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Résumé de l'article

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Néanmoins, il reste quand même quelques problèmes non résolus et auxquels la jurisprudence n'a pas encore trouvé de solution définitive, notamment l'existence d'un droit dérivé de la jurisprudence à la dissidence en l'absence d'un mécanisme statutaire spécifique; l'effet du recours au mécanisme de dissidence dans des cas où on peut inférer un consentement de fait ou un assentiment à la décision corporative; l'étendue du mécanisme de dissidence en regard des responsabilités statutaires telles que la responsabilité du directeur pour le salaire des employés; et des problèmes quant aux délais à respecter pour la formulation de la dissidence.

Commentaires

THE DIRECTOR'S DISSENT

par Lazar SARNA*

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PLAN

INTRODUCTION

Although much legal writing has for some time been concerned with the rights of the dissenting shareholder, little overt concern has been expressed for the rights and duties of the dissenting director. Although the minority director may often find himself oppressed, squeezed out and out-voted in a manner analogous to the position of the minority shareholder, a close review of the problem of dissent has not been given analogous attention. The purpose of the present essay is to analyse the dissent mechanisms available and to discuss problems inherent in the current statutory framework governing the minority director.

A dissent in the field of corporation law is an expression of *opposition* to a resolution or decision, generally manifested by way of a negative vote or written denial of consent. A director's dissent to a resolution of the board of directors by vote or written protest may be expressed during a meeting of the board or, in some circumstances, following the adjournment of the meeting. Dissent is to be distinguished from an abstention which is merely a refusal to participate in the decision-making process respecting a given resolution or act. Dissent is furthermore to be distinguished from an *opposition* which in general terms refers to a mere statement of disagreement with a proposed decision which may or may not be confirmed by the opposant upon the final vote taken.[1] As will, it may be said that simple absence does not constitute dissent even though absence from a meeting of directors by one of its participants may signify an overt act of boycott of or disagreement with any proceedings carried on by the board.

The most apparent result of dissenting from a board decision is to exonerate the director from liability which is imposed upon him if the act turns out to contravene the governing statute or his specific duty to exercise due care and skill. Secondary reasons for dissenting include, or course, an honest disagreement with the decision taken on the basis of the director's own perception of what is best for the corporate welfare. As well, a director having been appointed by a certain faction of shareholders and feeling himself *obliged* to follow instructions of his constituents may dissent in order to reflect the views of those who place him in office. Finally, a director may

1. In at least one corporation statute, the term "opposition" connotes a written statement of disagreement to any proposed action or resolution of directors or shareholders who propose to fill the office vacated by the director: *Canada Business Corporations Act*, S.C. 1974-75, c. 33, s. 105 (2).

dissent purely for reasons of politics or personality relevant to the board itself, or for reasons of simple ignorance.

There are very few alternatives to the dissent mechanism which are available to a minority director to accomplish some or all of the purposes just mentioned. Resignation in order to effect an exoneration of liability must be timely. A resignation from office following the declaration and commission of an improper corporate act by the board of directors may not prove to be a bar to suit by an interested party. Similarly, absolute non-intervention in the functioning of the company by way of abstention or absence is not equivalent to declaring to the co-directors that there exists fundamental disagreement over the enactment or execution of certain corporate acts undertaken by the board.

I. DISSENT MECHANISM

A- Restrictive application and sources

There are varying levels of concern expressed for the dissenting director in the different corporation statutes in Canadian jurisdictions. The following categorization of statutes is based more on the detail set out in the law, than on the nature or quality of the provisions. On the more rudimentary level, reference may be made to the dissent provisions contained in the *Quebec Companies Act* which exonerates a director from liability for a transfer of shares not fully paid and for the declaration and payment of improper dividends, if he protests against the action forthwith when he is present at the meeting of directors which sanctions the act or, if absent, if he enters his protest on the minutes of the board of directors within twenty-four hours after he becomes aware of the action and is able to do so; he must furthermore within eight days following his protest publish the same in at least one newspaper published at the place in which the head office or chief place of business of the company is situated.[2]

Parallel provisions may be found in the *Canada Corporations Act*[3] and the *Alberta Companies Act*;[4] the latter statute provides that the director may exonerate himself from liability for unauthorized dividends declared at a meeting of directors at which he was present provided he forthwith requests the entry on the minutes of

2. *Quebec Companies Act*, R.S.Q. 1964, c. 271, ss. 69, 91, 160, 183.

3. *Canada Corporations Act*, R.S.C. 1970, c. C-32, ss. 40 (3), 85 (6).

4. R.S.A. 1970, c. 60, s. 89 (4).

the board of his protest against the resolution, or if he is absent from the meeting, that he delivers to the president, secretary or other officer of the company his protest within one week after he becomes aware of the resolution and is able to do so. The director is also obliged within eight days after his protest to deliver or mail by registered letter, in duplicate, copy of his protest to the registrar of companies.

The statutory predecessor of dissent provisions of the *Quebec Companies Act* appeared in similar form as sections 33 and 46 of the *Act respecting the incorporation of joint stock companies of 1868*,[5] although an earlier version of the provision appearing in 1846 is more reminiscent of the version contained in the *Canada Corporations Act*. The legislation of 1846 provided a mechanism for expressing dissent by the deposit and not publication by a director before payment of an illegal dividend, of a written statement of his opposition at the office of the secretary of the company as well as at the registration office of the local county.[6]

Further mention may be made of the provisions of the *Bankruptcy Act*,[6a] specifically section 79 which grants exoneration from liability to dissenting directors for payment of dividends or sums used to redeem or purchase shares for cancellation at a time when the corporation is insolvent. The provision apparently views dissent as a protest "in accordance with any applicable law governing the operation of the corporation" having an exonerative effect under such law. Although section 79 of the *Bankruptcy Act* was enacted in 1966-67,[6b] conformity to dissent mechanisms established by subsequent company legislation would have an exonerative effect vis-à-vis the trustee in bankruptcy.

B- Wider application of dissent mechanism

On a more detailed level of drafting, reference may be made to the *Ontario Business Corporations Act*[7] which provides in section

5. 31 Vict. 1868, c. 25 (Que.). The predecessor of sections 40 (3) and 85 (6) of the *Canada Corporations Act* may be found in the *Companies Clauses Act*, 32-33 Vict., c. 12, ss. 24 and 37.

6. Acte pour pourvoir à la formation des compagnies incorporées à fonds social, pour des fins relatives à la manufacture, aux mines, à la mécanique ou à la chimie, 13 & 14 Vict., c. 28, s. 14.

6a. R.S.C. 1970, c. B-3.

6b. S.C. 1966-67, c. 32.

7. R.S.O. 1970, c. 53 as amended, S.O. 1971, c. 26, s. 21 (1) (2).

137 that a director who is present at a meeting of the board of directors or of a committee of the board shall be deemed to have consented to a redemption, purchase or acceptance for surrender of shares of the corporation, or a declaration and payment of a dividend or a prohibited loan authorized at the meeting, unless his dissent is entered in the minutes of the meeting. He may file his written dissent with the person acting as secretary of the meeting before its adjournment, or deliver or send his dissent by registered mail to the corporation immediately after the adjournment of the meeting. The director is further required to send a copy of his dissent by registered mail to the minister in charge of the administration of the act within seven days of his dissent, although a director who has voted in favour of the enumerated acts at the meeting is not entitled to dissent. An absentee director will be deemed to have consented to the authorization of the share redemption, dividend declaration or prohibited loan unless he delivers or sends to the corporation by registered mail his dissent or causes his dissent to be filed with the minutes of the meeting within seven days after he becomes aware of the authorization of the acts, and within seven days thereafter sends a copy of his dissent by registered mail to the minister.

It is to be noted that the dissent provisions apparently have application only with respect to resolutions affecting the acts enumerated in the provisions and to no other.[8] Furthermore, it has been suggested that the director who fails to send a copy of his dissent to the minister is deemed to have consented to the resolution even if he has submitted his dissent to the corporation.[9] This view is evidently based upon the literal interpretation of sub-section 137 (f) which cannot be read as providing a merely facultative obligation to advise the minister. There is at least one reported judicial ruling which holds that the procedures respecting dissent must be strictly complied with in order to permit the director to exonerate himself from liability: accordingly, where a dissenting director sends a letter of protest to the general manager of the company with a request that the same be entered on the minutes of the company books, the court will not relieve the director of his responsibility for the payment of improper dividends where the statute requires that his protest be published as well. A protest in writing followed by a subsequent resignation referring to the earlier protest does not constitute

8. See generally, Samuel LAVINE, *The Business Corporations Act: An Analysis*, Carswell Company Limited, 1971, p. 223.

9. IACOBUCCI et al., *Canadian Business Corporations*, Canada Law Book Limited, 1977, p. 325.

sufficient compliance with the statute requiring publication of protest.[10]

The provisions of the Ontario statute are largely based on the *New York Business Corporations Law* which consolidates previous statutory prescriptions and incorporates established principles of case law on the matter.[11] From the point of view of organization and derivation, the Law owes much of its inspiration to the *Model Business Corporations Act* of the American Bar Association Committee on Corporate Law which permits exoneration of liability by way of dissent from any corporate matter in providing succinctly:

> "A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken, shall be presumed to have assented to the action taken, unless his dissent shall be entered in the minutes of the meeting, or unless he shall file his written dissent to such action with the secretary of the meeting before the adjournment thereof, or shall forward such dissent by registered mail to the secretary of the corporation, immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favour of such action."[12]

A majority of states currently have legislation identical or similar in whole to the provisions of the *Model Business Corporations Act* or contain a statutory dissent mechanism for the purposes of exonerating directors from any or specific corporate actions taken by the board.[13]

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10. *Meyer Malt and Grain Corporation* v. *Coombs*, (1932) 3 D.L.R. 396 affirmed on other grounds (1933) 2 D.L.R. 374.

11. *Business Corporations Law*, McKinney's Consolidated Laws of New York, Annotated, Book 6, s. 719 (b) which provides:

> "A director who is present at a meeting of the board or any committee thereof when an action specified in paragraph (a) is taken, shall be presumed to have concurred in the action, unless his dissent thereto shall be entered in the minutes of the meeting, or unless he shall submit his written dissent to the person acting as the secretary of the meeting before the adjournment thereof, or shall deliver or send by registered mail such dissent to the secretary of the corporation promptly after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favour of such action. The director who is absent from a meeting of the board of any committee thereof when such action is taken shall be presumed to have concurred in the action unless he shall deliver or send by registered mail his dissent thereto to the secretary of the corporation, or shall cause such dissent to be filed with the minutes of the proceedings of the board or committee within the reasonable time after learning such action."

12. *Model Business Corporations Act Annotated*, 2nd Edition, 1971, s. 48.

13. *Ibid*, see generally pp. 4 to 8; see also KNEPPER, *Liability of Corporate Officers and Directors*, 1969, p. 53, No. 4.11.

The *British Columbia Companies Act*[14] repeats with some modification the procedural steps toward effecting dissent contained in the Ontario statute. The former statute adds to the nature of resolutions which may be subject to the dissent proceeding by including such matters as unauthorized commissions, indemnities to former directors and compensation. There is furthermore no requirement that the director send a copy of his dissent to the minister in charge of the administration of the Act. By contract, the federal *Canada Business Corporations Act*[15] and the *Saskatchewan Business Corporations Act*[16] make applicable the dissent formula to any resolution passed or action taken at a meeting of the directors of committee of the directors.[17] As well, these statutes contain no provision respecting notification to the relevant minister of the dissent.

II. PROBLEMS OF DISSENT

A- Dissent in the absence of statutory exoneration

Notwithstanding the existence of statutory dissent mechanisms, consideration must as well be given to the possible existence of a right of dissent in Canadian jurisdictions where the mechanisms do not apply or where the specific statutory right of dissent is absent.

There is American judicial precedent upholding the principle that in the absence of a statutory provision for exoneration a director may avoid liability by dissenting even though the dissent is not a formal written protest, has not been presented to the other directors, and has not been recorded in the books of the company.[18] A summary response respecting Canadian corporations may be similar in nature, especially when one considers the statutory right

14. S.B.C. 1973, c. 18, s. 150. As amended S.B.C. 1977, c. 33, s. 17.

15. S.C. 1974-75, c. 33, s. 118 (1) (2) (3).

16. S.S. 1976-77, c. 10, s. 118 (1) (2) (3).

17. To the same effect, see the *Manitoba Corporations Act*, S.M. 1976, c. 40, s. 118. The draft of the law suggested by Dickerson et al., provided a dissent mechanism for specified resolutions of the board: DICKERSON et al., *Proposals for a New Corporations Law for Canada*, (1971), Vol. I, p. 78, Nos. 223, 224; Vol. II, p. 72, No. 9.17; generally, J.L. HOWARD, "Directors and Officers in the context of the Canada Business Corporations Act", (1976) *Meredith Memorial Lectures* 300.

18. *Schofield* v. *Henderson*, 67 Ind. 258, 264; *Fletcher Cyclopedia Corporations*, Volume 3A, No. 1224 and No. 1238.

to dissent as an extraordinary remedy to an extraordinary legal duty. Statutes such as the Quebec and Ontario corporation laws limit the right to dissent to specific acts of the board of directors. At the same time, the degree of responsibility for the same acts are severe in one respect, namely a presumption of consent is created by the simple absence of the director from the meeting at which the corporate act is decided. The degree of severity is not in keeping with the general principle in Canadian corporate law best exemplified in *Re Dominion Trust Company*[19] where the Court of Appeal of British Columbia in reviewing the judgment of first instance held:

> "The judge set himself the task of deciding in the first place whether or not there was evidence to sustain the charges against all or any of the directors and officers charged with misfeasance. He came to the conclusion that certain of the directors who had taken no active part in the management of the company's business were not answerable for what had been done or omitted by the board. I think the judge came to the right conclusion in respect of these directors. They attended no meetings of the Board and are not shown to have been cognizant of any of the acts of commission or omission complained of."[20]

The decision in large measure is based on the prevailing English doctrine that neglect or omission to attend meetings is not the same thing as neglect or omission of a duty which is to be performed at those meetings.[21]

The English law has tended to regard directors as trustees by analogy only and has therefore recognized not only the practical existence of active as opposed to passive directors, but has also conceded the inevitability of lazy directors. Consequently, a director who is absent from a meeting or is not a party to a corporate decision will not be liable for losses incurred unless his failure to participate can be demonstrated to be a direct cause of the damages suffered. There is therefore no presumption of consent to a particular decision of the board, nor is there any burden of proof upon the passive director to demonstrate that his inactivity or abstinence from the decision-making did not result in the alleged damages.[22] The courts have held that mere presence at a meeting where the minutes of the

19. (1917) 32 D.L.R. 63 (BCCA).

20. Per MacDonald C.J.A. at p. 63.

21. The Court cited the case of *Marquis of Bute*, (1892) 2 Ch. 100.

22. See generally *Re City Equitable Fire Insurance Company*, (1925) Ch. 407; GOWER, *The Principles of Modern Company Law*, 3rd Edition, 1969, p. 551; Fraser & Stewart, Company Law of Canada, 1962, pp. 629, 632.

previous meeting were confirmed is not alone sufficient to make the directors liable for illegal acts committed by co-directors at the first meeting.[23] The notion that some form of active dissent is required to avoid liability is not a current one and the lack of such currency accounts for the absence of or acts as a substitute for specific dissent provisions in English corporation statutes.

It may therefore be argued that those provisions of law such as section 92 (illegal loans) of the *Quebec Companies Act* which provide for directors' liability in the event of consent or assent to an illegal corporate act, but which do not specify the availability of a dissent mechanism impose upon the director no presumption of consent and do envisage the possibility of active dissent as means of exoneration, although purely as a matter of evidence and not as condition precedent. On the other hand, statutes containing general dissent provisions similar to that of the *Canada Business Corporations Act* do create a presumption of consent or assent and therefore require a formal dissent as a pre-condition to exoneration.

Far from being a means of facilitating exoneration, current statutory dissent provisions testify to an onerous degree of duty owed by directors more reminiscent of the prevailing French doctrine on the matter.[24] In this regard, it is hoped that some measure of uniformity respecting the degree of duty may be established within each corporation statute in order to provide the director with some general guideline as to liability for both intervention and non-intervention in all corporation matters. At the

23. *In Re Lands Allotment Company*, (1894) Ch. 616, *Moxham* v. *Grant*, (1900) 1 Q.B. 88; *Lucas et al.* v. *Fitzgerald et al.*, (1903) 20 T.L.R. 16; *Cullerne* v. *London and Suburban General Permanent Building Society*, (1890) 25 Q.B.D. 485 which has held that directors who enact a resolution are not the servants or agents of an absent director for the purpose of making the latter liable for illegal acts committed. See also *Re Montrotier Asphalte Company* (Perry's case), (1876) 34 L.T. n.s. 716; *Land Credit Co. of Ireland* v. *Lord Fermoy*, (1870) L.R. 5 Ch. App. 763.

24. The French tradition has had negligible influence on the development of Canadian corporation law. Unlike English law, the French doctrine does not regard the duties of the director as flowing from or analogous to the institution of the trustee: liability of a director arises from proof of his fault. Nevertheless, while simple absence from a meeting at which the corporate act was decided does not in itself constitute proof of a fault, the burden of proof according to recent French jurisprudence lies upon the director to demonstrate that his absence from the meeting of the board was not a cause of the resulting loss. In this regard, evidence of the impossibility of attendance at the meeting may be sufficient to displace the burden of proof imposed upon the administrator: see, for example, ESCARRA & RAULT, *Traité théorique et pratique de droit civil*, t. 4, 1959, p. 318; F. DESEURE, *Responsabilité des administrateurs dans les sociétés anonymes*, 1901, p. 41, No. 67; Marc GIGUÈRE, *Les devoirs des dirigeants de sociétés par actions*, 1967, pp. 55-59.

same time, one would prefer to see the adoption of the general dissent mechanism suggested by the A.B.A. *Model Business Corporations Act* in all Canadian jurisdictions for reasons of interjurisdictional uniformity. While the general dissent approach has the effect of imposing a greater burden on the director, it is suggested that a legislative innovation having the effect of requiring a director to do little else than read the minutes of directors' meetings can only have a salubrious effect on the long-term welfare of the corporation.

B- De Jure Dissent, De Facto Consent

Questions may now be posed respecting the absolute nature of a dissent executed in conformity with statutory prescription. For example, what is the liability of a director who dissents according to law but who participates in the benefits arising from the resolution attacked. The wording of those statutes providing a specific or general dissent mechanism leaves the impression that a *de jure* dissent entails absolute exoneration from liability notwithstanding *de facto* consent by way of subsequent participation in the benefits arising from the enforcement of the resolution. In the same vein, the law does not formally take into consideration the liability of the director who is the *agent provocateur* of a resolution, but who specifically absents himself from the meeting in order to subsequently file a dissent, thereby avoiding liability. While this situation of the "double-crossing" director may practically never repeat itself during the tenure of the specific director, the chances of the manoeuvre being practised are not to be discarded as minimal.

While the English case law is concerned with attaching liability to those directors causing loss, an American precedent has held that a declaration of dissent may be disregarded, or absence from the decision-making process construed as ratification where the director confirms an additional debt on the same improper contract[25] or performs any act which approves the board decision.[26] A similar position must be adopted with respect to the Canadian experience: after all, the dissent mechanism is a formal expression of the role of the director. The performance of acts contrary to that formal expression should entitle the courts to apply the notion of waiver or fraud in order to pierce the veil of protection accorded the

25. *Cornwall & Maize* v. *Eastham*, 2 Bush 561.

26. KNEPPER, *supra*, p. 55, No. 4.11.

director by mere compliance with statutory formality.[27] On the other hand, it may be argued with equal force that losses incurred by the company are caused by and can only be attributed to the majority directors who voted for the improper resolution; no degree of subsequent ratification can have the effect of considering the otherwise dissenting director a contributing cause of the loss. In this regard, Canadian corporation statutes refer to liability of directors on the basis of their having voted for or assented to an improper resolution and having declared, that is, caused, the enactment of an improper corporate act. Again, the American approach appears most appealing in that it assumes the director is an organic part of the board without at the same time having him automatically assume the responsibility for bad or illegal decisions from which he has absolutely divorced himself.

C- Absolute Exoneration

Another major concern is the wording of the dissent provisions in statutes similar to the *Canada Business Corporations Act* which permits dissent from any "resolution". One is immediately tempted to query whether a director may exonerate himself from the liability imposed by statute for such debts as arrears of employees' wages by inspiring, promoting and later dissenting from a resolution of the board of directors which simply decides that wages of employees of the company shall be paid. That is, can a director who is held by statute to compensate employees in part for lost wages avoid the liability by dissenting from a resolution "that all wages, or arrears thereof, be paid to the employees of this company". No doubt the immediate response to the query is that the statutory liability of directors for unpaid wages cannot be waived by the mechanism of dissent in the form suggested: the resolution is not strictly speaking a resolution in that it provides a mere confirmation that the corporation will duly execute its existing wage agreements. Nevertheless, the response does not take into consideration a situation where a director opposes and dissents from a resolution calling for the engagement of a certain number of employees whose term of employment will commence only following the adoption of the resolution: such a resolution might declare that "Mr. Smith be engaged at a salary of $30,000.00 commencing one month from the date of these presents". However, the initial query must be answered

27. This notion may in part stem from the obligation of the director to perform his functions honestly and with due diligence.

by saying that liability for wages, mentioned for example in section 114 of the *Canada Business Corporations Act,* is not conditional upon a vote for the engagement of the employee in question, is a matter of public policy, and is subject to no limitation, except that provided for in the provision.[28]

D- Conflict of Application

It is to be noted that where the jurisdiction permits the management of a company by a one-man board, or where the board through vacancy or resignation is reduced to one man, the dissent provisions will not have application to the single director who actually administers the affairs of the company. The one-man board cannot and should not, of course, be permitted to enjoy the absurdity of a dissenting vote for the only member.

Further, it may be seen that the dissent mechanism modifies certain statutory presumptions respecting the meeting and voting of the directors. For example, section 109 of the *Canada Business Corporations Act* provides that in certain corporations the directors shall not transact business at a meeting of directors unless a majority of directors present are resident Canadians. Assuming that a board consisting of nine members meets: those present constitute three Canadian and two American residents. The subsequent declaration of dissent by two non-Canadian residents who were absent from the meeting would apparently have the effect of giving the vote count a distinctly non-resident quality. While the non-resident provisions of the Act refer to a resident or non-resident presence at the meeting, it is assumed that the purpose of the provisions is to prescribe the resident content of the decision-making process at the meeting. It may therefore be said that the dissent provisions may indirectly derogate from the purpose of the resident meeting rule, thereby causing some concern over the effect of the business transacted. Statutory elaboration discounting the effect of a non-resident dissent would be expected to provide some clarification.

E- Procedural Problems

There are questions which may be posed respecting the delays stipulated for the expression of dissent. First, what is the effect of

28. Namely, prior suit of the corporation or the proving of the claim in liquidation or bankruptcy proceedings, and the limitation of time for suit and amount for execution. But see s. 118 (4) with respect to a defence of good faith.

the death of the director which transpired prior to the expiry of the delays for dissent? The proposition which one may seek to posit is that death occuring within the stipulated dissent period exonerates the deceased director from liability in the same way as formal dissent. Aside from having a philosophical aversion to reducing the significance of death to such a particular legal consequence, it would be formalistic to require that some form of dissent be made by representatives of the director's estate. To require trustees and executors of the director's estate to participate in such a manner in the affairs of the company, although for purely exonerative purposes, would not be practical. It would furthermore be unfair to impose a liability upon the estate of the director purely for the reason of intervening death, without taking into account the absolute impossibility of performance as a result of the transition.

From the procedural point of view, it may be suggested that a director who learns of an illegal corporate act solely as a result of reading an action and statement of claim served upon him alleging his liability as director for the act, can within the delay stipulated by the various corporation statutes file his dissent and consequently, non-suit the plaintiff. However, a party who has instituted proceedings against the director must make some assumption respecting the position of the non-voting or absent director and should not be forced to support the burden of judicial costs in the event of non-suit. On the other hand, the director who was absent at the relevant meeting and who was absolutely unaware of the illegal act should equally not be required to pay costs of the action as a result of his compliance with the dissent provisions albeit following the institution of an action. As there is little reason to burden the co-directors with these costs one might assume that the legislator would stipulate or has implicitly done so, that plaintiff bears the risks of the suit as in other general litigation.

CONCLUSIONS

A director may seek to employ the dissent mechanism provided by a statute or implicitly approved by the case law in order to exonerate himself from liability imposed upon him for illegal acts committed by his co-directors at a meeting of the board. Nevertheless, the dissent of a director has both legal and political connotations as far as the role of a director within the framework of the company is concerned.

Judicial clarification is required in several respects including the liability of directors in the event of actual consent following formal dissent, exoneration by dissent from statutory liabilities which do not refer to the possibility of dissent, as well as procedural issues involving residence requirements at meetings, and suits against absentee or dissenting directors.

It is beyond the scope of the present essay to attempt a review of the relevance and validity of the dissent to persons acting as *de facto* directors,[29] parties to a unanimous shareholders agreement, and others who assume the responsability of, or exercise the management power of directors. In this regard, it is sufficient to say here, that a determination of these issue lies in concluding whether or not the dissent formula is a characteristic inherent in the formal office of director, or attaches to the functions usually attributed to the office.

Due to the scant literature on the subject at hand, matters of further original research may include such issues as, the desirability and validity of "automatic" dissent by way of the deposition of one dissent document to avail for all subsequent acts of the board; the validity of a conditional vote stipulated to be contingent upon the legality of the act but to be construed as a dissent in the event of an illegality; and the construction of a dissent or the lack thereof effected on the basis of erroneous information or counsel given to the director.

29. To the extent that the "dissent" mechanism is not only a benefit of the office of director, but an inherent tool in the exercise of management power, the *de facto* director should be entitled to exoneration by dissent. However, the source and nature of irregularity in his appointment will more likely determine the right to exoneration. As well, the Court would give consideration to the elements of actual contribution to or involvement in the particular corporate act, rather than his formal dissent. See generally, *Morris* v. *Kanssen*, (1946) A.C. 459; *MacDonald* v. *Drake*, (1906) 16 Man. R. 220. With respect to unanimous shareholder agreements, see *Canada Business Corporations Act, supra*, s. 140 (4).