

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

[00:01] HUSEIN: This is Episode 76 of Lawyered. I'm Husein Panju. And on this week's episode, we're speaking with Susan Kushneryk, about corporate governance law, and what's new at the board table. First up, we will be speaking about some new high-profile disputes involving family-run businesses, including the recent breakup at Rogers Communications. We'll find out what went sideways and also learn some practical takeaways for other businesses, both big and small. Next, we'll discuss diversity on corporate boards, because while there have been some limited trends towards inclusivity, we'll dig into some of the issues and some legal mechanisms that can help to move the needle.

[00:45] We'll also chat about shareholder democracy and have some new voting rules on the CVSA amendments that may increase participation. And in the Ask Me Anything segment we'll chat about succession planning, geopolitics, fiduciary duties, and other questions submitted by our listeners. All that and a lot more are coming up in just a bit. This is Lawyered.

[Music Break]

[01:16] HUSEIN: Hello, and welcome to another episode of Lawyered, the podcast. Thanks for joining us for another installment of the show. One thing I want to mention in terms of a cool podcast development is a couple of weeks ago, I was attending Fan Expo, which is a big comic convention in Toronto. And one of the panels that I attended was specifically about podcasts that was organized by the Sonar Network and they had a bunch of their podcast hosts on stage talking about some tips and tricks that they've learned from their own podcast experiences and it was really powerful.

[01:52] Some things, I kind of knew already, but a lot of it was really insightful, and hearing their tastes about podcast production, but particularly about building community within, you know, not just other podcasters, but with the audience as well. So, it's something that I always strive to do. And I learned a bit more about some tactics to make this a bit more engaging. So, I hope you're enjoying the show already. I mean, if you're listening to it, I have some assumptions about that. But I've learned a bit more in terms of podcast dynamics, I hope to be applying that in the near future. And I hope you notice the difference as well.

[02:28] One other really cool thing on a personal note is one of the podcasters on stage is a guy named Rob Norman, who I did not know personally beforehand but have been following his podcast religiously for four or five years. It's a show he does with his friend, Adam, called the Backline podcast. It's particularly about improv comedy—improv and sketch. And even if you're

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

not into either of them as a performer, it's a really fun conversational podcast. It talks a lot about the technical and inside base aspects of improv and it's really fun listening to it as well.

[03:09] For the Backline pod, this is not a paid advertisement and it's not "I'll promote you if you promote me." I just really liked the podcast. And Rob was very kind and generous and chatted with me afterward about some other podcast tips. So, check that out, if that's something you're interested in. Speaking of podcasts that you may be interested in, I want to tell you about our most recent episode that we aired, which was a bonus episode between Paul Karvanis. That was a very special episode. And I mean that not in the way that they use that term in the 90s, when it was heartfelt sensitive topics. This was literally a very special episode about lawyer happiness and some of the research that he's been doing on this on a very in-depth level. And identifying some trends, that separates happy from miserable lawyers, and even been developing a draft model about this as well. Cannot recommend that episode enough.

[04:15] There's a preview that's available for everybody, which includes a lot of discussion about those issues. If you are a member of the Patreon community or become a member, you'll always want to hear about a 20 to 30-minute coaching session that he does with me in terms of my own happiness as a lawyer and particularly about some struggles that I have about time management and things like that. It's a very vulnerable conversation, to be quite honest. And I really wanted to nonetheless share that with you, the audience, because I think it is that valuable. I think that there is longer learning that would be very applicable to you, even if you are not the exact same person as I am because everyone's got their own life and things outside of work—family, friends, social commitments, and other things.

[05:03] And there are some really thought-provoking ideas there that I would highly recommend you check out, if that is something you would find of value. Today's episode, I think you'll enjoy as well. It's about the corporate governance law, which has been top of the spin, it's been requested for quite a while. And we're very happy to find a guest, who is well versed in this area and has a lot to say about some topics that may seem technical on the face level, but actually have a very significant impact, as you'll quickly learn in terms of some high-profile issues that are in the news, as well. So, I hope you enjoyed this episode about corporate governance law. And without further ado, here's our interview with Susan Kushneryk.

[Music Break]

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

[05:48] HUSEIN: Susan is the co-founder of the law firm Kushneryk Morgan, which is located in Toronto. And she works with businesses to find practical solutions to their legal issues. She has prosecuted securities fraud and acted as Counsel in complex and high-value capital markets litigation, including class actions. And Susan has also conducted investigations of a range of alleged wrongdoing in public and private corporations and has advised and litigated on behalf of boards, special committees, and audit committees in a range of special situations. Susan has appeared before the Supreme Court of Canada, all levels of court in Ontario, the courts of appeal and Queen's Bench in Alberta, and numerous administrative tribunals.

[06:30] She has also appeared before the Senate of Canada Standing Committee on Banking, Trade, and Commerce in connection with amendments to the Canada Business Corporations Act or the CBCA. And prior to her current role, she has been employed with the Ontario Securities Commission with the LIC as well as the Investment Industry Regulatory Organization of Canada, and also served on the staff of two Attorneys General of Ontario. Most recently, Susan was a partner at the Boutique law firm, Hansel LLP, where she focused on matters of corporate governance. And Susan also speaks regularly on issues regarding capital markets disputes and matters of corporate governance. She has also taught the administering of law course at the University of Toronto, Internationally Trained Lawyers Program. So, Susan, thanks for joining us on the show today.

[07:15] SUSAN: Thank you very much for the opportunity.

[07:17] HUSEIN: Yeah, of course. So, we've had a lot of requests to do an episode of this exact subject matter about corporate governance. And so, we're very excited to speak with you about some of the current issues in this field. And over the last year or so, there's been several high-profile internal disputes involving large family-run Canadian-based corporations, including Rogers Communications, and the Conservatory Group. And although each case study comes with its own specific facts, there are some trends that may provide some helpful guidance to corporate governance, lawyers, and practitioners. So, Susan, I know that both these cases, particularly the Rogers one, have generated a lot of activity, a lot of information has been spelled about family drama, almost like succession in a sense. But we're hoping you will walk us through what the facts were for each of these two cases. What's this whole Rogers thing about?

[08:13] SUSAN: Absolutely. So, Rogers is a widely held public company, as we all know, but it also has a dual-class share structure. So, the family controls the company even though it is widely held. The family shares are held in a trust. But to narrow it down to the crux of it, the

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

directors disagreed on whether Rogers former CEO, should be removed from his position. Edie Rogers, who is the founder, Ted Rogers' son wanted to remove the former CEO and he was pitted in this against his mother and his two sisters. So, through a really complex process, through the family trust, Edward Rogers had the voting rights through the Family Trust, which ultimately was able to choose the board and put the board for the company that he wanted with the new CEO.

[09:13] The court found that Edward Rogers properly brought and passed the resolution, meaning that his slate of directors was duly elected. So, really in this case, what it came down to was a dispute over the meaning and interpretation of written agreements. There was confusion over what is enforceable law versus governance, customs, and culture. Ted Rogers Sr. had drafted what he called a Memorandum of Wishes after the company bylaws were passed, and that Memorandum of Wishes outlined how Ted Rogers wanted to see the company's governance going forward. The company also made big commitments to good corporate governance and public documents with the people opposing Edward Rogers wanted to rely on.

So, really the key point coming out of the Rogers decision is notwithstanding all of the kerfuffle and all of the challenges that were going on in these relationships. The courts will enforce the law, the courts will enforce the statute, the courts will enforce the articles of incorporation, and then the bylaws and the policies regardless of what customs have built up. And regardless of what the people running the company have been doing in practice, if it's been offside the legal documents.

[10:42] HUSEIN: And it seems like that that might be a hard thing to reconcile for families who operate family businesses who might be used to a different level of formality?

[10:52] SUSAN: Absolutely. And look, both the cases we're going to talk about are family businesses, and there are a lot of family businesses in Canada. I will only pause to note that this is equally applicable to closely held companies, and startup companies, which tend to be found or controlled and controlled by a very small group of people. And what the court shows us is that they need to even in those small companies, what the courts will enforce is the actual legal documents.

[11:24] HUSEIN: For sure.

[11:25] SUSAN: Smaller companies run into issues where they don't have regular board meetings, they don't have clear minutes of their board meetings, and they don't have bylaws,

Lawyered – Episode 76
Corporate Governance Law ft. Susan Kushneryk
Episode Transcript

that are internally consistent and coherent. And everybody just let's all of that slide because everything is going really well and they're running an exciting business and they're starting to make money and people are starting to invest and then all of these problems come to the surface when something goes wrong or somebody comes in and wants to take over the company.

[12:00] HUSEIN: And I think there are some similar themes that come up in this other case of this rift involving this conservatory group and this group of brothers.

[12:08] SUSAN: Oh, absolutely. So, Libfeld is much less high profile than Rogers, but Libfeld is another family company, a very successful enterprise. A guy named Theodore Libfeld, who emigrated to Canada in 1951, founded this real estate company. And the court actually found that the likely value of the enterprise in 2021 was in the range of 2.5 to \$4 billion. Notwithstanding, there were no formalities to the relationship among the family members. So, when Theodore Libfeld died in 2000, his four sons took over running the operation. But there were no governance documents or no documents governing their relationship with each other, or with the enterprise.

[13:03] So, the brothers starting in 2005, tried to bring some formality some structure to the relationship, but by then they'd already started bickering, they saw the company going in different directions, and ultimately, their relationship with each other degenerated into such a point that they couldn't work together anymore. One of the brothers brought an application to wind up the business and the brothers fought like crazy about what should happen to this business.

[13:38] In the result, the court rejected all of the brothers' proposals and ordered that the group be wound up in sold under the supervision of a court-appointed sales officer. So, really, what's happened is that all the brothers have lost control, right? I mean, it's possible that one of the brothers may end up being the purchaser and maybe it will work out, but they're no longer in control of the process, the courts now control the process.

[14:07] HUSEIN: The theme that I'm hearing is that it's better to have more formality in these situations, even when maybe, especially when it's a family enterprise. But what does it probably look like if you're the corporate lawyer or you're the lawyer who's responsible for putting formality in place when previously there was little to none? How do you actually do this?

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

[14:29] SUSAN: Well, the way you do it is by pushing management to make the investments in the corporate governance structure. So, some things you can do as a lawyer, you know, make sure that the basic corporate documents and corporate structure is looked after. Don't disregard the governance instruments and practices, make sure that your articles align with what the enterprise actually looks like. Make sure that you've got bylaws that aren't internally inconsistent. Usually, that's because they've been amended, some provision has been amended, somewhere along the way, without taking the time to review the bylaws in their entirety.

[15:15] Make sure that your policies are consistent with your bylaws and consistent with the statute and your articles, make sure it all makes sense. Put the time into that review. Make sure that the structure keeps up with how the business looks. Because the structure when you start off with three investors to share, two shareholders, three investors, three creditors, and a board of two people, one of whom is the founder, there are certain things that make sense. But that doesn't make sense anymore, when you've got 2,000 shareholders and caught up in potentially complex creditor systems. So, make sure that you review and revise and that everything stays current.

[16:03] And these are basic corporate law things. But again, we find time and time and time again, that they're not being done. Make sure that the board actually reduces their minutes to writing, make sure that if there are really important decisions about directions that the company is going to take or significant things that company is going to do, make sure that they get their way into board resolutions. So, all of this annoying stuff, as the company's lawyer, it can be hard to push back against the CEO and CFO who may find all those an annoyance. But it's really important to do that.

[16:44] HUSEIN: Because I imagine it will pay dividends if and when there is a dispute.

[16:48] SUSAN: Oh, absolutely. And in fact, it might even prevent a dispute. Because if the answer is clear, in the instruments, there may be nothing to fight about. Where people are fighting, it's almost invariably where there's some ambiguity somewhere or something's been done offside the instruments, and again, until something goes wrong, people skate forward without actually dealing with these things. But when it does go wrong, it goes colossally wrong.

[Music Break]

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

[17:25] HUSEIN: Despite numerous actions and calls for action, corporate boards continuously fails to represent the diversity of the population. And while there's been some incremental progress, many commentators have maintained that increased corporate diversity has tangible effects beyond just tokenism. And several states in the US have even implemented regulations to specifically encourage and require this form of diversity. So, Susan, before we get into it, we want to get your thoughts on—when we talk about diversity in this context, what does it mean for a corporate board to have diversity?

[18:00] SUSAN: Well, I suspect that there will never be any board that can claim to have reached the golden ring of, we are diverse. At a bare minimum, a board should have a diversity of professional experience. So, traditionally, boards have included a lot of experience with finance and law. But it's important to also include a lot of Human Resources experience, for example, technical experience, for example, and these are just some examples. But beyond that, and going to your point that you just raised, it's generally agreed that diversity of thought and perspective can be achieved by diversity of experience in boards can go a long way to achieving that by seeking gender diversity, racial diversity, sexual identity diversity.

[18:49] So, what's the ultimate mix and the ultimate success in terms of diversity? There really is no gold standard for what is the appropriate diversity for any particular board. I think it will depend on industries, depend on companies themselves, depend on the market as a whole, and taking all of that into account. The diversity of one company's optimum diversity will be different from another company. But before we start talking about where the gold standard is, and when people have reached it, I will say absolutely without question based on any of the studies, based on any of the data, based on looking at what anyone has done, no one is achieving it. So, we are so far from achieving that kind of diversity that I think questions about when have we really reached it, are still a number of years away.

[19:57] HUSEIN: And I mentioned in the intro to this segment that there have been some initiatives in the US to push this diversity. And I know that in January 2020, the CBCA broadened certain types of disclosure that corporations are required to provide, particularly about minorities in a leadership role. So, I was wondering, what role do you think something like that either has or might have in terms of getting us towards a more diverse corporate landscape?

[20:30] SUSAN: Well, it's, it's helpful because, as you say, it broadens out the categories of diversity on which companies are required to disclose. And I say, broadens, so stepping back, what's the baseline? The baseline is that Canadian Securities Administrators, were focused on gender, the number of women on boards, and the number of women in senior executive roles.

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

And so the CSA requirement is very similar to the new CBCA requirements, except that the CBCA requirements broaden out the categories. So, neither the OSC requirement nor the new CBCA requirements actually set quotas, and they don't even set targets. What they do... and what's actually quite unique in the Canadian experience versus some markets, is they really rely on disclosure.

[21:37] So, it's more sort of leaning on a persuasion tool to try and get companies to change, as opposed to even targets or quotas. And it is having some impact. So, there's been some progress, but the progress is very slow. What I can say is that the Ontario Securities Commission has posted a review, maybe a CSA review. But what they've done is they've looked at the progress on diversity year over year. And if you'll look at the report on 2021, I believe that the number is starting to creep up to 25%. I believe that the number is around 23 point something percent of board seats on TSX companies are now held by women, which is an advancement from five or six years ago.

[22:39] What's actually interesting is that the bigger companies are doing a lot better than the smaller companies. And some of the bigger companies have actually adopted targets in respect of gender balance. So, based on my experience with clients running closely held companies, smaller companies, venture stage companies, and frankly, as a small business owner myself, I know that smaller companies are just that much more susceptible to manipulation through the shareholders acting through the boards than widely held companies are.

[23:20] So, the number of fights I've seen in my own practice between founders and investors, fights that are fought really through the board and through the boardroom, that's really high. So, huge wildly held companies just aren't susceptible to that kind of fighting. So, the directors of the bigger companies are just not as susceptible to that kind of manipulation. So, there's a little bit more freedom, I expect with who those companies can have on their board without that worry. With very small companies, especially companies that are founder-led, there's such a fear that management doesn't want to open up the board as much.

[24:06] HUSEIN: So, let's say you learn that there's an appetite for, you know, more diversity on the board. Are there any legally specific considerations you can think of that lawyers should be mindful of in this respect?

[24:19] SUSAN: Absolutely. So, certainly boards of publicly traded companies, if they're incorporated under the CBCA need to think very carefully about their disclosure requirements and make sure that their disclosure meets the requirements of the new statute. If they're not

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

CBCA incorporated, they still need to be careful to ensure that their disclosure meets what the CSA requires. Beyond that, there are ways to build incentives to have more diversity on the boards but also among senior executives. For example, a number of companies have chosen to introduce term limits for their directors. And you can do that through a company's bylaws.

[25:09] And the reason that term limits will promote diversity is it will ensure that there's turnover on the board. There are boards of companies in this country where there are no term limits. And there are directors who've been on these boards for 20-plus years. So, if you have term limits of 10 or 12 years, which tend to be common, 9 or 12 years, then that will necessarily open up new spots for more diverse directors. But then this is where your role as General Counsel, will blend a little bit into... not even so much policy, but the non-legal.... well, I should be careful, not illegal, but not...

[26:00] HUSEIN: Non-legal.

[26:01] SUSAN: Non-legal, not mandated at law. But that really does come down to your role as General Counsel in particular, as corporate secretary. Some really good practices are to build a matrix for the board for nominations. A matrix of diverse skills and other qualities to guide the nomination of new directors. Also, as General Counsel and corporate secretary, you can encourage your company to take risks by expanding its board selection. And you can consider organizations like the Institute of Corporate Directors, for example, that organization trains prospective directors and maintains a large roster. So, that can hopefully give some comfort to management who might be nervous about introducing an unknown director.

[26:54] The other thing you can do as General Counsel and Corporate Secretary is to encourage your board to think about search firms. That's another way to expand beyond personal networks, but also have some comfort, that you're not taking too big a risk, for example.

[Music Break]

[27:22] HUSEIN: Now, in 2018, the federal government finalized legislation to the Canada Business Corporations Act, also known as CBCA. And a series of these amendments recently came into effect at the end of August 2022 and will impact the manner in which directors are elected and the manner in which shareholder proposals are considered. So, Susan, I know that some of these amendments will change the requirements for electing directors. Can you walk us through at a high level what these changes look like?

Lawyered – Episode 76
Corporate Governance Law ft. Susan Kushneryk
Episode Transcript

[27:51] SUSAN: So, the amendments specific to the election of directors will apply to distributing companies only. So, shorthand meetings for publicly traded companies. For these companies, the amendments will require three things. They will require that directors be elected annually, and that directors be elected individually, as opposed to on a slate. And that directors be elected by a majority of votes, with no exceptions, except that if a director is not elected, there's a 90-day grace period. The only exception in the majority voting requirement in the CBCA as per the regulation is, that if a director was not elected, they can stay on the board if it's necessary to meet Canadian residency requirements or to meet the requirement that at least two of the directors not be officers or employees of the company or an affiliate. So, those exceptions are I mentioned them, but that should be pretty rare.

[29:06] HUSEIN: Okay. And I know that there are some changes in terms of the majority voting requirements. Can you tell us a bit more about that? I know that that's an area that generated some conversation.

[29:22] SUSAN: Absolutely, yeah. In fact, majority voting is only relevant if there is only one nominee for each of the board positions. Because if you have if you only have eight seats on a board, but you'll have 10 or 12 people nominated, then what you have is a genuine election. What the majority voting calls for, is for shareholders to be able to vote both for and against directors. And that's really the key point. I'll back up a little bit. The Business Corporations Act across the country and the federal statute, the CBCA generally provide for the election of directors that directors will be elected at the annual meetings. It doesn't say anything about voting for or against. And if you have a company with 10 shareholders who can sit around a boardroom table for the shareholders' meetings, and put up their hands, they can put up their hands and vote either yay or nay. But the reality for a company that's held by any material number of investors, as shareholders, most of those investors or shareholders are voting by proxy. And that's where the...

[30:41] HUSEIN: There's usually a lot more than 10 of them too.

[30:44] SUSAN: That's right. Absolutely. I mean, with the biggest companies, there can be literally millions, the biggest companies trading on the TSX. So, the way that the shareholders' vote is by proxy, the proxy form allows shareholders to either vote for a director or to withhold their vote. The proxy form does not allow shareholders to vote against a director candidate. So, the workaround was for all of the withheld votes to be counted effectively, as votes against, because if you interpret the vote for or withheld, literally what it means is that there was no

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

way to vote against a director on a proxy form. And even if 99% of the votes were withheld, the director would still be elected, because the only votes technically cast would be the votes for.

[31:49] What the CBCA amendment does is it just says up front, that shareholders are going to be able to vote either for or against director candidates, either at the meeting in person or by proxy. So, that's a big change. What underlies all of this big technical complex structure is a real drive for shareholder democracy. Institutional investors who want to have more control over the companies in which they're investing have really been pushing to be able to have their proxy votes count and have the weight and the force of the statute behind them. So, that's really what we've come to with the CBCA.

[32:45] HUSEIN: Do you think that scenario will become more common now with these amendments, now that there's like a true majority voting requirement, for situations where there are only as many candidates as there are positions?

[33:03] SUSAN: I think time will tell. I think the really interesting thing to see is the smaller companies, as I said, on the Venture Exchange. It's going to be really interesting to watch there. And the reason I say that is that the venture companies and the company trading on TSX and on the CSC, for example, I deal with a lot of companies on those exchanges. And those companies tend to be much more closely held than the TSX traded companies. By closely held, I mean that the number of shareholders tends to be a lot smaller. And so what that means is even aside from this majority voting requirement, even setting that aside, those companies are much more susceptible to manipulation. They're much more susceptible to taking over. They're much more susceptible to, frankly, shenanigans.

[34:02] And I think that the majority voting requirement, it's going to be very interesting to see what the impact is going to be on these smaller companies because from the shareholders' perspective, it will give a lot more control and the shareholder democracy advocates see this as a great way for investors in these smaller and venture stage companies to potentially have more control over what's going on with their investments in those companies. It's possible that it will also make these companies more susceptible to easy manipulation, where, as I said, it's closely held enough that a small number of shareholders can come together and make up the majority.

[34:56] In an extreme situation where you've got fights between shares which happens a lot with venture stage companies, particularly between founders and other investors, I could see a scenario where you could end up with an effective takeover of the board and a change of

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

control of the company through the board, just by exercising voting rights under this new majority voting policy. So, we'll have to see. Hopefully, it won't mean more shenanigans. And what it will mean is more genuine shareholder engagement and shareholder democracy. But as I said, time will tell, and we'll see what happens.

[Music Break]

[35:52] HUSEIN: And now it's time for the Ask-Me-Anything segment with Susan Kushneryk. As listeners of our show will know, one of the bonus words we have for members of our crowdfunding campaign is your opportunity to submit questions that they want to hear answered on the show. These can be questions about anything at all within the guest's area of expertise, as long as they are not asking for legal advice. And if you want to find out more about what this whole crowdfunding thing is all about, you can check out our website which is at www.lawyeredpodcast.com/patreon.

[36:23] Okay, so Susan, I have a bunch of very interesting questions that have been submitted. And the first one we're going to get into is: What are things that lawyers can do to facilitate succession planning within a corporate governance framework? And maybe you start by explaining what succession planning means.

[36:40] SUSAN: Well, succession planning generally means making sure that there's someone waiting in the wings that there are people to take over, take the board seats over as the board turns over. And in fact, a term that some people use as an "evergreen list". So, you'll always have a list of prospective directors so that as your board renews, and sometimes people have to step off boards for all kinds of reasons and you could end up with all of a sudden, a vacancy on your board. So, you want to have that planned out ahead. The other place people talk about succession plans in corporations, of course, is with the CEO, and sometimes the CFO.

[37:21] So, if you are a Counsel, there's a lot of stuff you can do to help facilitate and promote that kind of succession planning. Really, what you want to do is you want to turn people's minds to it, you want to turn the board nominating committee to looking forward not just to the next annual meeting, but down the road. You can encourage the board to, for example, develop a skills matrix, or the CEO, the same thing, develop the skills matrix for what they see as being really important for the executive team. For the board specifically, introduced term limits. You can encourage the board to build term limits into their bylaws, for example. Consider working with a search firm. So now this is again, pushing beyond the strictly legal

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

piece to help the board broaden beyond their personal networks. These are all things that lawyers can do.

[38:24] HUSEIN: Right. And you mentioned the skills matrix, can you tell us a bit more about what that looks like, in practical terms?

[38:30] SUSAN: Absolutely. And in fact, if somebody is really interested in the skills matrix, I encourage them to go on SEDAR, where public companies publish all of their disclosure. And some of the companies include a skills matrix in, right in their disclosure. And what you're looking for there are, what kinds of skills do you want on your board? Do you want an accounting background? Do you want the legal background? Do your Human Resources background? Do you want a facility or reading financial statements? Do you want mining expertise? Government experience might be really important for a heavily regulated company or in a heavily regulated industry, for example. So, if you think about what's really needed on your board, to help with the best oversight that you can get from your board. And this was also where you might want to think about diversity targets and bringing those in.

[39:29] HUSEIN: Great. Okay, so the next question we have is, are there any situations in which a corporate director can be removed from a board based on misconduct?

[39:40] SUSAN: The short answer, is no. The corporate statutes generally include qualifications for a director, they have to be over 18 and generally, they can't have been bankrupt for example. So, as long as you meet those qualifications, then you can be a director. And when we're talking about misconduct, it's actually hard to say exactly what misconduct would be. I mean, fraud, but anything short of fraud, what constitutes misconduct in the boardroom can be quite subjective. Now, I'll say the other reason my answer is no, is because, for corporations, shareholders can just remove the directors anytime. So, if there's somebody engaged in what is perceived to be misconduct in that context, the shareholders can just call a special meeting. This is not like an employment context, the shareholders don't like what you're doing, and can just vote you out.

[40:48] HUSEIN: But that said, can corporations create their own bylaws that put some requirements on what they expect board members to do and comply with?

[40:57] SUSAN: That's an interesting question. If the board passed a bylaw, that made certain conduct a disqualification factor, unless and until those bylaws were adopted by the shareholder at the next annual meeting, I suspect that the board would be running a risk of

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

being found to be acting oppressively to whatever director is being targeted with that bylaw change. The better thing to do is just to have the shareholders reconstitute the board and look, if the fact is that a significant shareholder supports a particular director, even if they're a thorn in the side of all of the other directors. They got to live with it because that shareholder supports it.

[41:54] So, a couple of caveats to that: There are sometimes ways with companies that may be the shareholders don't have the same level of control. And I'm thinking of, for example, Crown Corporations. And in those instances, you need to consult a specific statute that governs those corporations. And in fact, I'm litigating a case right now with a Crown Corporation, where the board is appointed by various stakeholders. And in that statute specific to that organization, there was a provision specifically for an application to the court for misconduct by the directors to have the director removed.

[42:39] But I will say that there are very few litigated cases in this area, which generally relate to municipal council or school trustees because they're not litigated because circling back, the shareholders can just reconstitute the board if there's a problem. An exception to all of that is that the Securities Commissions regularly use banning people as officers or directors of public companies, as an enforcement tool. So, that's the one exception to everything I just said.

[43:10] HUSEIN: Okay, that's helpful to know. The next question we have here is that it's well established that corporate directors owe a financial duty in their role. And I'll just say as an aside that, that was not my question. But I've heard this during law school, and I don't do much corporate law, but I hear fiduciary thrown around all the time. But the question is, what is fiduciary duty look like in practical terms?

[43:42] SUSAN: Absolutely. And I will just say, right off the bat, that people tend to confuse the fiduciary duty with the standard of care. So, without going into a whole big corporate law course, I will say that the fiduciary duty is that duty that we always hear quoted, "To act honestly and in good faith with a view to the best interests of the corporation." That's like the director visa vie the corporation. The duty of care is the requirement that the directors exercise the care diligence and skill that a reasonably prudent person would exercise in comparable circumstances. So, if we look specifically at the fiduciary duty, what that means is that directors and officers have to act always in the best interest of the corporation, and no one else's interests are in preference to those or in priority to those interests.

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

[44:32] Where this comes up on a practical basis, usually it comes up where there's a conflict of interest. Like if you are doing business with a company, there may be reasons that you... it's quite common for a significant lender to have a seat on a board. So, are you there protecting your loan or are you there looking after the company? And as director, you're there looking after the company and usually, those interests align. But every once in a while, they might not. Or are you a supplier who's selling supplies to the company? And in those instances, what you have to do is you have to declare as a director, what your conflict is. And you have to bear in mind always that no matter what your other rule is, when you're sitting in the director's chair, you have to be thinking about what's best for the company. And if you can't do that, then you have to step away and not vote on that issue.

[45:35] HUSEIN: The next question we have is, are there situations in which geopolitics can impact the governance operations of a company? And if so, how? For example, we are recording this in the summer of 2022, there has been a lot of news about Russia and its involvement in Ukraine. So, what are your thoughts on this geopolitical issue?

[45:57] SUSAN: Oh, absolutely. Look, those absolutely will affect the governance of a company, and directors need to be attuned to those issues. It will depend, of course, on the nature of the company's operations. But for example, companies that were doing business in Russia, in February and March and later, those boards were those companies were scrambling to figure out what the heck do we do, and a lot of companies as has been reported in the media, a lot of companies shut down the Russian operations altogether. Well, how do you do that effectively? And how do you do that without damaging the company, or minimizing damages to the company? And that's generally something that a board would be involved in thinking about.

[46:51] What it may mean for the board is that you need to bring in experts who maybe to consult with the board, or maybe you need to round out your board to add a director who has got expertise. It just may mean a shift in the board's oversight of the company and what kind of reporting it gets from management, what kind of priority the board requires from management in terms of keeping the board informed about some of these issues. Canada, of course, as we all know, Canada is really big in mining. And there can be significant issues there. We've seen this litigation, we've seen this with regulators, a whole panoply of regulatory issues.

[47:42] Wars in countries, unstable governments, war, civil war, and other kinds of violence in companies may not be that stable, but are places where the mining opportunities are significant. One really good example of this kind of issue coming up is climate change. And climate change boards need to think about climate change, and how climate change can also

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

affect your company. And this is where directors need to be really alive to a range of issues. Because you may think, well, we're not an oil and gas company. So, it doesn't really affect me, it's not something I need to worry about, I make socks. But if the socks you're making are in a factory located near a coastline, where the water is expected to rise over the next 10 years, maybe you'll lose your factory. You need to be thinking about all of these things and reacting as a board.

[48:45] HUSEIN: The phrase is, we've got to be thinking about all these things. But practically, how do boards do this? Do you need to have subject matter experts on every country and every environmental issue? How would a board go about identifying what are the areas in which they ought to be monitoring or getting reports from?

[49:09] SUSAN: Well, boards generally work very closely with management to come up with a risk profile for the company. Unless you're Microsoft or Coca-Cola, you probably don't actually have operations in every country. So, you need to think about where you are operating and what makes sense for you and your company. So, boards need to work very closely with management. And in fact, that's one of the big challenges for boards is to make sure that they're getting the right level of information from management and making sure that they're getting information from right across the company, fed up to the board. In terms of expertise, that's one area where boards may not rely as much on management, they may have their own initiative, reach out and find the expertise that they need to inform their decision-making.

[50:17] HUSEIN: I think every second, we've gone through, there have been some mention of shareholders and the relation between them and the directors. So, the question that's been submitted is, what impacts if any has the pandemic had in terms of the dynamics between shareholders and corporate boards?

[50:33] SUSAN: Well, as elsewhere in society, right across the board, there's been a massive shift to virtual work. And so one thing we've seen is that from 2020, a lot of companies by necessity, held virtual shareholder meetings instead of in-person shareholder meetings. What was interesting from that is that some companies found that they actually had better participation. They had more people who may not have been able to or wanted to travel for the shareholders' meeting, actually attend virtually. So, that's been a good thing.

[51:08] HUSEIN: We're in the summer of 2020 right now, I'm weary to say that COVID is over, but it's, starting to slow down a little bit. Do you see these virtual meetings, virtual AGMs becoming more commonplace, even when health restrictions don't require this format?

Lawyered – Episode 76
Corporate Governance Law ft. Susan Kushneryk
Episode Transcript

[51:25] SUSAN: Well, that's an interesting question. And I think we're going to have to all watch with a lot of interest to see what happens. I expect that yes, we will because there have been such positive results in terms of attendance, it certainly saves a whole lot of money for the company not having to hold a great big huge in-person meeting. So, with everything coming out of COVID, time will tell, but I expect that we're going to see a lot more virtual meetings, either fully virtual or maybe in a hybrid format, for example.

[52:06] HUSEIN: I imagined that beyond the voting aspect, it might improve dialogue between the shareholders and the directors.

[52:15] SUSAN: I expect so and anecdotally, we've seen that some companies have talked about that. Partly just because of the attendance, and it may be easier to be asking questions and to be engaging in a virtual format than it could be to raise your hand in a room with 500 people. But there have been some real positives noted from this, and hopefully, the companies are taking note and figuring out a way to retain the benefits that we've seen.

[52:50] HUSEIN: So, Susan, I want to thank you for walking us through these interesting issues and really explaining the dynamics between how corporate boards not only interface with their shareholders but the roles that they play within society. A lot of the themes that we've spoken about in terms of geopolitics and diversity really helped to bring this home. You did a great job of explaining the legal impacts and what may come in years to come. So, we really appreciate your insight and time and looking forward to staying in touch in the future.

[53:21] SUSAN: Well, thank you so much for the opportunity to be here today. I appreciate it.

[Music Break]

[53:31] HUSEIN: And that's a wrap on our interview for today. Thanks for listening. In today's episode, our guest was Susan Kushneryk. You can learn more about her and her law firm called Kushneryk Morgan LLP at the firm's website, which is kmCouncil.ca. And for more about today's show and links to all of the issues and legislation that we spoke about in our episode, you can find those on our website, which is www.lawyeredpodcast.com. And in two weeks' time, we'll be shifting gears entirely and speaking with Yabba Hamid, about the area of national security law.

Lawyered – Episode 76

Corporate Governance Law ft. Susan Kushneryk

Episode Transcript

[54:10] And we got some very timely and interesting issues here, including the use of the Emergencies Act, and the use of facial recognition by the government. You're not going to want to miss that episode. Not only is the guest, a friend of mine, but he's someone who is very intimately involved in this particular subject matter, does a lot of work in this area and he's got a lot of interesting insights. So, I hope that you check that one out.

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