairman under a duty to appoir scrutineers at a meeting. Failure to do so, however, may brir rise to a valid claim that the chairman has departed markedly from the common usage standard. While the point was not necessary to his decision, the referee in Gray v. Yellowknife Gold Mines, found that: [21]

> On the first ballot Mr. Swanson rejected a suggestic that scrutineers be appointed. The appointment of scrutineers is not mandatory. But the refusal under the circumstances clearly indicates that in his position of chairman, Mr. Swanson had abandoned any idea of exercising a proper discretion. . . . having placed himself in a positon which he could have avoided, and should have avoided by appointing scrutineers, the chairman exercised his discretion after, and not before, the event, when he evidently had an excellent opportunity of knowing the results of the vote.

In these circumstances a direction in the statute or articles that the chairman may appoint scrutineers in any event, and shall appoint them upon a demand from one side, would have resolved the difficulty. It might, however, be useful to add that such scrutineers shall not themselves be nominees for any office, since this would conflict with the quasi-judicial nature of their duty as was found in the old Ontario case of Dickson v. Murray.[217] In that case V.C. Proudfoot had found that there was a plain conflict of interest and duty since their own defeat or re-election as directors depended upon how they accepted or rejected votes.

(b) Show of hands

Traditionally all resolutions have first been voted on by a show of hands, which is then followed by a demand for a poll. Naturally, if the meeting is unanimous on the show of hands there is a need for a poll. This is particularly so in closely-held corporations. However, there is a clear circumstance in which the usual procedure of voting by show of hands can potentially disenfranchise a majority of voting shares. Gower gives the example that if the articles make provision that at least 5 members must demand a poll before o is carried our (see Alberta Companies Act s. 136(2)). then it would be possible for 4 members of the 5 at a meeting, each having one share, to pass a special resolution over the dissenting vote of a majority shareholder. Gower remarks:[218]

> The moral is that a member should, to be absolutely always split his holdings among five nominees.

While Table A presently provides for a single member to demand a poll (Art. 40), this can, of course, be changed by the company. Both the B.C. Act and the federal Act have

cured this anomaly by providing statutorily that a poll may be demanded by a member or proxy holder before or after the v by show of hands:

B.C. *18/* (3) At any meeting at which a resolution is submitted a poll may be demanded, before or on the declaration of the results of the vote by show of hands, by a member or proxyholder entitled to attend the meeting.

Fed. 135. (1) Voting.—Unless the by-laws otherwise provide, voting at a meeting of shareholders shall be by show of hands except where a ballot is demanded by a shareholder or proxyholder entitled to vote at the meeting.

(2) Ballot.—A shareholder or proxyholder may demand a ballot either before or after any vote by show of hands.

There are two comments to be made with respect to these provisions. Firstly, it appears that the inclusion of "proxy holder" remedies another anomaly under the older acts. Gower notes that there was no obligation imposed by statute to allow proxies to vote by show of hand, and that it was not usual to do so, although, as he notes, this is difficult to enforce in practice unless the proxy holders are kept in a separate part of the room.[219] The point seems confirmed by th wording of our present Art. 40 requiring that the poll demand made by a "member".

Secondly, the B.C. section speaks of a "resolution", whe the federal Act speaks simply of "voting". Whether this in fact gives broader scope to the poll demand under the federal Act is not entirely certain. Under the common usage standard it appears that not every matter in issue on the floor, specifically procedural matters, need be put to a poll by the chairman. Most importantly this relates to the chairman's power to adjourn the meeting.[220]

The chairman's power to adjourn the meeting on a mere show of hands, even where the articles provide for the demand of a poll by 5 members, was decided in 1875 by the Court of Appeal in MacDougall v. Gardiner.[221] A motion to adjourn had been declared carried by the chairman, who refus to grant a poll on the matter on the grounds that it could not be taken on the question of adjournment. The plaintiff' action, based on the claim that the adjournment was taken to stifle discussion, was dismissed, the court taking the view that this was a matter of internal management within the rule in Foss v. Harbottle.

The matter came before the Alberta court in Legion Oils Ltd. v. Barron.[222] The simple question was whether the chairman could adjourn the meeting after the taking of a poll to allow the scrutineers to count the ballots and bring in the results. The company had articles permitting the chairman to adjourn "with the consent of the meeting" (present Art. 39 of Table A), to permit the chairman to direct the manner of taking a poll (our present Art. 42) and a provision that the demand for a poll shall not prevent the continuance of business.

Mr. Justice Cairns held:[223]

> In my view the chairman has an absolute discretion to direct an adjournment for the purpose of taking poll. It may be that it is most important to ascertain the result of the vote prior to conductin the business of the meeting.

Now, it should be noted that Mr. Justice Cairns is here no longer speaking of a residual right in the chairman to adjourn the meeting for any purpose on a show of hands. Here clearly the power derives from the articles, for a specific purpose--to take a poll. Were it otherwise we might still we

be in the early days of the application of Foss v. Harbottle with the chairman in a clear position to throttle discussion by adjourning. Our present articles in Table A seems to give clear directions and place appropriate restraints on the power of the chairman to adjourn the meeting. We might that Art. 39 also provides for a direction from the meeting the chairman that he adjourn, and Art. 43 clearly makes all questions of adjournment to be decided not by hand, but by a poll vote.

> 43. A poll demanded on the election of a chairman, or on a question of adjournment, shall be taken fo with. A poll demanded on any other question shall taken at such time as the chairman of the meeting directs.

(c) Demanding a poll

As we have seen, in the absence of statutory provisions respect to adjournments, and in the presence of permissive statutory provisions, it is possible for the majority of interest to lose an issue at a shareholders' meeting by simple show of hands. It is for this reason that the right demand a poll should be extended as far as is possible, as as indeed the Federal Act attempts to do.

It should be noted here that the right to demand a poll devolves into a duty upon the chairman if there is any doubt in his mind that the show of hands does not represent the re intention of the meeting, as, for example, in the case where the chairman is himself proxy-holder of shares that he is directed to vote contrary to the vote by show of hands.[224]

As to the time of the taking of the poll, the present articles are quite clear that with the exception of matters requiring immediate decision (election of chairman, adjournm

the chairman may validly postpone the taking of the poll until other business has been dealt with, so that there is no undue interruption of the meeting.

While Gower is of the opinion that where the articles direct that a demand by the chairman shall be effective, it is a further strengthening of the board since they do not run any risk of not being able to use full voting power,[225] this is in issue only where more than one person is needed to demand a poll from the floor, a situation that will hopefully be remedied by statute.

(d) The chairman's casting vote

Article 42 of Table A provides for a "second or casting vote" to the chairman either by show of hand or poll where there is an equal division on the floor.

Gower remarks that there was no such right at common law; that a chairman could only disclose the deadlock if he had not previously cast his own vote.[226] The question of the force behind this casting vote came before an Ontario County Court in Re Citizen's Coal and Forwarding Co. Ltd.[227] The company had two equal shareholders, one of whom had the management for two years and had completely prevented the other from participating in the management by the use of his casting vote as president. The application for a winding-up was based in part on the allegation of the virtual dead-lock. It countered that under the provision of the Ontario Companies Act, R.S.O. 1914, c. 178, s. 49 (3), giving the president a casting vote, no dead-lock could arise. Nonetheless the application was granted by Lavell Co. Ct. J., stating:[228]

> ...I am disposed to think that the provision is not intended to go further than to provide a ready and reasonable means of dealing with occasional or even frequent tie-votes rather than a continuous and

settled condition which here existed.

Lavell J. was aware of the following dictum by Cave J. in Nell v. Longbottom:[229]

> The institution of a second or casting vote, as it is called, is the creature of the statute law introduced for the purpose of avoiding the deadlock whic would otherwise ensue.

In that case there was an 11-11 split in votes for mayor at a borough election. The ex-mayor's casting vote (as chairman) broke the tie. Lavell J. decided that the circumstances the Ontario case distinguished it because it was a persistent deadlock. This reasoning appears to have been sustained by t decision in Re Bondi Better Bananas.[230]

As a result it appears that the lower level courts are willing to curb the effectiveness of the casting vote where i is used in an essentially oppressive manner. Perhaps some qualification in this respect could be incorporated into any standard by-law or enactment regulating the casting vote.

V. FOOTNOTES

1. Gower, Modern Company Law, 3rd, 474. Hereafter "Gower".

2. Ibid., 43.

3. 1 Blackstone, Commentaries on the Laws of England, 468 (ed. Lewis), 1897; cited by Paul P. Harbrecht, S.J. The Modern Corporation Revisited (1964) 64 Columbia L.R. 1410 at 1420.

4. Op. cit.

5. Ibid.

6. A. A. Berle and Gardiner Means, The Modern Corporation and Private Property, (New York, 1932).

7. Harbrecht, supra note 3, 1425.

8. See Earl Sneed, The Stockholder May Vote as He Pleases: Theor and Fact, (1960) 22 U. Pitts. L.R. 23; Sneed relies generall on Williston, History of the Law of Business Corporations before 1800 (1888) 2 Harv, L.R. 105 at 156.

9. Gower, 30-33.

10. Sneed, passim 23- 26.

11. Ibid. Apparently still common in France and Germany.

12. Ibid.

13. This compilation is taken from the Alberta Companies Manual, Richard De Boo Ltd., Toronto, 1969, pp. 5024-5025.

14. See, for example, the decision of Buckley L.J. in Gramophone and Typewriter Ltd. v. Stanley [1908] 2K.B. 89 (C.A.) at 105-106, with reference to the court's earlier decision in Automatic Self-Cleansing Filter Syndicate Co.Ltd. v. Cuninghame [1906] 2 Ch. 34, which decided that "even a resolution of a numerical majority [as destinct from a special majority] at a general meeting of the company cannot impose its will upon the directors when the articles have conferred to them the control of the company's affairs . . . Of course, the corporators have it in their power by proper resolutions, , which would generally be special resolutions, to remove direc who do not act as they desire . . . "

15. See F. J. Millett, Conflict between Modern Managerial Practice and Company Law (1965-67) 5 Melbourne U.L.R. 481.

16. Ibid., 491.

17. Ibid.

18. See E. C. Bovey, Consider the Rights of the Shareholders, Edmonton Journal, Monday, Aug. 25, 1975, p.4. Reprinted from The Financial Times.

19. Ibid.

20. Ibid.

21. Ibid.

22. See the decision of Fraser J. in Re Humberbank Investment Development Ltd. (172), 17 C.B.R. (N.S.) 220, and also of Grant J. in Re Cappuccitti Potato Co. (1972), 17 C.B.R.(N.S 213.

23. Re Broadway Enterprises Ltd. [1972] 6 WWR 673 (Man. Q.B.), rev'd. on appeal sub. nom. Marmel v. Burshstein and Broadway Enterprise Ltd. [1973] 4 WWR 643 (CA).

24. (1916), 32 Times L.R. 235 at 255.

25. [1924] A.C. 783

26. Id. at 786.

27. Id. at 787-788.

28. Re Investment Properties International Ltd. [1974] 1 O.R.(2d) 533 (Ont.H.Ct.), aff'd. [1974] 2 O.R.(2d) 654 (Div. Ct.) This was one of the I.O.S. companies. Another "just and equitable" winding-up order was granted to a shareholder of I.O.S. itself on the basis that the affairs of the company were in a "state of complete and irrevocable disarray and impotency": Re I.O.S. Ltd. (No. 1) (1973, 7 N.B.R.(2d) 311 (C.A.).

29. E.g. Re Bondi Better Bananas Ltd. [1952] 1 DLR 277 (C.A.) and also supra, note 22.

30. Report of the Company Law Committee (The Jenkins Report), London, 1962, at 74-75.

31. [1971] 1 WWR 8 (B.C.)

32. Companies Act, S.B.C. 1973, c.18.

33. Business Corporations Act, S.C. 1975, c. 33.

34. Id.

35. Id.

36. Id.

37. See E.D.R. Corporate Meeting Procedure: A Rationale, (1971) 57 Virg. L.R. 129 at 142-143.

38. Companies Act, R.S.A. 1970, c. 60. Table A.

39. Riguet v. Bergeron(1960) 24 D.L.R.(2d) 449.

40. Supra, note 33.

41. Supra, note 38.

42. Bryan et al. v. Western Pacific Railway Corp. 35 A2d 909.

43. Supra, note 33. Also abbreviated as C.B.C.A.

44. Ontario Business Corporations Act, R.S.O. 1970, c. 53 as amended by 1972, c. 26.

45. S.B.C. 1973, c. 18, s. 166.

46. See Model Business Corporations Act, 1969, Annotated, P. 3.03, p. 707f.

47. Supra, note 30, p. 49.

48. Id.

49. (1917) 34 D.L.R. 748 (Ont. S.C.)

50. Id., at 753.

51. Id., at 755.

52. (1877), 6 Ch.D. 70.

53. Supra, note 49, at 760.

54. Supra, note 46, at 614.

55. Supra, note 44.

56. Supra, note 32.

57. Dominion Companies Act, R.S.C., c. , s. 105(1).

58. Submission by Tory, Tory, Deslauriers & Birminton, Toronto to the Hon. Robert Andras, Minister for Consumer and Corpo Affairs on Proposals for a New Business Corporations Law f Canada, October 1972, at page 56.

59. (1904), 9 O.L.R. 3.

60. (1905), 5 O.W.N. 591.

61. Id., at 594.

62. (1918), 39 D.L.R. 401.

63. Id., at 404.

64. Id., at 406.

65. Gower, 3rd, 377.

66. [1941] 3 W.W.R. 625 (Alta. S.C.).

67. See Table A, Art. 31.

68. (1961), Que. Q.B. 405.

69. Id., at p. 409.

70. Id., at p. 410.

71. K. A. Aickin, Division of Power Between Directors and General Meeting as a Matter of Fact and Policy, (1965-67) 5 Melbourne Law Review 448.

72. [1906] 2 Ch. 43.

73. [1908] 2 K.B. 89.

74. Supra, note 71, 458.

75. Gower, 3rd, 562-563.

76. [1967] Ch. 254.

77. [1973] 2 W.W.R. 385 (B.C.S.C.)

78. [1942] Ch. 304 (C.A.)

79. Barry Slutsky, Canadian Rejection of the Hogg v. Cramphorn "Improper Purposes" Principle--A Step Forward? (1974) 37 Modern Law Review 457.

80. Id., at 460.

81. Id., at 462.

82. Interim Report of the Select Committee on Company Law (Lawrence Committee, Ontario),(1967) 75, s.3.4.

83. Id.

84. See 19 American Jurisprudence 2d, Par. 543.

85. See 9 Halsbury, 4th, par. 1293.

86. (1900) 83 L.T. 729 (Ch.D.)

87. Id., at 730.

88. Supra, note 84, par. 604.

89. Milot v. Perreault (1886), 12 Q.L.R. 193 (C.A.).

90. Supra, n. 33.

91. Supra, n. 32, s. 166.

92. Supra, n. 89

93. (1913), 133 P. 965 (Mon. S.C.)

94. Id. at 967.

95. Id.

96. (1940), 135 S.W. 2d, 873 (Ken.)

97. Id., at 875-876.

98. (1905), 81 P. 17 (Cal.)

99. Supra, n. 84.

100. Supra, n. 98 at p.10.

101. Supra, n. 89.

102. See Canada Furniture Co. v. Banning [1918] 1 W.W.R. 31 (Man.SC) at 35.

103. Id.

104. Id., at 33.

105. See Gower, 3rd, at 562-563.

106. (1887) 12 App. Cas. 586.

107. Supra, n. 8 at 32

108. (1973), 38 DLR(3d) 17 (B.C.S.C)

109. Id., at p. 20-21.

110. Id., p. 22.

111. Supra, n. 102.

112. Supra, n. 98.

113. Id., at 20.

114. 19 Am.Jur. 2d, par. 611.

115. [1945] 1 Ch. 271 (C. A.)

116. (1870), 22 L.T. 400.

117. Supra, n. 115 at 273.

118. Id., at 275.

119. R.S.O. 1970, c. 60.

120. Model Business Corporations Act, 1969, Annotated, Section 29, par. 3.01.

121. [1917] A.C. 607 (P.C.)

122. Id., at 617-618.

123. Id.

124. (1920), 67 O.L.R. 328.

125. Id.

126. [1961] B.R. 405 (Que.)

127. (1961), 31 D.L.R. (2d) 65.

128. Id., at 82-83.

129. Id., at 87.

130. (1969), 70 W.W.R. 649 (B.C.S.C.)

131. Id., at 650.

132. Id., at 652.

133. Id., at 653.

134. Id., at 656, quoting Spence J. in Garvie v. Axmith [1962] O.R. 65 at 84.

135. 2 Hare 461.

136. [1902] A.C. 83 at 93.

137. [1908] 1 Ch. 84.

138. See E.D.R., Corporate Meeting Procedure: A Rationale (1971) 5 Virg. L.R. 129 at 133.

139. [1932] 1 DLR 391 (Alta. A.D.)

140. [1933] 1 DLR 192 at 204, 206-207.

141. Ashbury Railway Carriage and Iron Co. v. Riche (1875) LR 7 HL 653 per Cairns L.C. at 675.

142. [1895] 1 Ch. 674 at 686.

143. [1931] 3 WWR 671 (C.A.).

144. Eg. Pictou County School Trustees v. Cameron (1879), 2 SC and Bartlett v. Bartlett Mines Ltd., (1911), 24 OLR 419 (

145. [1965] SCR 681.

146. [1946] O.W.N. 938.

147. Alberta Companies Manual, p. 5019.

148. Model Business Corporations Act, 1969, Annotated, p. 604.

149. See Young v. Jebbel 211 N.Y.S. 61 (A.D.)

150. 19 Am.Jur. 2d, par. 618.

151. See Alberta Companies Manual, p. 5026.

152. (1928), 62 O.L.R. 635.

153. Id. at 650.

154. (1929), 63 OLR 190 (C.A.)

155. Supra, n. 152, at trial, p. 651.

156. [1945] 2 WWR 309 (B.C.)

157. Relying on Pender v. Lushington [1877] 6 Ch.D. 79

158. Supra, n. 156 at 314, 315.

159. Id., at 316.

160. Cited as (1857), 119 E.R. 1286.

161. Cited as 1921 AC 631.

162. Supra, n. 156, at 317.

163. (1957), 23 WWR 228 (B.C.)

164. Id., at 231.

165. Id.

166. Gower, 3rd, 490.

167. Supra, n. 146.

168. Id., at 942.

169. Id., at 943.

170. Id., at 945.

171. 1951 3 DLR 522, partly reversed on other grounds, 1952 1 DLR 277.

172. Id., at 532.

173. Supra, n. 146, at 941.

174. Id.

175. Id.

176. Carroll R. Wetzel, Conduct of a Stockholder's Meeting, The Business Lawyer, Jan. 1967, p. 303 at 311.

177. Specifically, the California, Delaware, New Jersey, New York and North Carolina statutes were consulted.

178. 1941 3 DLR 96.

179. Id., at 104.

180. (1924), 26 OWN 443.

181. Id., at 445.

182. Supra, n. 176 at 311-312.

183. Guide for the Conduct of Annual Meetings, Society of Corporate Secretaries, Inc. 1970, reproduced at p. 160 of Structuring the Annual Meeting, Practising Law Institute, New York City, 1972.

184. At pp. 5111J-5123.

185. Supra, n. 176 at 312.

186. Id., at 312-313.

187. [1896] 2 Ch. 268 at 277.

188. (1915), 9 WWR 487 (B.C.S.C.).

189. Gower, 3rd, 489.

190. Henderson v. Louttit (1894), 21 R. (Ct. of Sess.) 674.

191. See Frank Shakelton, The Law and Practice of Meetings, 5th, London, 1967, p. 38.

192. See Re Morris Funeral Services Ltd., (1957), 7 DLR (2d) 64

193. See Re Cowichan Leader Ltd. (1963) 45 WWR 57.

194. Gower, 3rd, 489.

195. East v. Benett Bros. Ltd., [1911] 1 Ch. 163.

196. Supra, n. 191 at 4.

197. Supra, n. 138 at 138.

198. Id., at 140-141. The pertinent footnotes to the article are reproduced below:

> [63] *Id.* at 779, 211 N.Y.S. at 66.
>
> [64] 17 Del. Ch. 140, 151 A. 223 (Ch.), *aff'd*, 17 Del. Ch. 376, 152 A. 849 (Sup. Ct. 1930).
>
> [65] 17 Del. Ch. at 385, 152 A. at 853, *quoting* 17 Del. Ch. at 149, 151 A. at 227-28.
>
> [66] A more recent example of the judicial tolerance of corporate *faits accomplis* is *In re* Election of Directors of Bushwich Sav. & Loan Ass'n, 189 Misc. 316, 70 N.Y.S.2d 478 (Sup. Ct. 1947), where an adjournment was necessitated by the unruly behavior of shareholders at the annual meeting. In rejecting a challenge to the title of the directors elected at the reconvening of the meeting, the court noted that an adjournment would be proper if a meeting could not be continued peacefully, and that election of directors at the reconvening would be in accord with accepted usage and common practice. *Id.* at 319, 70 N.Y.S.2d at 481. Similarly, in Burke v. Wiswall, 193 Misc. 14, 85 N.Y.S.2d 187 (Sup. Ct. 1948), on the basis of accepted usage the court upheld the authority of election inspectors to invalidate proxies that were patently defective, even though there was no statute or bylaw authorizing such conduct.
>
> [67] 345 Ill. App. 110, 102 N.E.2d 565 (1951).

199. Id. The pertinent footnotes are below:

> [68] *Id.* at 116, 102 N.E.2d at 567.
>
> [69] 51 Misc. 2d 803, 274 N.Y.S.2d 283 (Sup. Ct. 1966).
>
> [70] *Id.* at 805, 274 N.Y.S.2d at 285.
>
> [71] 232 Pa. 53, 81 A. 153 (1911).

200. (1884), 26 Ch.D. 70.

201. Id., at 77.

202. (1929), 41 BCR 478 (B.C.)

203. (1906), 15 Que. K.B. 345.

204. (1957) 23 WWR 228 (B.C.S.C.).

205. [1960]OWN 160 (C.A.).

206. (1912), 22 Man.R. 441.

207. Id., at 445.

208. Id., at 446.

209. (1890), 45 Ch.D. 331 (C.A.).

210. Id., at 346.

211. Id., at 348.

212. [1898] 2 Ch. 469 (C.A.).

213. Id., at 472.

214. Id., at 473.

215. Id., at 483-484.

216. 1946 OWN 938 at 943.

217. (1881), 28 Gr. 533, cited and quoted by Macfarlane J. in Bluechel and Smith v. Prefabricated Bldgs. Ltd. and Thomas [1945] 2 WWR 309 at 314-315.

218. Gower, 3rd, 493.

219. Id., at 492.

220. It also appears that the election of a chairman may, unless the articles otherwise provide, be by mere show of hands: per Gower, 3rd, 493. This makes sense, since, until the chair is occupied, such business as the taking of polls can in the absence of existing guidelines be reasonably transacted.

221. (1875), 1 Ch. 13.

222. (1956) 17 WWR 209 (Alta. S.C.).

223. Id., at 214-215.

224. Gower, 3rd, 493-494, cites the case of Second Consolidated Trust v. Ceylon Amalgamated Estates [1943] 2 All E.R. 56 in support.

225. Id., at 493.

226. Id., at 495.

227. [1927] 4 DLR 235.

228. Id., at 276-277.

229. [1894] 1 Q.B. 767 at 771.

230. See infra at 101.

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