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Time (and Process) of the Essence: Ontario Court Accelerates Timing of Requisitioned Meeting

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A recent decision of the Ontario Superior Court of Justice represents a rare victory for activists in overturning a target board's proposed timing for setting a requisitioned meeting. While Canada is generally viewed as an activist-friendly jurisdiction, due in part to the relative ease with which a shareholder may demand that a special shareholder meeting be called, the ultimate timing of that meeting is in the discretion of the board. Canadian courts have rarely interfered with a board's exercise of that discretion, even when the meeting date was set several months after the requisition. The decision includes important guidance for boards and shareholders seeking to bring their case for change before their fellow shareholders, particularly if they can demonstrate that the requisitioned meeting is urgent. The decision emphasizes that the right to requisition a meeting is "fundamental" and that a board's decision in scheduling the meeting is deserving of careful scrutiny, both in the process undertaken to reach that decision and the substantive reasons advanced by the board to justify it.

Background

In *Sandpiper Real Estate Fund 4 Limited Partnership v First Capital Real Estate Investment Trust*, 2023 ONSC 794, two activist investors, the Sandpiper Group and Artis Real Estate Investment Trust (together, the Shareholder Group), submitted a meeting requisition with the goal of replacing four of nine of the issuer's trustees to oversee the implementation of the issuer's recently announced capital allocation plan (the Plan), which included the sale of certain assets by the real estate investment trust. The requisition asked the Board to call a unitholder meeting no later than March 1, 2023, some two-and-a-half months after the requisition. On December 30, 2022, the issuer announced a combined annual and special meeting of unitholders to be held on May 16, 2023, five months after the requisition.

The Shareholder Group applied to the Ontario Superior Court of Justice (Commercial List) to compel the issuer to hold a special meeting on March 1, 2023, or as soon as practical thereafter, citing concern over the possibility of assets being sold under the Plan before the meeting is held.

The Decision

The court noted that although there is no specific timeframe for holding a requisitioned meeting, unitholders have a "fundamental right" to have the meeting held expeditiously. While this does not imply a right to have a meeting held immediately or at the soonest available date, it does imply an obligation to hold the meeting "without unreasonable or unjustifiable delay." Still, boards generally enjoy deference under the business judgment rule in determining the appropriate timing for a meeting.

The court looked to the Board's process and whether it applied an appropriate level of prudence and diligence in its decision to schedule the meeting. The court took issue with the process undertaken by the Board, namely that the Board had only held one two-hour meeting at which the requisition was only one item on the agenda, and that the trustees targeted by the Shareholder Group participated in the deliberations. The court found that this process failed to demonstrate the required independence and objective process that would warrant deference under the business judgment rule. As a result, the court proceeded to examine whether the special meeting was called within a reasonable timeframe.

The factors cited by the Board included (i) the costs and distractions of holding two meetings; (ii) the desire to give time for the issuer's strategy to unfold and for financial results to be available for unitholders and proxy advisory firms to appropriately assess the strategy; and (iii) the desire for unitholders to have more time to consider the issues to be raised at the special meeting.

While the court recognized that concerns regarding the cost and distraction of holding two meetings are frequently cited by target boards, these concerns had more relevance for a smaller company facing financial challenges. For the issuer, the cost was relatively small considering its size, and the issuer had previously held unitholder meetings in close succession.

Similarly, the purpose of the special meeting was, in part, to refresh the Board in order to supervise the execution of the issuer's Plan. Delaying the meeting to allow the Plan to unfold would thwart the very purpose of the meeting, which was to allow unitholders to consider whether they wanted the existing Board to continue with their plans. Moreover, the Board cited unspecified events that, if they transpired, would be reflected in the first quarter results, and should be considered by shareholders. The court concluded that this was too vague and speculative a reason, given that the issuer could not point to any specific transaction or event that could justify the Board's decision to delay the meeting. Further, the Shareholder Group was willing to agree to the May meeting so long as the Board would provide an undertaking not to dispose of any further assets under the Plan in the interim.

Ultimately the court ordered the issuer to hold the requisitioned meeting as soon as practicable after March 1, 2023.

Key Takeaways

1. **A board's decision in a contested situation will be heavily scrutinized, with a focus on management of conflicts.** In its evaluation of the Board's decision-making process, the court cited similar cases in which boards made use of special committees and met frequently prior to making key decisions that would warrant the protection of the business judgment rule in the context of proxy contests. The decision suggests that boards should carefully evaluate whether directors specifically targeted for removal may be viewed by a court as being conflicted and, if necessary, consider conducting deliberations in the absence of those directors. In addition, the fact that the Board formally considered the requisition only once and as part of a board meeting with unrelated agenda items was viewed as insufficient. This finding highlights the need for boards to demonstrate that they devoted sufficient time and focus to decisions, especially when responding to the exercise of one of a shareholder's fundamental rights.
2. **A board's response must be tailored to the specific circumstances.** The Shareholder Group primarily sought to prevent the issuer from following through on its Plan, which included selling assets and increasing distributions. In its reasoning for setting the meeting in May, the Board focused on the costs and distraction of holding two separate meetings and on the fact that it was preferable to wait an additional quarter so that the Plan would have more time to play out. Although the argument of saving costs by combining meetings is frequently used, it appears this will no longer justify the deferral of a requisitioned meeting in cases where the cost savings are nominal relative to the resources of the company. Boards should instead consider the specific circumstances of the company, including its size and potential near-term material developments, in setting the timing of a meeting. On the second consideration, the court found that by delaying the meeting by five months, the Shareholder Group's goal of checking the Board's oversight of the optimization Plan was undermined.
3. **Parties to a contested situation can benefit from demonstrating responsive engagement.** Activists are well served by trying to show that they are accommodating to the board's concerns. The Shareholder Group was prepared to accede to the May meeting date, provided that the Board undertook not to proceed with any further asset dispositions under the Plan prior to the meeting. The court discussed this decision in its reasons and referred to the *Wells v Bioniche* case in which the company at issue had also determined to hold a meeting later than was requested by the activist, but unlike the issuer in this case, also provided a commitment not to take certain actions prior to the requisitioned meeting. The commitment in the *Wells* case allayed concerns surrounding the timing of the meeting. In the case of the issuer, the court found that the very purpose of the requisition was being frustrated by pushing out the meeting to allow the Plan to unfold.

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