

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BAYLIN TECHNOLOGIES INC. and 2385796 ONTARIO INC.

Applicants (Appellants)

- and -

DAVID GELEMAN

Respondent (Respondent in Appeal)

APPLICATION UNDER SECTION 248 OF THE *BUSINESS CORPORATIONS ACT*
(ONTARIO), R.S.O. 1990, c. B. 16 AND RULE 14.05(2) OF THE *RULES OF CIVIL*
PROCEDURE, R.R.O. 1990, AS AMENDED

B E T W E E N:

SPACEBRIDGE INC., ADVANTECH AMT CORP., ADVANTECH WIRELESS DO BRASIL
PRODUTOS DE TELECOMUNICAÇÕES LTDA., ADVANTECH WIRELESS (EMEA)
LTDS. and DAVID GELEMAN

Applicants (Respondents in Appeal)

- and -

BAYLIN TECHNOLOGIES INC., ADVANTECH WIRELESS TECHNOLOGIES INC.
(formerly BAYLIN TECHNOLOGIES HOLDINGS CANADA INC.), ADVANTECH
WIRELESS TECHNOLOGIES (USA) INC. (formerly BAYLIN TECHNOLOGIES (USA)
INC.), ADVANTECH WIRELESS TECHNOLOGIES (EMEA) LIMITED), (formerly BAYLIN
TECHNOLOGIES (EMEA) LIMITED), 2385796 ONTARIO INC., JEFFREY ROYER,
RANDY DEWEY, JANICE DAVIS, BARRY REITER, DONALD SIMMONDS, HAROLD
WOLKIN, DAVID SASKA and DAVIES WARD PHILIPS & VINEBERG LLP

Respondents (Appellants)

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PROCEDURE, R.R.O. 1990, AS AMENDED

**FACTUM OF THE INTERVENER,
THE CANADIAN COALITION
FOR GOOD GOVERNANCE**

November 19, 2020

HANSELL LLP

Brookfield Place
161 Bay Street
Suite 2800
Toronto, ON M5J 2S1

Susan Kushneryk

LSO No.: 45702F
Tel: (416) 649-8498
skushneryk@hanselladvisory.com

Eric Morgan

LSO No.: 60531Q
Tel: (416) 649-8495
emorgan@hanselladvisory.com

Lawyers for the Intervener,
The Canadian Coalition for Good Governance

TO: **AIRD & BERLIS LLP**

Barristers and Solicitors
Brookfield Place
181 Bay Street
Suite 1800
Toronto, ON M5J 2T9

Steve J. Tenai

LSO No.: 33726R
Tel: (416) 865-4620
Fax: (416) 863-1515
Email: stenai@airdberlis.com

Miranda Spence

LSO No.: 60621M
Email: mspence@airdberlis.com

Lawyers for the Appellants

AND
TO:

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street
Suite 3400
Toronto, ON M5H 2S7

Jason Wadden
LSO No.: 46757M
Tel: (416) 979-2211
Fax: (416) 979-1234
Email: jwadden@goodmans.ca

Lawyers for the Respondents in
Appeal

AND
TO:

TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: (416) 865-7380

Linda Plumpton
LSO No.: 38400A
Tel: (416) 865-8193
Email: lplumpton@torys.com

James Gotowiec
LSO No.: 60107E
Tel: (416) 865-7981
Email: jgotowiec@torys.com

Adrienne Oake
LSO No.: 74718I
Tel: (416) 865-3817
Email: aoake@torys.com

Lawyers for the Intervener,
The Toronto Stock Exchange

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PART I - OVERVIEW

1. The decision at first instance contains fundamental errors in its interpretation of the Toronto Stock Exchange ("TSX") majority voting requirement (the "TSX Majority Voting Requirement"), as implicitly recognized in guidance from the TSX issued after the decision. The two fundamental errors concern (a) the treatment of votes withheld under TSX Majority Voting Requirement; and (b) the scope of "exceptional circumstances" when a board may refuse to accept a director's resignation under the TSX Majority Voting Requirement.

2. Contrary to the decision at first instance, under the TSX Majority Voting Requirement votes withheld are treated as votes against a nominee director. The TSX Majority Voting Requirement thus gives effect to the will of shareholders in a manner not provided within the peculiarities of the relevant corporate and securities law. Further contrary to the decision at first instance, there are no legal restrictions on the scope of exceptional circumstances that a company may adopt for when a board may refuse a resignation.

3. As the only judicial interpretation in Canada of the TSX Majority Voting Requirement, these errors could completely undermine majority voting policies of all TSX listed companies incorporated in Canada ("TSX Issuers"). The result would be to deprive shareholders of TSX Issuers of the benefits of majority voting. Regardless of the outcome of the dispute between the parties, it is important for this Court to correct those errors.

4. CCGG is the country's pre-eminent corporate governance organization representing institutional shareholders. CCGG has been the driving force behind the adoption of majority voting in Canada and has deep knowledge and expertise with respect to the purpose and effective operation of majority voting. CCGG continues to advocate for broad adoption of majority voting

and, in particular, for it to be enshrined in corporate law in all Canadian jurisdictions. As one of the foremost experts in majority voting in Canada, CCGG makes these submissions as a friend of the Court.

PART II - FACTS

5. CCGG takes no position regarding the facts of this appeal.

PART III - ISSUES AND THE LAW

6. The two fundamental errors in the decision at first instance are critical issues on this appeal:

- (a) Justice Pattillo mischaracterized the significance of votes that are withheld when he ignored them for the purpose of calculating the director election results. Including the votes withheld with the votes cast is the cornerstone of the TSX Majority Voting Requirement. Ignoring the votes withheld, as Justice Pattillo did, wholly undermines majority voting as set out in the TSX Majority Voting Requirement.
- (b) Justice Pattillo erroneously held that a corporation cannot restrict to a narrow list the "exceptional circumstances" when, under a majority voting policy, a board is permitted to refuse to accept a director's resignation. A restricted, narrow approach to "exceptional circumstances" is compliant with the TSX Majority Voting Requirement. In fact, the narrower the "exceptional circumstances", the more the majority voting policy makes directors accountable to shareholders by minimizing the circumstances in which a board can override the will of the shareholders.

A. Director Elections in Context

Director Elections Under Corporate and Securities Law

7. The election of directors is a key shareholder decision. Directors are responsible for managing or supervising the management of the corporation. Directors appoint the chief executive officer (the "CEO"), approve the strategy proposed by the CEO and his or her management team and set the corporation's compensation philosophy, among other things. Directors also approve the annual audited financial statements (among other documents), which provide important information to shareholders about the state and performance of the business in which they have invested.

8. Under the *Business Corporations Act* (Ontario) ("OBCA") (and most other corporate statutes in Canada¹), directors are elected at each annual shareholder meeting at which an election of directors is required.² Each director must be elected by a majority of the votes cast.³

9. The meeting materials provided to shareholders of TSX Issuers in connection with each annual meeting include the incumbent board's recommendations about the individuals that shareholders should elect as directors for the coming year. The vast majority of shareholder

¹ *Canada Business Corporations Act*, [R.S.C. 1985, c. C-44](#), s. 106(3); *Business Corporations Act* (British Columbia), [S.B.C. 2002, c. 57](#), ss. 122(1), 173(8); *Business Corporations Act* (Alberta), [R.S.A. 2000, c. B-9](#), s. 106(3); *The Business Corporations Act* (Saskatchewan), [R.S.S. 1978, c. B-10](#), s. 101(3); *The Corporations Act* (Manitoba), [C.C.S.M. c. C225](#), s. 101(2); *Business Corporations Act* (Prince Edward Island), [R.S.P.E.I. 1988, c. B-6.01](#), s. 81(5); *Corporations Act* (Newfoundland and Labrador), [R.S.N.L. 1990, c. C-36](#), s. 175(3); *Business Corporations Act* (Yukon), [R.S.Y. 2002, c. 20](#), s. 107(3); *Business Corporations Act* (Northwest Territories), [S.N.W.T. 1996, c. 19](#), s. 107(3); *Business Corporations Act* (Nunavut), [S.N.W.T. \(Nu.\) 1996, c. 19](#), s. 107(3). The exceptions are Quebec, New Brunswick and Nova Scotia. In Quebec under the *Business Corporations Act* (Quebec), [C.Q.L.R. c. S-31.1](#), s. 110, the matter is left to the corporation's by-laws. In New Brunswick, the *Business Corporations Act* (New Brunswick), [S.N.B. 1981, c. B-9.1](#), ss. 65(1)-(4) provides for cumulative voting. In Nova Scotia, under [N.S. Reg. 155/91](#), s. 116(1) the threshold for director election is not specified.

² *Business Corporations Act* (Ontario), [R.S.O. 1990, c. B.16](#), s. 119(4).

³ *Business Corporations Act* (Ontario), [R.S.O. 1990, c. B.16](#), ss. 1(1) (definition of "ordinary resolution"), 97(a), 119(4).

meetings in Canada are uncontested – in other words, no one other than the incumbent board nominates anyone for election to the board. In 2019, 99.88% of director elections in TSX listed companies were uncontested. There was only one meeting of a TSX listed company at which candidates were nominated by someone other than the company's management.⁴

10. Shareholders of public companies must be given the opportunity to vote by proxy.⁵ This ensures that shareholders are not disenfranchised if they cannot attend a meeting. The form of proxy is prescribed by the OBCA and by the *Securities Act* (Ontario) (the "Securities Act").⁶ The form of proxy prescribed by the OBCA and the form of proxy prescribed by the Securities Act are identical;⁷ they allow a shareholder to vote for the election of a director or to withhold its vote on that issue.⁸ There is no option on a form of proxy to vote against a director.⁹

⁴ Affidavit of Catherine McCall in support of CCGG's motion for leave to intervene, sworn October 20, 2020, at para. 16.

⁵ Public companies are referred to as "offering corporations" in the *Business Corporations Act* (Ontario), [R.S.O. 1990, c. B.16](#), s. 1(1) (definition of "offering corporation") and as "reporting issuers" in the *Securities Act* (Ontario), [R.S.O. 1990, c. S.5](#), s. 1(1) (definition of "reporting issuer").

⁶ *Business Corporations Act* (Ontario), [R.R.O., Reg. 62](#), s. 27(6); [National Instrument 51-102 Continuous Disclosure Obligations](#), s. 9.4(6), which the Ontario Securities Commission adopted.

⁷ We note that only registered shareholders receive a proxy. If the registered shareholder holds shares on behalf of another person (the beneficial shareholder), the registered shareholder must vote that proxy as instructed by the beneficial shareholder. Those instructions are provided by the beneficial shareholder by filling out a voting instruction form (a "VIF"), which is materially the same as the form of proxy. Most investors are beneficial holders – they hold their shares through a broker, custodian or other intermediary. For simplicity, we refer to the proxies provided to registered shareholders and the VIFs provided to beneficial shareholders as "proxies" in this factum.

⁸ *Business Corporations Act* (Ontario), [R.R.O., Reg. 62](#), s. 27(6); [National Instrument 51-102 Continuous Disclosure Obligations](#), s. 9.4(6), which the Ontario Securities Commission adopted.

⁹ Hansell LLP and Hansell McLaughlin Advisory, "[Majority Voting: Getting it Right](#)", April 11, 2017, at p. 11, CCGG Book of Authorities, Tab 4.

11. Marking the "withhold" box has no impact on the outcome of an election and is the same as not voting.¹⁰ A vote that is withheld is not a vote that is cast for the purpose of determining the voting result under corporate law.

Legal Requirements Restrict Shareholders

12. The need for the TSX Majority Voting Requirement results from the intersection of several statutory requirements.

- (a) Ontario corporate law (and the corporate law in most Canadian jurisdictions) provides that a director is elected if the majority of votes cast are cast in favour of that person's election.
- (b) The form of proxy for TSX Issuers set by corporate and securities law does not allow shareholders to cast votes against the election of a director. Votes may only be cast in favour of the election of a director. Shareholders who wish to mark their proxy but do not wish to vote in favour of a director nominee have the option to mark the box labelled "withhold" or to simply not send in their proxy at all. While marking the "withhold" box may send the message that the shareholder opposes the election of the candidate, doing so has no practical impact on whether that candidate is elected. Because a vote withheld is not cast, it is not counted for the purposes of the election under corporate law. An individual nominated for election by the incumbent board will be elected even if only a single vote is cast in favour of that individual's election.
- (c) The board has no authority to remove a director. Only shareholders have the authority to remove a director.

¹⁰ Hansell LLP and Hansell McLaughlin Advisory, "[Majority Voting: Getting it Right](#)", April 11, 2017, at p. 25, CCGG Book of Authorities, Tab 4; *Mason v. Augen Capital Corp.*, [2010 ONSC 5319](#), 193 ACWS (3d) 94, at para. 18, CCGG Book of Authorities, Tab 1.

B. The Significant Role of Majority Voting in the Canadian Capital Markets

Institutional Investors' Drive For Majority Voting

13. Institutional investors, frustrated by the inability of shareholders to vote by proxy against a director, drove the issue of majority voting as a means for the will of shareholders to prevail in director elections without changing the legal requirements described above. A majority voting policy gives effect to the will of the shareholders by giving meaning to the "withhold" box.

14. In 2006 when few Canadian issuers had adopted a majority voting policy, CCGG, as the pre-eminent organization representing institutional investors, issued a model majority voting policy.

15. In 2011 the CCGG updated its majority voting policy¹¹ and launched its Majority Voting Initiative to encourage companies to adopt majority voting policies. The initiative focused originally on companies in the S&P/TSX 60 that had yet to adopt majority voting policies and was expanded later in 2011 to include all companies in the S&P/TSX Composite Index.

16. By 2012, 65% of the boards of the companies in the S&P/TSX Composite Index had adopted majority voting policies.¹²

17. CCGG continues to advocate for majority voting to be enshrined in the corporate statutes of all Canadian jurisdictions to ensure that majority voting, and the meaningful director accountability it brings, applies beyond TSX-listed issuers.¹³

¹¹ Canadian Coalition for Good Governance, [CCGG Policy, Majority Voting Policy](#), March 2011, Appellants' BOA, Tab 6.

¹² Affidavit of Catherine McCall in support of CCGG's motion for leave to intervene, sworn October 20, 2020, at para. 11.

TSX Majority Voting Requirement

18. Following the groundwork done by the institutional investors, the TSX brought in majority voting. The TSX does not have the authority to override corporate and securities law regarding the election or removal of directors or the form of proxy. Instead, the TSX requires that the boards of TSX Issuers adopt a majority voting policy consistent with the TSX Majority Voting Requirement added to the TSX Company Manual by amendment in 2014.¹⁴

19. Initially, in 2012, the TSX adopted majority voting in a comply-or-explain regime under which the boards of TSX Issuers could either adopt a majority voting policy or explain their decision not to do so. By 2013, 88% of the boards of the companies in the S&P/TSX Composite Index had adopted majority voting policies.¹⁵

20. In 2014 the TSX adopted the TSX Majority Voting Requirement for all TSX Issuers. The TSX listing agreement requires TSX Issuers, as a condition of being listed, to comply with all TSX listing requirements. Thus, a listed issuer must adopt a majority voting policy unless it otherwise satisfies the TSX Majority Voting Requirement in a manner acceptable to the TSX, for example, by applicable statutes, articles, by-laws or other similar instruments.

¹³ Federally, amendments to the *Canada Business Corporations Act* not yet in force include a provision that provides that a director is only elected in an uncontested election if the number of votes cast in his or her favour represents a majority of the votes cast for and against the director by the shareholders who are present in person or represented by proxy. See: *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act*, [S.C. 2018, c. 8](#), s. 13(1). Amendments to the *Canada Business Corporations Regulations, 2001* are required to provide for a form of proxy which allows shareholders to vote "for" and "against" a director. See: Corporations Canada, [Bill C-25 proposed regulations](#), (January 19, 2018), CCGG Book of Authorities, Tab 3.

¹⁴ TSX Notice of Approval, Amendments to Part IV of the Toronto Stock Exchange Company Manual, (February 13, 2014), [\(2014\) 37 OSCB 1769](#) at 1783, CCGG Book of Authorities, Tab 7.

¹⁵ Affidavit of Catherine McCall in support of CCGG's motion for leave to intervene, sworn October 20, 2020, at para. 11.

21. A policy consistent with the TSX Majority Voting Requirement must provide for the following (among other things):

- (a) any director must immediately tender his or her resignation to the board if he or she is not elected by at least a majority (50% +1) of the votes cast with respect to his or her election;
- (b) the board shall determine whether or not to accept the resignation within 90 days after the date of the relevant security holders' meeting. The board shall accept the resignation absent exceptional circumstances; and
- (c) the resignation will be effective when accepted by the board.

Listed issuers that are majority controlled are exempt from the TSX Majority Voting Requirement.

22. The TSX Majority Voting Requirement recognizes that there may be some circumstances in which it is not in the best interests of the TSX Issuer for certain directors to resign from the board immediately (as would be the case if the director were required to resign immediately upon losing the vote under the company's majority voting policy). Accordingly, the policy does not require that the director resign, but requires that he or she must submit his or her resignation to the board, and that such resignation will not be effective until it is accepted by the board. The TSX guidance contemplates very limited "exceptional" circumstances in which the board will not accept the resignation. Those exceptional circumstances are discussed below.

23. In 2017, the TSX released a notice stating that when a board determines not to accept a director's resignation, the TSX would discuss with the company the exceptional circumstances and review each situation on a case-by-case basis. The TSX noted that "exceptional circumstances" are expected to meet a high threshold, and included in the notice certain

examples of what may be "exceptional circumstances" and other examples that generally are not.¹⁶

24. In June 2020, after the release of the decision at first instance, the TSX amended its Company Manual, explicitly clarifying that, "when counting the total votes cast in respect of the election of a director, 'withheld' votes are considered 'against' votes and must be counted in the total."¹⁷ The TSX classified this amendment as a "housekeeping rule", indicating that the TSX considers this amendment to be simply a clarification of, and not a change to, the TSX Majority Voting Requirement.

Majority Voting Improves Director Accountability to Shareholders

25. CCGG's position in advocating for majority voting is that the board of directors of a public company has a responsibility to ensure that shareholders have the opportunity to vote for each director on an annual basis and that the vote is conducted fairly.¹⁸ When the TSX introduced the TSX Majority Voting Requirement, it cited as its purpose "to improve corporate governance standards in Canada by providing a meaningful way for security holders to hold individual directors accountable."¹⁹ The decision at first instance similarly acknowledged this

¹⁶ Toronto Stock Exchange, [Staff Notice 2017-0001](#), (March 9, 2017), CCGG Book of Authorities, Tab 6.

¹⁷ Toronto Stock Exchange, [Notice of Housekeeping Rule Amendments to the TSX Company Manual](#), (June 4, 2020), CCGG Book of Authorities, Tab 5.

¹⁸ Canadian Coalition for Good Governance, [CCGG Policy, Majority Voting Policy](#), March 2011, Appellants' BOA, Tab 6.

¹⁹ TSX Notice of Approval, Amendments to Part IV of the Toronto Stock Exchange Company Manual, (February 13, 2014), [\(2014\) 37 OSCB 1769](#) at 1769, CCGG Book of Authorities, Tab 7.

purpose of meaningful director accountability, and the Appellants' factum describes electing directors as a "shareholders' fundamental right."²⁰

26. The court of first instance erred in holding that the Appellant's majority voting policy did not meet the purpose of the TSX Majority Voting Requirement (meaningful director accountability) when it held:

Finally, I consider that the Policy is contrary to the purpose of the TSX's Majority Voting Requirement. As stated in the Notice, the purpose of the TSX Majority Voting Requirement is to provide 'a meaningful way for security holders to hold individual directors accountable.' **It requires that each director be elected by a majority of the votes cast for him or her. Baylin's Policy, which provides for security holders to withhold votes, does not meet that purpose.**²¹

27. A majority voting policy that requires a director to tender his or her resignation if more votes are withheld than are cast "for" his or her election is consistent with seeking meaningful director accountability to shareholders. It does so by giving consequence to the will of shareholders expressed by a majority of votes being withheld for the election of a director.

28. Majority voting also gives shareholders an effective alternative to mounting a dissident proxy challenge. Professor Anita Anand has noted that, because the shareholder "bear[s] the expense of a dissident proxy process, [it] has been a successful tactic of late for only the wealthiest of shareholders."²²

²⁰ *Baylin v. Gelerman*, [2020 ONSC 404](#), at paras. 41, 58, Appeal Book and Compendium of Appellants, Tab 4, pp. 28-29, 33. Appellants' Factum, at para. 17, see also para. 63.

²¹ *Baylin v. Gelerman*, [2020 ONSC 404](#), at para. 58, Appeal Book and Compendium of Appellants, Tab 4, p. 33 [emphasis added].

²² Anita Anand, [The Future Of Poison Pills in Canada: Are Takeover Bid Reforms Needed?](#), (2015) 61:1 McGill LJ 1 – 29, at 23, CCGG Book of Authorities, Tab 2.

29. Majority voting can be used where shareholders wish to express a view on a particular director (for example, a director with a poor attendance record), or to register their disagreement with a specific board decision. For example, shareholders who disagree with the compensation awarded to a CEO may withhold votes from the re-election of the compensation committee chair (or the entire compensation committee).

30. Majority voting also encourages shareholder engagement and shareholder democracy. While CCGG's institutional investor members are likely to submit proxies in respect of all of their investments, retail investors may not be as motivated. In an uncontested director election, those shareholders could lack an incentive to send in their proxy, knowing that all of the candidates named in the proxy will be elected as long as a single vote is cast in their favour (*i.e.*, whether they vote or not).

31. All these benefits are lost if the court of first instance's reasons stand and majority voting policies are rendered ineffective.

C. Votes That Are Withheld Are Critical to Majority Voting

32. The court at first instance erred in holding that a majority voting policy providing for votes withheld to be counted is contrary to the purpose of the TSX Majority Voting Requirement because "the withholding of one's vote is equivalent to not voting" and "provid[ing] for not voting does not provide a 'meaningful way for security holders to hold individual directors accountable'"²³ and that "withholding votes does not hold directors accountable by the votes cast

²³ *Baylin v. Geleman*, [2020 ONSC 404](#), at para. 41, Appeal Book and Compendium of Appellants, Tab 4, pp. 28-29.

at the meeting."²⁴ Counting votes that are withheld, however, is critical to the effective operation of majority voting policies adopted pursuant to the TSX Majority Voting Requirement.

33. The court of first instance appears to have misunderstood that it is not a corporation's majority voting policy which provides for shareholders to withhold votes – it is the form of proxy. Where voting is done by proxy, a director in an uncontested election is elected if one vote is cast in favour of his or her election, regardless of how many shareholders withhold their votes. Under the court of first instance's interpretation of majority voting, the same end result (the director remaining on the board) would hold true even at a corporation that has adopted a majority voting policy: votes that are withheld would be ignored, only votes "for" would be counted, and a single vote "for" would be enough to avoid the requirement for the director to tender his or her resignation to the board.

34. While a corporation's majority voting policy cannot change the election result pursuant to corporate law and cannot change the form of proxy prescribed by corporate and securities law, it can require additional actions by directors and boards as a consequence of the election result.

35. As the only options on the prescribed form of proxy are voting "for" a director's election or marking the "withhold" box, marking the "withhold" box is the only means by which a shareholder can express by proxy anything other than support for a director's election. Under a majority voting policy consistent with the TSX Majority Voting Requirement, votes that are withheld are tantamount to "against" votes, to be counted in the total number of votes when determining whether a director has achieved a majority of support from shareholders for the

²⁴ *Baylin v. Geleman*, [2020 ONSC 404](#), at para. 58, Appeal Book and Compendium of Appellants, Tab 4, pp. 28-29.

purposes of the majority voting policy and whether a director is required to tender his or her resignation. Without considering the votes that are withheld, the majority voting policy consistent with the TSX Majority Voting Requirement does not work.

D. Companies Entitled to Narrow Exceptional Circumstances

36. The court of first instance's other critical error was with respect to the "exceptional circumstances" that must be present for a board to refuse to accept a failed director's resignation.

37. Recognizing that the immediate resignation of a director may not be in the best interest of the corporation, majority voting policies consistent with the TSX Majority Voting Requirement usually provide that a defeated director does not resign immediately following the shareholder vote. Instead, the director tenders his or her resignation to the board and the resignation is only effective once accepted by the board. Requiring a director to always resign immediately is too blunt a consequence and would not be appropriate in every circumstance (for example, where the number of directors consequently fell below a statutory minimum).

38. The board considers whether the resignation is in the best interest of the corporation. The board does not have the authority to remove a director, but it is given the role of a safety catch on a director's resignation required under a majority voting policy. The board must accept a resignation absent "exceptional circumstances". The TSX issued guidance including certain examples of what may be "exceptional circumstances"²⁵ and other examples that generally are not.²⁶

²⁵ Toronto Stock Exchange, [Staff Notice 2017-0001](#), (March 9, 2017) provides: "Examples of exceptional circumstances may include: the issuer would not be compliant with corporate or securities law requirements, applicable regulations or commercial agreements regarding the composition of the Board as a result of accepting the Subject Director's resignation; the Subject Director is a key member of an

39. The court of first instance erred in stating that the TSX Majority Voting Requirement requires that in a majority voting policy "exceptional circumstances" be open and unrestricted.²⁷

40. The TSX's guidance does not provide that each majority voting policy **shall** contain certain enumerated examples of "exceptional circumstances", but only that certain circumstances **may** be "exceptional circumstances".²⁸ The TSX's guidance does not represent a prescribed scope for exceptional circumstances, but rather simply provides examples. There is nothing in the TSX's guidance that prevents a majority voting policy from being restricted to a particular enumerated list of exceptional circumstances.

41. Furthermore, requiring every majority voting policy's "exceptional circumstances" to contain every example provided by the TSX and to be unrestricted is contrary to the policy rationale of meaningful director accountability that underlies majority voting.

42. While CCGG would prefer that companies adopt binding majority voting (where no exceptions would be permitted), if companies retain some discretion for their boards to consider "exceptional circumstances", CCGG favours a narrow approach, including a restriction to an enumerated list of such circumstances. A narrow approach does not need to include every

established, active Special Committee which has a defined term or mandate (such as a strategic review) and accepting the resignation of such Subject Director would jeopardize the achievement of the Special Committee's mandate; or majority voting was used for a purpose inconsistent with the policy objectives of the Majority Voting Requirement." CCGG Book of Authorities, Tab 6.

²⁶ Toronto Stock Exchange, [Staff Notice 2017-0001](#), (March 9, 2017) provides that "[g]enerally TSX does not consider the following factors to be exceptional circumstances, especially given that such information is typically available to security holders when they make their voting decision: the director's length of service; the director's qualifications; the director's attendance at meetings; the director's experience; or the director's contributions to the issuer." CCGG Book of Authorities, Tab 6.

²⁷ *Baylin v. Geleman*, [2020 ONSC 404](#), at para. 44, Appeal Book and Compendium of Appellants, Tab 4, pp. 29.

²⁸ Toronto Stock Exchange, [Staff Notice 2017-0001](#), (March 9, 2017), CCGG Book of Authorities, Tab 6.

example of "exceptional circumstances" provided by the TSX and can restrict the ability of directors to override the votes of the shareholders.

43. While a board may draft the policy as it sees fit, if the board is given any discretion, this shifts the power of accountability away from shareholders. CCGG's position is that directors should be accountable to shareholders because shareholders are the only body with the right to elect and remove directors.²⁹

PART IV - RELIEF SOUGHT

44. CCGG respectfully requests that, in its reasons for decision on this appeal, this Court correct the errors at first instance in respect of majority voting by:

- (a) Confirming that, for the purposes of a majority voting policy consistent with the TSX Majority Voting Requirement, when counting the total votes in respect of the election of a director votes that are withheld are considered "against" votes and must be counted in the total of votes; and

²⁹ *Business Corporations Act* (Ontario), [R.S.O. 1990, c. B.16](#), ss. 119(4) and 122(1).

- (b) Confirming that a majority voting policy consistent with the TSX Majority Voting Requirement can restrict the "exceptional circumstances" under which a director's required resignation may be refused by the board, and that these "exceptional circumstances" can be narrower than the examples provided in the TSX's guidance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of November, 2020.



Susan Kushneryk
Counsel for the Intervener,
The Canadian Coalition for Good Governance



Eric Morgan
Counsel for the Intervener,
The Canadian Coalition for Good Governance

SCHEDULE A
AUTHORITIES TO BE CITED

CASES

1. *Mason v. Augen Capital Corp.*, [2010 ONSC 5319](#), 193 ACWS (3d) 94.

SECONDARY SOURCES

1. Anita Anand, [The Future Of Poison Pills in Canada: Are Takeover Bid Reforms Needed?](#), (2015) 61:1 McGill LJ 1 – 29.
2. Canadian Coalition for Good Governance, [CCGG Policy, Majority Voting Policy](#), March 2011.
3. Corporations Canada, [Bill C-25 proposed regulations](#), (19 January 2018).
4. Hansell LLP and Hansell McLaughlin Advisory, "[Majority Voting: Getting it Right](#)", April 11, 2017.
5. Toronto Stock Exchange, [Notice of Housekeeping Rule Amendments to the TSX Company Manual](#), (June 4, 2020).
6. Toronto Stock Exchange, [Staff Notice 2017-0001](#), (March 9, 2017).
7. TSX Notice of Approval, Amendments to Part IV of the Toronto Stock Exchange Company Manual, (February 13, 2014), [\(2014\) 37 OSCB 1769](#).

SCHEDULE B
RELEVANT STATUTORY PROVISION

An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act, [S.C. 2018, c. 8](#)

13 (1) Subsection 106(3) of the Act is replaced by the following:

Election of directors

(3) Subject to subsection (3.1) and paragraph 107(b), shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term ending not later than the close of the third annual meeting of shareholders following the election.

Election of directors — distributing corporations

(3.1) Subject to paragraph 107(b), shareholders of a distributing corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term ending not later than the close of the next annual meeting of shareholders following the election.

Exceptions — certain distributing corporations

(3.2) Despite subsection (3.1), in the case of any prescribed class of distributing corporations or in any prescribed circumstances respecting distributing corporations or classes of distributing corporations, the directors are to be elected in accordance with subsection (3).

Separate vote for each candidate

(3.3) If the election of directors is for a prescribed corporation, a separate vote of shareholders shall be taken with respect to each candidate nominated for director.

Majority voting

(3.4) If, at a meeting of shareholders of a distributing corporation — other than in the case of a prescribed class of distributing corporations — at which an election of directors is required, there is only one candidate nominated for each position available on the board, each candidate is elected only if the number of votes cast in their favour represents a majority of the votes cast for and against them by the shareholders who are present in person or represented by proxy, unless the articles require a greater number of votes.

Business Corporations Act (Alberta), [RSA 2000, c B-9](#)

106 (3) Subject to subsection (9)(a) and section 107, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the next annual meeting of shareholders following the election.

Business Corporations Act (British Columbia), [SBC 2002, c 57](#)

122 (1) Directors, other than the first directors of a company who are in their first term of office, must be elected or appointed in accordance with this Act and with the memorandum and articles of the company.

173 (8) Unless otherwise provided under this Act or in the memorandum or articles, any action that must or may be taken or authorized by the shareholders under this Act may be taken or authorized by an ordinary resolution.

Business Corporations Act (New Brunswick), [SNB 1981, c B-9.1](#)

65 (1) Each shareholder entitled to vote at an election of directors has the right to cast a number of votes equal to the number of votes attached to the shares held by him multiplied by the number of directors to be elected, and he may cast all such votes in favour of one candidate or distribute them among the candidates in any manner.

65 (2) A separate vote of shareholders shall be taken with respect to each candidate nominated for director unless a resolution is passed unanimously permitting two or more persons to be elected by a single resolution.

65 (3) If a shareholder has voted for more than one candidate without specifying the distribution of his votes among the candidates, he shall be deemed to have distributed his votes equally among the candidates for whom he voted.

65 (4) If the number of candidates nominated for director exceeds the number of positions to be filled, the candidates who receive the least number of votes shall be eliminated until the number of candidates remaining equals the number of positions to be filled.

Business Corporations Act (Northwest Territories), [SNWT 1996, c 19](#)

107 (3) Subject to paragraph (8)(a) and section 108, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the next annual meeting of shareholders following the election.

Business Corporations Act (Nunavut), [SNWT \(Nu\) 1996, c 19](#)

107 (3) Subject to paragraph (8)(a) and section 108, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the next annual meeting of shareholders following the election.

Business Corporations Act (Ontario), [RSO 1990, c. B.16](#)

1 (1) "offering corporation" means a corporation that is offering its securities to the public within the meaning of subsection (6) and that is not the subject of an order of the Commission deeming it to have ceased to be offering its securities to the public[.]

1 (1) "ordinary resolution" means a resolution that is submitted to a meeting of the shareholders of a corporation and passed, with or without amendment, at the meeting by at least a majority of the votes cast[.]

97 Subject to this Act or the articles or by-laws of a corporation or a unanimous shareholder agreement,

(a) all questions proposed for the consideration of the shareholders shall be determined by the majority of the votes cast and the chair presiding at the meeting shall not have a second or casting vote in case of an equality of votes[.]

119 (4) Subject to clause 120 (a), shareholders of a corporation shall elect, at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

122 (1) Subject to clause 120 (f), the shareholders of a corporation may by ordinary resolution at an annual or special meeting remove any director or directors from office.

Business Corporations Act (Ontario), [RRO 190, Regulation 62, General](#)

27 (6) A form of proxy shall provide a means for the shareholder to specify that the shares registered in the shareholder's name shall be voted or withheld from voting in respect of the appointment of an auditor, the remuneration of the auditor or the election of directors.

Business Corporations Act (Prince Edward Island), [RSPEI 1988, c B-6.01](#)

81(5) Subject to clause 82(b), shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

Business Corporations Act (Quebec), [CQLR c S-31.1](#)

110 The directors are elected by the shareholders, in the manner and for the term, not exceeding three years, set out in the by-laws.

It is not necessary that all the directors elected hold office for the same term.

A director not elected for an expressly stated term ceases to hold office at the close of the first annual shareholders meeting following the director's election.

If circumstances prevent a shareholders meeting from electing the fixed number or minimum number of directors required by the articles, the directors elected at that meeting may exercise all the powers of the directors if the number of directors so elected constitutes a quorum.

Business Corporations Act (Yukon), [RSY 2002, c 20](#)

107 (3) Subject to section 108, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

Canada Business Corporations Act, [RSC 1985, c C-44](#)

106(3) Subject to paragraph 107(b), shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

Corporations Act (Newfoundland and Labrador), [RSNL 1990, c C-36](#)

175 (3) Shareholders of a corporation shall, by ordinary resolution at the 1st meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the 3rd annual meeting of shareholders following the election.

National Instrument 51-102, [Continuous Disclosure Obligations](#)

9.4 (6) A form of proxy sent to securityholders of a reporting issuer must provide an option for the securityholder to specify that the securities registered in the name of the securityholder must be voted or withheld from voting in respect of the appointment of an auditor or the election of directors.

[NS Reg 155/91](#)

116 (1) At every annual general meeting, all the directors shall retire from office, but shall hold office until the dissolution of the meeting at which their successors are elected.

Securities Act (Ontario), [RSO 1990, c S.5](#)

1 (1) "reporting issuer" means an issuer,

(a) that has issued voting securities on or after the 1st day of May, 1967 in respect of which a prospectus was filed and a receipt therefor obtained under a predecessor of this Act or in respect of which a securities exchange take-over bid circular was filed under a predecessor of this Act,

(b) that has filed a prospectus and for which the Director has issued a receipt under this Act,

(b.1) that has filed a securities exchange take-over bid circular under this Act before December 14, 1999,

(c) any of whose securities have been at any time since the 15th day of September, 1979 listed and posted for trading on any exchange in Ontario recognized by the Commission, regardless of when such listing and posting for trading commenced,

(d) to which the Business Corporations Act applies and which, for the purposes of that Act, is offering its securities to the public,

(e) that is the company whose existence continues following the exchange of securities of a company by or for the account of such company with another company or the holders of the securities of that other company in connection with,

(i) a statutory amalgamation or arrangement, or

(ii) a statutory procedure under which one company takes title to the assets of the other company that in turn loses its existence by operation of law, or under which the existing companies merge into a new company,

where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months, or

(f) that is designated as a reporting issuer in an order made under subsection 1 (11);

The Business Corporations Act (Saskatchewan), [RSS 1978, c B-10](#)

101 (3) Subject to clause (b) of section 102, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

The Corporations Act (Manitoba), [CCSM c C225](#)

101 (2) Subject to clause 102(b), shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.

[Toronto Stock Exchange Company Manual](#)

461.3 Each director of a listed issuer must be elected by a majority (50% +1 vote) of the votes cast^[5] with respect to his or her election other than at contested meetings^[6] ("Majority Voting Requirement").

A listed issuer must adopt a majority voting policy (a "Policy"), unless it otherwise satisfies the Majority Voting Requirement in a manner acceptable to TSX, for example, by applicable statutes, articles, by-laws or other similar instruments. The Policy must, substantially, provide for the following:

(a) any director must immediately tender his or her resignation to the board of directors if he or she is not elected by at least a majority (50% +1 vote) of the votes cast with respect to his or her election;

(b) the board shall determine whether or not to accept the resignation within 90 days after the date of the relevant security holders' meeting. The board shall accept the resignation absent exceptional circumstances;

(c) the resignation will be effective when accepted by the board;

(d) a director who tenders a resignation pursuant to this Policy will not participate in any meeting of the board or any sub-committee of the board at which the resignation is considered; and

(e) the listed issuer shall promptly issue a news release with the board's decision, a copy of which must be provided to TSX. If the board determines not to accept a resignation, the news release must fully state the reasons for that decision.

If an issuer adopts a Policy to satisfy the Majority Voting Requirement, it must post a copy of the Policy on its website in accordance with Section 473.

Listed issuers that are majority controlled^[7] are exempted from the Majority Voting Requirement. Listed issuers with more than one class of listed voting securities may only rely on this exemption with respect to the majority controlled class or classes of securities that vote together for the election of directors. A listed issuer relying on this exemption must disclose, on an annual basis in its materials sent to holders of listed securities in connection with a meeting at which directors are being elected, its reliance on this exemption and its reasons for not adopting majority voting.

⁵ For the purposes of this section, when counting the total votes cast in respect of the election of a director, "withheld" votes are considered "against" votes and must be counted in the total.

⁶ A contested meeting is defined as a meeting at which the number of directors nominated for election is greater than the number of seats available on the board.

⁷ Majority controlled is defined as a security holder or company that beneficially owns, or controls or directs, directly or indirectly, voting securities carrying 50 percent or more of the voting rights for the election of directors, as of the record date for the meeting.

BAYLIN TECHNOLOGIES INC. et al. v. SPACEBRIDGE INC. et al.
Plaintiffs (Appellants)

SPACEBRIDGE INC. et al.
Defendants (Respondents)

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

**FACTUM OF THE INTERVENER,
THE CANADIAN COALITION
FOR GOOD GOVERNANCE**

HANSELL LLP

Brookfield Place
161 Bay Street
Suite 2800
Toronto, ON M5J 2S1

Susan Kushneryk

LSO No.: 45702F
Tel: (416) 649-8498
skushneryk@hanselladvisory.com

Eric Morgan

LSO No.: 60531Q
Tel: (416) 649-8495
emorgan@hanselladvisory.com

Counsel for the Intervener,
The Canadian Coalition for Good Governance