

When must boards hold a requisitioned shareholders meeting?

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The Ontario Superior Court of Justice's recent decision in *Sandpiper Real Estate Fund 4 Limited Partnership v. First Capital Realty Real Estate Investment Trust* [PDF], 2023 ONSC 794, provides helpful guidance to boards as to when they must hold a requisitioned shareholders meeting and the process they should follow to ensure their business judgment is afforded the greatest degree of deference.

Background

First Capital announced an enhanced capital allocation and portfolio optimization plan on September 22, 2022 (the Optimization Plan). Sandpiper Group, an activist fund that beneficially owned approximately nine percent of all issued and outstanding units of First Capital along with a joint actor, did not have confidence in the First Capital Board of Trustees (the Board) to oversee the Optimization Plan. On December 12, 2022, Sandpiper requisitioned a special meeting of unitholders to be held no later than March 1, 2023, to remove four members of the Board (including the chairs of the Board, Corporate Governance Committee and Compensation Committee) and replace them with Sandpiper's proposed slate.

On December 30, 2022, First Capital issued a press release announcing that a combined annual general meeting and special meeting would be held on May 16, 2023. In response, Sandpiper sought an order from the Court to compel First Capital to hold the meeting on March 1, 2023, or as soon as practicable thereafter.

Under Canadian corporate law, boards must "call" a requisitioned meeting within 21 days of the date of the requisition. Except for British Columbia, which mandates that a meeting must be "held" within four months of the date of the requisition, other provincial and federal corporate statutes do not impose a specific timeframe within which a requisitioned meeting must be held. Affirming previous case law, the Court stated that the scheduling of the meeting is left to the business judgment of directors, provided that the meeting is held "expeditiously and within a reasonable time". This does not require holding the meeting at the soonest available date; it means the meeting must be held "without unreasonable or unjustifiable delays".^[1]

The Court's decision

In reviewing the Board's decision to hold the meeting five months after the requisition date, the Court noted that the business judgment rule requires courts to defer to the business judgment of the board provided that its decision falls within a range of reasonableness. The degree of deference to be afforded to the Board, however, depended on the process the Board followed and whether it "applied the appropriate degree of prudence and diligence in

coming to its decision”.^[2]

The Court found that the Board only held one meeting on December 14, 2022, to discuss the requisition, the meeting lasted only approximately two hours and other agenda items were discussed. While noting that a special committee with special advisors is not required to be convened to consider a requisition, the Court was nevertheless troubled by the fact that the four directors Sandpiper sought to replace were present and voted on the resolution to hold the meeting on May 16, 2023. The Court stated that “[a] relatively short single meeting at which the potential for a conflict does not appear to have been acknowledged or considered does not reflect a robust, independent and objective process of deliberation.”^[3] Accordingly, the Court concluded that the Board’s decision did not warrant a high level of deference.

Turning to the merits, the Court examined the three justifications given by the Board for setting the meeting date on May 16, 2023. The first was to avoid the added cost and distraction of holding a special meeting in March followed by an annual general meeting in May. The second was to provide more time for unitholders to consider information and engage with the Board before the special meeting. The Court found neither compelling.

The third justification was the desire to give the Optimization Plan a chance to unfold and be reflected in another quarter of financial results. The Court concluded that this was not a reasonable factor to take into consideration in determining the meeting date. The Board did not set out any specific steps or event that might transpire and would be reflected in the first quarter, which the Court held was “too vague and speculative to be meaningful.”^[4] Sandpiper requisitioned the meeting in order elect new trustees to check the Board’s oversight and supervision of the Optimization Plan. The Court found that this objective would “at the very least [be] diminished, even if not rendered moot, by allowing the existing Board to continue with its implementation for any longer than is justifiably necessary until the special meeting is held.”^[5]

Accordingly, the Court found that the Board did not hold the special meeting expeditiously and within a reasonable time, and that the five-month delay in holding the meeting resulted in an “unreasonable or unjustifiable delay”. The Court ordered that the special meeting be held as soon as practicable after March 1, 2023, and that the information provided to unitholders should include First Capital’s 2022 year-end financial statements. The Court noted this would lead to the meeting being held in late March or early April 2023.

Takeaways

The Court’s decision is a reminder that when responding to requisitioned meetings, boards should engage in a well-documented deliberative process in which conflicts of interest are identified and dealt with appropriately. While establishing a special committee may not be required, the use of in camera sessions where conflicted directors do not participate for a portion of the meeting and recuse themselves from voting on the final resolution are potentially helpful practices. Minutes should set out the specific reasons and factors considered by the board in setting the meeting date.

[1] *Sandpiper Real Estate Fund 4 Limited Partnership v. First Capital Realty Real Estate Investment Trust*, 2023 ONSC 794, para. 14.

[2] *Sandpiper*, para. 16.

[3] *Sandpiper*, para. 57.

[4] *Sandpiper*, para. 76.

[5] *Sandpiper*, para. 71.