Stikeman Elliott

Shareholder Activism and Shareholders' Rights in Private and Public Companies in Canada
Overview

By Christian Brands and Meghan Jones

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Shareholder Activism in Canada: Overview

by *Christian Brands* and *Meghan Jones*, *Stikeman Elliott LLP*

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A Q&A guide to the use of shareholder activism in Canada.

The Q&A gives a high-level overview of the use and goals of shareholder activism, the regulation of shareholder activism, and the strategies and tools used by shareholder activists. It also considers how shareholder activism may be prevented, and the practical steps that a company can take to minimise the risk of being targeted.

Use of Shareholder Activism

1. Provide an outline of the use of shareholder activism in your jurisdiction.

Shareholder activism in Canada involves the use by shareholders of a broad range of tools and tactics to effect the activists' desired changes, which can range from changes to board composition that result in increased representation, change of control or the complete replacement of board members, changes in corporate management, strategy and operations, including changes in deployment of assets or use of capital, and changes to corporate governance practices and other matters.

While shareholder activism is traditionally less prevalent in Canada than in the US, it has been on the steady rise in Canada, both on account of US activist shareholder activity in Canada and increased acceptance and participation by Canadian institutional investors. Changes in market conditions, liquidity and access to cost of capital and regulations also impact the activity from time to time.

Some elements of the Canadian regulatory framework that may result in the landscape being shareholder friendly and therefore perhaps encourage shareholder activism include:

- Rights of shareholders with a 5% ownership interest to requisition meetings.
- Entitlement to receive shareholder and convertible securityholder lists.
- Ability to be reimbursed for costs associated with proxy contests.
- Ability of shareholders to include proposals on the election of directors in management proxy circulars.
- Ability of shareholders to avoid disclosure given both:
    - the ability to communicate with up to 15 shareholders without using a proxy circular; and

- the presence of a 10% beneficial interest reporting threshold.

- Fewer structural defences in Canada than in the US (for example, there are generally no staggered boards and an ordinary resolution can remove the board in a single step).
- Canadian securities regulators are generally less deferential to defensive tactics than US courts (although Canadian courts have strongly endorsed the "business judgment" rule).
- Notwithstanding inherent target company advantages, target boards of Canadian issuers are often willing to be somewhat accommodating to avoid public criticism and related reputational concerns.
- A wide range of judicial remedies for aggrieved activists, including the potential availability of the broad "oppression remedy" under federal and provincial corporate statutes.
- Recent legal, regulatory, and governance developments.

Regulation of Shareholder Activism

2. What are the main regulatory or legislative provisions relevant to shareholder activism in your jurisdiction?

Regulatory/Legislative Provisions

Shareholders of a publicly traded Canadian company wishing to effect a change in the company's behaviour have several tools available to them. In addition to informal persuasion tactics, shareholders can:

- Formally submit a proposal to be considered at a shareholders' meeting.
- Requisition a meeting of shareholders for the purposes that they specify in the requisition.
- Engage in a proxy contest.
- Engage in a "vote no" campaign.

A shareholder who satisfies certain minimum prescribed share ownership requirements (generally, ownership, for the prior six-month period, of voting shares which have either voting rights of at least 1%, or a fair market value of at least CAD2,000) is entitled to formally submit proposals to be considered at a shareholders' meeting. The ownership threshold is higher if the proposal includes nominations for the election of directors (in that case, the proposal must be signed by holders of at least 5% of the voting shares). A shareholder is entitled (but not obligated) to submit a description and statement in support of its proposal (limited to an aggregate of 500 words) to be distributed with management's proxy circular. The value of the proposal mechanism is that it allows a shareholder direct access to management's proxy circular. However, as a general matter, a dissident shareholder who wishes to put forward an additional director (or an alternative slate of directors) would typically be unlikely to attempt to effect that desired change by way of a proposal alone.

Shareholders of a Canadian company may also requisition a meeting of the company's shareholders. Specifically, registered holders of not less than 5% of the company's voting shares can requisition the directors of the target company to call a special meeting of shareholders for the purpose(s) stated in the requisition.

Shareholders have tended to rely on proxy contests where the change they are seeking is to replace the directors of the company or contest fundamental transactions that have been approved by management and/or the board of directors. A proxy contest can be launched with respect to either a meeting previously called by the company or by requisitioning a shareholder meeting. Shareholders can also nominate their own nominees for election to the board, although advance notice bye-laws, if adopted by the target company, would require advance written notice of such information. Generally, in order for the dissident shareholder to obtain enough support to effect its objectives, it must request (or solicit) the proxies of other shareholders in compliance with applicable corporate and securities laws.

Shareholders can also apply to securities regulators to intervene where regulatory requirements may not have been complied with by the target company, including where the target company has not complied with disclosure and minority approval requirements or in respect of inappropriate defensive tactics by a target board.

Case Studies

In *In the Matter of Sprott Asset Management (2015) 38 OSCB 10680* the Ontario Securities Commission (OSC) ordered the issuance of a notice of change to provide enhanced disclosure to unitholders of the target trust in respect of amendments that had been made to voting powers of attorney solicited by the target trust and its management in connection with its unsolicited offer to acquire all of the outstanding units. The OSC also prohibited the target's management from exercising rights attaching to the amended voting powers of attorney before the expiry of 15 days after the notice of change was issued.

Goals of Shareholder Activism

3. What are the principal goals of activist shareholders where shareholder activism is used?

Financial Reasons

Activist shareholders typically seek near-term opportunities to exploit undervalued share prices. Attributes that tend to attract activist shareholders typically include:

- Underperformance (for example, a low valuation multiple or market cap relative to peers or apparent asset value).
- Untapped mergers and acquisitions (M&A) or other transactional (or event driven) opportunities.
- Balance sheet characteristics (for example, strong cash generating capability and/or excess cash; extremes of financial leverage (too high or too low)).
- Corporate governance weaknesses.

Usually, an activist shareholder's objective is to increase a target company's share price. An activist shareholder may seek to achieve this goal by seeking board representation in order to influence:

- A sale of the company or assets of the company.
- A change in the strategy of the company.
- A change in the composition of the board/management.
- A change in the company's share capitalisation (for example, share buybacks, enhanced dividends and so on).

Non-Financial Reasons

Recently, there has been an increase in activism surrounding environmental, social and corporate governance/compensation considerations and challenges to proposed M&A transactions (that is, rejecting a proposed transaction or seeking increased consideration).

Strategies Used by Activist Shareholders

4. What are the key strategies used by activist shareholders?

Strategies used by activists can include one or more of the following:

- Non-public approaches to management or the board with concerns/proposals/threats.
- Shareholder proposals.
- Public relations campaigns and/or securities filings to make their concerns public.
- Proxy contests or unsolicited takeover bids.

In addition, as directors of companies incorporated federally under the Canadian Business Corporations Act (CBCA) and companies whose shares are listed on the Toronto Stock Exchange (TSX) are required to be elected by a majority of votes represented in person or by proxy at a meeting of shareholders, disgruntled shareholders can also engage in "vote no" campaigns and defeat incumbent directors by forcing them to resign or cause them not to be elected where they obtain less than a majority of votes for their (re-)election.

Shareholder Disclosures

5. Are shareholders required to disclose their share ownership? What are the penalties for non-compliance?

Disclosure Requirements

Shareholders of public issuers are required to disclose their beneficial ownership under "insider reporting" and "early warning reporting" requirements under applicable Canadian securities laws. Early warning reporting requirements include reporting for any "joint actors". Generally, shareholders are required to report their interest in public issuers if they directly or indirectly beneficially own, or exercise control or direction over, alone or together with affiliates and joint actors, 10% or more of the outstanding voting equity securities of the issuer.

Penalties for Non-Compliance

Such holders can be subject to enforcement action by securities regulators for failing to comply, including monetary penalties and other restrictions relating to their ability to trade or access public markets. Penalties can also include disgorgement or rescission.

Tools Available to Activist Shareholders

6. Outline the range of legal and regulatory tools available to activist shareholders.

The principal tool available to shareholder activists is the ability of shareholders who hold 5% or more of the company's voting shares to requisition a special meeting to effect corporate changes, which can include the removal of directors. The annual meeting also presents a forum to replace directors through proxy contests of nominations from the floor. Shareholders may also make shareholder proposals to be included in the company's management proxy circular.

The definition of "solicit" under the CBCA and Canadian securities laws is quite broad. Generally a dissident shareholder must utilise a dissident proxy circular to solicit proxies. However, dissident shareholders may solicit proxies from 15 or fewer shareholders without using a dissident proxy circular. Dissident shareholders are also entitled to request shareholder lists from the company and the CBCA allows for the reimbursement of costs of a dissident shareholder incurred in connection with a proxy contest.

Target companies and incumbent boards can also challenge the dissident shareholder before the securities commissions or the courts for, among other things, deficient disclosure and proxy solicitation violations.

Dissident shareholders can also challenge defensive tactics of a target company before the securities commissions or the courts. In *In the Matter of Eco Oro Minerals Corp (2017) ONSEC 23*, the Ontario Securities Commission (OSC) overturned a decision of the TSX approving a private placement of shares by the issuer in the face of a proxy contest. The OSC relied on its public interest jurisdiction to overturn the decision of the TSX on the basis that the TSX was not advised of all the relevant facts at the time of applying for conditional approval for the issuance, where the private placement would have allowed for the issuance of shares to existing shareholders supportive of the incumbent board.

Prevention of Shareholder Activism

Red Flags

7. Are there any red flags that a company should look out for to provide an early indication that it may have become the target of shareholder activism?

As a preliminary matter an activist may accumulate a "toehold" position before any public disclosure and before engaging with the target. The Canadian reporting threshold is only triggered at 10% direct or indirect beneficial ownership or control or direction, whether alone or as a group acting jointly or in concert, over voting equity securities, and that disclosure may be delayed if the reporting shareholder is using the alternative monthly reporting system (if available). Activists may also commence canvassing third parties for support and recruiting candidates to join in with their activist agenda prior to making any public disclosure, subject to applicable proxy solicitation and beneficial ownership reporting rules.

Typically, the target company will be approached by an activist, and that approach may include a request for a meeting with board/management, a "bear hug" letter (that is, a letter to the chief executive officer or board of directors of the target corporation containing a preliminary offer to acquire the corporation) and white paper (as applicable), and/or the use of publicity. Some activists prefer to exhaust private avenues before going public, while others will use publicity to leverage their position. An increasing number of activist shareholders are achieving success or partial success. In recent years it has become prevalent for public companies in Canada to adopt "advance notice bye-laws" that prevent dissident nominees being proposed from the floor of a shareholder meeting. As a result, advance notice of dissident nominees is also an early indication of activist activity.

Minimising the Risk of Being Targeted

8. What practical steps can a company take to minimise the risk of being targeted by activist shareholders?

Although there is inherent uncertainty surrounding the intentions of shareholders, and the actions of a target company in response to any activist shareholder activity will by necessity be somewhat reactive based on the particular activist threat, the target company can take the following steps to keep informed as to the potential intentions of such persons and prepare itself accordingly:

- Maintain generally open (but careful) communications with shareholders, as disgruntled shareholders in particular can be the source of potentially useful information and a willingness to hear their concerns can potentially deflect them from launching a proxy contest.
- Be aware of the composition of the company's shareholder body and stay close to key shareholders.
- Watch for the accumulation of ownership positions or the formation of "joint actors" as identified in press releases and early warning report filings announcing the acquisition of beneficial ownership of, or power to exercise control or direction over, common shares of the company, that in the aggregate constitute 10% or more of the outstanding common shares of the company, and filings with the United States Securities and Exchange Commission under the United States Exchange Act (these are known as Schedule 13D and Schedule 13G filings), where applicable, announcing the acquisition of beneficial ownership of more than 5% of the common shares of the company.
- Watch for requests from shareholders:
    - for a shareholder list;
    - for access to the company's corporate records;
    - to view the list of shareholders entitled to receive notice of a meeting prepared in connection with a shareholders' meeting; and
    - for a list of non-objecting beneficial owners.
- Consider retaining a proxy solicitation firm.
- During the period leading up to a shareholders' meeting, monitor the number of proxies returned to the transfer agent and any changes in patterns from prior years.
- Keep an eye out for completed and returned proxies where the beneficial owners have named themselves as their own proxy appointees and for the nomination of one individual as proxy appointee for a number of proxies, as that may hint at the existence of an activist shareholder group.

Companies should also generally benchmark performance and be aware of where they lie relative to peers and whether operating performance, share price or balance sheet characteristics may make it an attractive target. Increasingly, outlying characteristics on environmental, social and governance issues can also make the company a target.

Steps to Take when Faced with Shareholder Activism

9. What steps can a company take when it is faced with shareholder activism?

Once it has been targeted by a shareholder activist, in formulating a response the target company should first examine the potential impact of the shareholder activist's message/proposal on key shareholders and shareholders in general and evaluate their chances for success based on the size of shareholdings and identity (that is, the past record of the activist), general sentiment/

support in the market and other tactical considerations. Such an assessment may include identifying the methods through which the shareholder activist may be given part or all of their demands with a view to compromise, and the likelihood and the terms of a settlement with the shareholder activist, which will generally depend upon the nature of the issues involved.

In Canada, directors' duties in the context of a shareholder activist situation are akin to those in any merger and acquisition situation and the board may oppose action that on reasonable grounds is believed to be contrary to the best interests of the company. When faced with this type of situation, a target company may choose to respond in a number of ways, including:

- Formulating responsive or pre-emptive proposals (including recruitment of new board members).
- Negotiating a compromise solution (for example, the board and management execute a plan of action proposed by the shareholder or accommodate the shareholder's proposal).
- Denying the shareholder activist's demands and conducting an appropriate solicitation campaign.
- Employing other defensive strategies, including transactional or litigation strategies.

Procedural mechanisms can include postponing meetings and adopting advance notice and enhanced quorum bye-laws, and adopting shareholder rights plans or "poison pills" (although recent reforms may render these less effective (*see Question 11*)).

The incumbent board and management enjoy several potential advantages over activists, including:

- Control over meeting timing, agenda and conduct.
- Control of proxy machinery and ultimate say on validity of voting documentation (subject to judicial review).
- The ability to set and sometimes opportunistically waive the 48-hour proxy cut-off period.
- Existing shareholder relationships, shareholder information and information regarding alternatives.
- Access to the company treasury.

Risks and Benefits of Company Responses

10. What are the risks and benefits of different company responses to shareholder activism?

While a variety of strategies are used and the risks and benefits are highly situation-specific, generally in the Canadian landscape, it is often the case that the most successful outcomes are for target companies to engage in negotiation and compromise to a certain extent, by admitting some of the activist's nominees to the board and/ or adopting some of the proposed plan of action.

Current Trends and Developments

11. Are there any current trends, developments or reform proposals that have or will affect the area of shareholder activism in your jurisdiction?

Amendments to provincial securities laws in May 2016 have resulted in a fundamental shift in the framework for take-over bids in Canada by increasing the amount of time a target company has to respond to a hostile bid to 105 days. The amendments require the initial hostile bid to remain open for at least 105 days, which may be shortened if the target company enters into an alternative transaction, and mandate a minimum tender requirement of more than 50% of the outstanding securities that are the subject of the takeover bid (other than those owned, or over which control or direction is exercised, by the bidder and any joint actors).

Target companies now have significantly more time to respond to bids and seek out alternative transactions. The increase in the time frame has negated, to a large extent, any benefit of adopting a shareholder rights plan (as Canadian securities regulators have historically taken the view that the target board cannot "just say no" and the rights plan must expire or cease to be traded when the target is no longer utilising it to seek out maximising alternatives). While a shareholder rights plan could be (and commonly was) implemented to provide target boards with additional time to respond to an unsolicited bid and defend against creeping acquisitions, our legal framework makes Canadian pills "chewable" in the sense that our provincial securities regulatory authorities operate on a highly shareholder-centric model and have broad "public interest" jurisdiction to "cease trade" the rights issued under a rights plan upon the application of an interested third party (generally the bidder in the context of an unsolicited bid). However, shareholder rights plans may continue to be appropriate in protecting target companies from a "creeping bid" made through the normal course of purchases and private agreement exemptions and may also be employed to guard against hard "lock-up" agreements between shareholders.

Case Study

In *In the Matter of ESW Capital, LLC (2020) 43 OSCB 7348* the Ontario Securities Commission ordered that ESW Capital, LLC (ESW) would not be exempted from the minimum tender requirement in its proposed all-cash bid for the subordinate voting shares of Optiva Inc (Optiva). The exemption sought would have allowed ESW to control Optiva without purchasing the shares held by Optiva's principal minority shareholders. These shareholders opposed the ESW proposal and had been engaged in a protracted proxy contest against ESW for control of Optiva. The OSC has yet to deliver reasons for its decision.

Contributor Profiles

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Areas of Practice. Mergers and acquisitions; securities; capital markets; private equity; corporate governance; mining; REITs.

Recent Transactions

- Various issuers and activist shareholders in numerous proxy contests and contested meetings including Hudbay Minerals and Obsidian Energy.
- Teck Resources Ltd in the CAD1 billion sale of its 21.3% interest in the Fort Hills oil sands project and certain associated downstream assets to Suncor Energy Inc.
- Centerra Gold Inc in its USD900 million global arrangement agreement with Kyrgyzaltyn JSC and the Government of the Kyrgyz Republic.
- The Special Committee of Independent Directors of Stelco Holdings in its buyback of approximately 13% of its outstanding shares from its significant shareholder, LG Bedrock Holdings LP, for gross proceeds of approximately CAD400 million.
- OMERS in its USD375 million acquisition of a 14% interest in Lloyd's (re)insurer Brit Limited.
- OMERS in its USD600 million acquisition of a 40% interest in Fairfax Financial Holdings Limited's UK run-off insurance group, RiverStone UK.
- Vector Capital in its USD1.4 billion sale of Saba Software in a cash and stock transaction.
- Flutter Entertainment plc, as Canadian counsel, in its USD15 billion all-share business combination with The Stars Group Inc.
- Progressive Waste Solutions Ltd in its acquisition by Waste Connections, Inc in a CAD13 billion all-stock business combination effected by way of a reverse merger.
- Obsidian Energy Ltd in its unsolicited take-over bid to purchase all of the issued and outstanding common shares of Bonterra Energy Corp.

Professional Associations/Memberships. Member of the Law Society of Ontario.

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Recent Transactions

- Detour Gold Corporation in its CAD4.9 billion acquisition of all of its issued and outstanding common shares by Kirkland Lake Gold Ltd.
- Maxar Technologies Ltd (formerly MacDonald, Dettwiler and Associates Ltd) in its cross-border acquisition of DigitalGlobe, Inc for an equity value of approximately CAD3.1 billion, and an enterprise value of CAD4.7 billion.
- Potash Corporation of Saskatchewan Inc in its USD36 billion merger of equals by way of a plan of arrangement with Agrium Inc.
- Performance Sports Group in the USD575 million sale of its business to Sagard Capital and Fairfax Holdings through CCAA and Chapter 11 court proceedings (TMA, 2018 Transaction of the Year: Large Company winner and Turnaround Atlas Awards, 2018 Restructuring Transaction winner).
- MAV Beauty Brands Inc in its CAD240 million initial public offering.
- TA Associates in its acquisition of Petcurean Pet Foods.
- VERTU Capital in its acquisition of Firmex.
- Various issuers in connection with ongoing continuous disclosure and corporate governance/board and management advisory matters.
- Various issuers and underwriters in connection with their public offerings and private placements.

Professional Associations/Memberships. Member of the Law Society of Ontario.

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Country Q&A | Law stated as at 01-Feb-2023 | Canada

A Q&A guide to shareholders' rights in private and public companies law in Canada.

The Q&A gives a high-level overview of types of limited companies and shares, general shareholders' rights, general meeting of shareholders (calling a general meeting; voting; shareholders' rights relating to general meetings), shareholders' rights against directors, shareholders' rights against the company's auditors, disclosure of information to shareholders, shareholders' agreements, dividends, financing and share interests, share transfers and exit, material transactions, insolvency and corporate groups.

Types of Companies with Share Ownership and Limited Liability

1. What are the main types of companies with limited liability protections and shareholders or members? Which is the most common? Which type do foreign investors most commonly use?

In Canada, the main types of companies with limited liability and shareholders are business corporations incorporated under either Canadian federal or provincial law. Other types of limited liability entities include limited partnerships and trusts, in each case formed under the applicable provincial laws.

Foreign investors most commonly use federal or provincial business corporations, including Canadian subsidiaries of foreign corporations. In appropriate circumstances, including for tax and other considerations, other structures may also be used, including general partnerships and unlimited liability corporations (although the latter two do not have limited liability).

With respect to limited liability corporations, both the federal and provincial governments of Canada have enacted legislation providing for the incorporation and regulation of business corporations.

A business corporation incorporated under provincial law may carry on business as of right in the province of its incorporation and also has the capacity to carry on business beyond the limits of that province. A federal business corporation is subject to provincial laws of general application, although it has the basic right to carry on business in any province. Most provinces require corporations incorporated in other jurisdictions to register or be licensed before doing business in that jurisdiction and to file initial and annual returns and notices reporting certain basic corporate changes.

While similar in many respects, there are differences among the federal and provincial business corporations laws, including with respect to Canadian resident director requirements (which are lower, or not applicable, under certain provincial statutes). While this article addresses Canadian corporate law generally, specific provisions are based on the federal law only, that is, the Canada Business Corporations Act (CBCA). Public companies are also most often organised as business corporations, although non-corporate public entities such as trusts and partnerships can also be formed.

2. What are the minimum share capital requirements for companies?

There are no minimum share capital requirements for private business corporations. However, publicly traded corporations typically must meet the thresholds under the minimum original listing requirements of the relevant stock exchange. Corporations carrying on regulated businesses often also have minimum capital requirements of various kinds.

3.Briefly set out the main types of shares typically issued by a company and the main rights they provide. Set out the other financial instruments (for example, bonds) and participation instruments that can be issued by a company.

The most common types of shares issued by business corporations are common shares and preferred shares. As a matter of corporate law, all shares must be fully paid up and, for corporations incorporated under the CBCA, are without nominal or par value.

Common shares have the right to vote, to receive dividends when declared and to participate on the liquidation, dissolution or winding-up of the corporation. The rights attaching to preferred shares can be customised, including the right to participate in the profits of the business while ranking ahead of the common shares with respect to liquidation preferences and dividends. Preferred shares can be voting or non-voting and can have other features, such as being convertible (into equity/common shares, for example), redeemable or retractable.

Shares can be issued in the form of one or more classes or series, and can have the rights and attributes as are set out in the articles of incorporation or in shareholders' agreements that bind the shareholders. Corporations can also issue other types of securities such as debentures, options and warrants with a range of attributes.

4. What is the minimum number of shareholders in a company?

There is no minimum number of shareholders. All corporations, whether private or public, can have one sole shareholder, although stock exchanges will generally impose a minimum number of holders (or public float) requirement and a public corporation will generally only have a single or small number of shareholders for a temporary period of time following a merger, amalgamation, takeover bid or similar transaction. For example, corporations listed on the Toronto Stock Exchange (TSX) must generally meet the minimum listing requirement of 300 public shareholders each holding a board lot (the size of which varies depending on the trading price of the shares).

General Shareholders' Rights

5. At the formation of a company, what level of government defines the rights and obligations of the company?

Canadian corporate law is administered at both a federal and a provincial level. A corporation can be incorporated under the federal CBCA or the equivalent legislation of a province, and will be administered by the relevant ministry of the relevant jurisdiction. Canadian securities laws (which govern matters such as shareholder meetings, takeover bids and securities distributions by public companies) are administered solely at a provincial level by the relevant securities commission or securities regulator in each province.

6. What are the general rights of all shareholders? How can shareholders' rights be varied (for example, attaching additional rights or limitations to a class of shares, or waivers of shareholders' rights)? Are such variations generally provided in the company's bye-laws, shareholders' agreements or by statute?

Where a corporation has only one class of shares, the general rights of all shareholders must include the rights to:

- Vote.
- Receive any dividend declared by the corporation.
- Receive the remaining property of the corporation on liquidation or dissolution.

The corporation's articles of incorporation may allow for more than one class of shares, in which instance the three rights listed above must be attached to at least one class of shares, but all such rights are not required to be attached to one class and can be dispersed among multiple classes.

Further general rights of all shareholders include:

- The right to receive certain information, including the financial statements of the corporation, certain corporate records, minutes of meetings and resolutions of shareholders.

- The right to approve certain fundamental changes (*see Question 14*).

The rights attaching to a specific share class or series are generally set out in the articles of incorporation but can be varied by a unanimous shareholders' agreement and, in certain circumstances, may be set out in other agreements to which the shareholders are party or are otherwise subject, including certificates or indentures governing the specific securities, such as a warrant certificate or debenture indenture.

7. Briefly set out the rights of minority shareholders and the minimum shareholding required to exercise such rights.

The rights of minority shareholders include the general rights of all shareholders, as well as certain rights that depend on their ownership interests held. If they hold at least 1% of the total number of outstanding voting shares and meet other prescribed requirements, shareholders are eligible to submit a shareholder proposal (*see Question 16*). If they hold at least 5% of the total number of outstanding voting shares and meet other prescribed requirements they:

- Have the right to requisition a shareholders' meeting (*see Question 15*).
- Are eligible to submit a shareholder proposal that includes nominations for the election of directors (*see Question 16*).

8. How effective are institutional investors and other shareholder groups in monitoring and influencing a company's actions (for example, corporate governance compliance)? List any such groups with significant influence in this area.

Institutional investors, proxy advisors and shareholder representative groups can be quite influential for public companies in Canada, particularly for widely held companies. Among the more influential proxy advisors are Institutional Shareholder Services and Glass Lewis, who each publish annual proxy voting guidelines and have been delegated proxy voting by a broad range of institutional investors. Other sources of influence outside of proxy advisors include shareholder representative groups such as the Canadian Coalition for Good Governance. Institutional investors such as pension funds and certain portfolio managers also publish and apply their own proxy voting guidelines.

Meetings of Shareholders

Calling a Meeting

9. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved at a general meeting? Which decisions must be approved by the shareholders in a general meeting?

Generally, a corporation must hold an annual meeting of shareholders not later than 18 months after the corporation comes into existence and thereafter not later than 15 months after the date of the preceding annual meeting (but not later than six months after the end of the corporation's preceding financial year). Annual meetings generally address three items of business:

- Election of directors.
- Receipt of financial statements and the auditor's report on these statements.
- Appointment of auditors.

Matters outside these three items are deemed to be special business, which can also be addressed at an annual meeting upon giving the appropriate shareholders' notice.

A corporation may dispense with the holding of an annual meeting where all matters to be approved at the annual meeting are approved by way of a written resolution signed by all of the shareholders entitled to vote at the meeting.

10.Can a company hold extraordinary or special meetings of shareholders? If so, when and how often? What issues can be discussed and approved by the shareholders in an extraordinary or special meeting?

A company can generally call an extraordinary or special meeting at any time, subject to requirements relating to the provision of notice and record dates. There is no limit on the number of meetings that can be called although, generally, it would be rare for a company to call more than one or two in any year, given the costs and timing involved.

11. Can a general or special meeting be held by telecommunication means or written/electronic approval?

A shareholders' meeting may be held entirely by telephonic, electronic or other communication facility, if the corporation's bye-laws so provide, provided that the telecommunication facility used permits all participants to communicate adequately with each other during the meeting.

When voting is required at a shareholders' meeting, the voting may also be carried out by means of telephonic, electronic or other communication facility, provided that the telecommunication facility used both:

- Enables the votes to be gathered in a manner that permits their subsequent verification.
- Permits the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each shareholder, or group of shareholders, voted.
- In light of the COVID-19 pandemic and the institution of social distancing and similar restrictions, there was a significant shift in 2020 to virtual-only or hybrid meetings for Canadian companies.

12. What are the notice, information and quorum requirements for holding general and special meetings and passing resolutions?

Notice of the time and place of a meeting of shareholders must be provided not less than 21 days, or no more than 60 days, before the date of the meeting. Notice for corporations that are not distributing corporations (that is, public companies) may be sent within a shorter time period if so specified in the articles or bye-laws of the corporation. If a record date is fixed for the provision of notice or voting, then notice of the record date within the prescribed periods must also be provided.

Notice of any special business to be discussed at a shareholders' meeting (*see Question 9*) must state the nature of the special business in sufficient detail to permit the shareholder to form a reasoned judgment of that special business and any special resolution relating to it to be submitted to the meeting.

A quorum for a meeting of shareholders may be set by the corporation. A quorum of shareholders is present at a meeting of shareholders, irrespective of the number of persons actually at the meeting, if the holders of a majority of the shares entitled to vote at the meeting are present or represented by proxy, unless the corporation's bye-laws provide otherwise. If a corporation has only one shareholder, or only one holder of any class or series of shares, the shareholder present or represented by proxy constitutes a meeting.

A special resolution is passed by the holders of not less than two-thirds of the votes cast by the voting shareholders. In contrast, an ordinary resolution is passed by a majority of the votes cast by the shareholders who voted in respect of that resolution, being a simple majority vote of 50% plus one of the votes cast by the voting shareholders.

Voting

13. What are the voting requirements for passing resolutions at general and special meetings?

Unless the corporation's articles provide otherwise, shareholders are entitled to one vote per ordinary voting share at a shareholders' meeting. The voting may be done by show of hands, unless the corporation's bye-laws provide otherwise, although a ballot may be demanded by a shareholder or proxyholder. Public companies also generally only conduct voting by ballot due to stock exchange meeting (results disclosure) requirements. Shares of different classes may have different voting rights, including voting rights that are greater than their proportional economic interest.

Two or more shareholders may enter into a voting trust or other similar agreement by which they can pool their votes or grant voting authority to another party.

In order to pass a special resolution, the holders of not less than two-thirds of the votes cast with respect to the resolution must approve it. An ordinary resolution, in contrast, requires a simple majority or 50% plus one of the votes cast.

Corporations can also pass resolutions in writing, which must be signed by all of the shareholders entitled to vote on that resolution.

14. Are specific shareholder approvals/resolutions required by statute or an applicable stock exchange for certain corporate actions? What voting requirements and majorities apply?

Certain fundamental changes affecting the corporation must be approved by a special resolution, which requires approval by the holders of not less than two-thirds of the votes cast with respect to that resolution or signed by all the shareholders entitled to vote on that resolution. These fundamental actions can be broadly described as fitting into one of three categories:

- Fundamental changes requiring an amendment to the articles of incorporation.
- Fundamental changes to the share structure that must be approved by each class and series of shares, even if such class and series is ordinarily non-voting.
- Any other significant fundamental changes, including amalgamation, export of the corporation to another jurisdiction, sale of all, or substantially all, of the corporation's assets, and voluntary dissolution. Generally, the changes listed in this third category must be approved by at least two-thirds of the votes cast by shareholders, whether or not their shares otherwise carry the right to vote, and in certain cases, voting must be done by class or series.

Shareholders who oppose certain fundamental changes can also dissent and require the corporation to purchase their shares at fair value. See also *Question 22* with respect to requirements for public companies in respect of related party transactions.

Shareholder Rights Relating to Meetings

15. Can a shareholder require a general or special meeting to be called? What level of shareholding is required to do this? Can a shareholder ask a court or government body to call or intervene in a general meeting?

Generally, the right to call a shareholders' meeting is vested in the board of directors. Under the CBCA, holders of at least 5% of the shares entitled to vote at meetings may require the directors to call a meeting, and if the directors do not do so within a prescribed time period following receipt of that written request, any shareholder who signed the original written request may call the meeting. If the directors have already called a meeting, or the business in the written request is improper, the directors are not required to call a meeting.

It is also possible for the court to call a meeting of shareholders on the application of a director or a shareholder entitled to vote at the meeting, if any of the following apply:

- It is impracticable to call a meeting of shareholders.
- It is impracticable to conduct the meeting in the manner prescribed by the articles, bye-laws or the CBCA.
- For any other reason the court thinks fit.

16. Can a shareholder require an issue to be included and voted on at a general meeting? What level of shareholding is required to do this? Can a shareholder require information from the board about the meeting's agenda?

A shareholder who satisfies certain minimum prescribed share ownership requirements (generally, ownership, for the prior six-month period, of voting shares which have either voting rights of at least 1%, or a fair market value of at least CAD2,000) is entitled to formally submit proposals to be considered at a shareholders' meeting. The ownership threshold is higher if the proposal includes nominations for the election of directors (in that case, the proposal must be signed by holders of at least 5% of the voting shares). A shareholder is entitled (but not obligated) to submit a description and statement in support of its proposal (limited to an aggregate of 500 words) to be distributed with management's proxy circular. Proposals must be submitted to the company during the 60-day period between 90 days and 150 days before the one-year anniversary date of the company's previous annual meeting.

Under the CBCA, a shareholder proposal may be about "any matter that the person proposes to raise at the meeting". Generally, this broad language means that any matter not falling within certain specified exclusions may be the subject of a shareholder proposal. Despite the broad scope of the shareholder proposal language, the general view is that shareholder proposals do not legally bind the directors of the corporation in a manner that extends the authority of shareholders to actions which they are not otherwise entitled to take. In other words, if a particular matter is under the control of the directors (under the CBCA, the corporation's articles of incorporation or its bye-laws), then the shareholders of the corporation do not have the power to pre-empt the directors and legally obligate them to take any action approved in a proposal. However, shareholders may, through a shareholder proposal, recommend that a particular course of action be taken by the directors, and the directors may feel obliged to comply with the shareholders' expressed position.

There are certain circumstances where the corporation can omit a shareholder proposal from a proxy circular on the grounds of its subject matter, namely if any of the following apply:

- The proposal is not submitted to the corporation by the proposing shareholder at least 90 days before the anniversary date of the notice of the meeting that was sent to shareholders in connection with the previous annual meeting of shareholders. It clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation, its directors, officers or shareholders/security holders.
- It clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation.
- The proposing shareholder had a proposal included in a management proxy circular at some time within the two-year period prior to the receipt of the current proposal but failed to present that earlier proposal in person or by proxy.
- Substantially the same proposal was submitted in a management or dissident proxy circular relating to a meeting held within the previous two years and was defeated at the meeting.
- The shareholder proposal rights are being abused in order to secure publicity.

Notice of any special business to be discussed at a shareholders' meeting (*see Question 9*) must state the nature of the special business in sufficient detail to permit the shareholder to form a reasoned judgment of that special business and any special resolution to be submitted to the meeting.

17. Do shareholders have a right to resolve in a general or special meeting on matters which are not on the agenda?

Shareholders holding the prescribed interest in shares may submit proposals that are not on the agenda to be considered at a meeting of the corporation (*see Question 16*).

18. Can a shareholder challenge a resolution passed at a general meeting? Is a certain shareholding level required to do this? What is the time limit and procedure to challenge a general meeting resolution?

A shareholder can challenge a resolution adopted by a general meeting on procedural grounds or on other grounds challenging the validity of the meeting. To succeed, the shareholder will have to demonstrate the lack of validity on procedural or other grounds, and cannot otherwise generally challenge a resolution where the meeting was otherwise properly constituted and conducted.

Shareholders' Rights Against Directors

19. What is the procedure to appoint and remove a director?

Election of a Director

Shareholders of a corporation must, by ordinary resolution at the first meeting of shareholders, and at each successive 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 terms of directors for public companies cannot end later than the close of the corporation's next annual meeting and public corporations must have a separate vote of shareholders for each nominated director candidate, thereby prohibiting slate voting (that is, electing directors as a group).

In respect of the election of directors of public corporations at uncontested meetings, recent amendments to the CBCA require that a director be elected by a majority of votes cast at the meeting in respect of the director's election, unless otherwise required by the corporation's articles. This requirement is similar to the majority voting requirements adopted by the TSX.

Appointment of a Director

The directors of a corporation may, if the articles of incorporation so provide, appoint one or more additional directors. If appointed, the director will hold office for a prescribed term, ending not later than the close of the next annual meeting of shareholders. However, the total number of directors so appointed cannot exceed one third of the number of directors elected at the previous annual meeting of shareholders.

Removal of a Director

The shareholders of a corporation can, by ordinary resolution at a special meeting, remove any director(s) from office.

20. Can shareholders challenge a resolution of the board of directors? Is there a minimum shareholding required to do this?

Shareholders who oppose certain fundamental changes have a right to dissent under the CBCA and can require the corporation to purchase their shares at fair value. Shareholders may dissent from, among other changes:

- An amendment to the corporation's articles to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class.
- An amalgamation, and a sale lease or exchange, of all (or substantially all) of the corporation's property.

21. Briefly set out the main directors' duties to the company and its shareholders. What is the potential liability of directors to the shareholders? Can their liability be limited or excluded? On what grounds can shareholders bring legal action against the directors?

Directors' statutory duties under the CBCA are as follows:

- **Duty to manage.** This is the fundamental legal duty of boards of directors in Canada, which requires the directors to manage, or supervise the management of, the business affairs of the corporation.
- **Fiduciary duty.** Directors have a fiduciary duty to act honestly, in good faith and in the best interests of the corporation.
- **Duty of care.** Directors must perform their duties with the care, skill and diligence of a reasonably prudent person.

Directors also have a duty to comply with the CBCA, the regulations, the corporation's articles and bye-laws and any unanimous shareholder agreements.

Oppression Remedy

The CBCA provides a remedy to shareholders and creditors where a corporation, or its directors and officers, act in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, shareholders and creditors. It is not necessary that a breach of fiduciary duty has occurred for an oppression claim to succeed. If a court finds oppression, it may make any order it considers appropriate to remedy an oppressive or unfair situation. Oppression claims can be easier for shareholders, creditors and others to assert. They are also very open-ended in terms of remedy (including personal remedies against directors and officers).

Compliance Orders

If a director does not comply with the statutory duties, regulations, articles or bye-laws, or unanimous shareholders' agreement that apply to them, then shareholders can apply to the court for a compliance order requiring the director to comply with one or more of these requirements. A compliance order can also be granted to restrain a director from acting in breach of any of these requirements.

Derivative Actions

When a board of directors fails to pursue the corporation's legal rights diligently through the courts, shareholders or other proper parties can attempt to initiate an action on the corporation's behalf. Derivative actions require court approval, which will usually necessitate a demonstration of good faith on the part of the putative complainants and an additional demonstration that the action is in the best interests of the corporation. There is a further requirement that the shareholders, or complainants, give notice to the directors of their intention to apply to the court not less than 14 days before bringing the application.

22. Are directors subject to specific rules when they have a conflict of interest relating to the company? Are there restrictions on particular transactions between a company and its directors? Do shareholders have specific rights to bring an action against directors if they breach these rules?

In acting as a director, and in compliance with the fiduciary duty owed, a director must focus on promoting the corporation's interests, even if doing so might cause a conflict with another interest that is significant to the director, including other business or personal interests. In particular, implicit in this duty is the requirement for full disclosure of a director's dealings with the corporation, avoidance of all possible conflicts of interest between the director and the corporation with respect to the transactions in which the corporation is involved and the furtherance of the corporation's interests at all times over the director's own interests, financial or otherwise. This can be advanced by establishing a "special committee" of independent directors to minimise conflicts (and the perception of those conflicts).

Under the CBCA, a director must also disclose an interest in a contract or transaction if the contract or transaction is material to the corporation and if the director has a material interest in the contract or transaction, or is a director or senior officer of, or has a material interest in, a person that has a material interest in the contract or transaction (a "disclosable interest"). A director or senior officer is liable to account to the corporation for all profits that accrue to that director as a result of a contract or transaction in which the director holds a disclosable interest, unless certain conditions are met or a court of competent jurisdiction orders otherwise. The two primary conditions are that appropriate disclosure of the nature of the disclosable interest has been made, or that approval of the contract or transaction has been given by either the directors that do not have a disclosable interest, or the shareholders.

Except in certain circumstances, an interested director is not entitled to vote on the directors' resolution approving the material transaction or contract in which that director has a disclosable interest (although he or she can be present at the directors' meeting where such matters are considered and voted on, and can be counted in the quorum for the meeting, unless the bye-laws of the corporation provide otherwise). However, an interested director may, notwithstanding having a disclosable interest, vote on a transaction or contract that relates primarily to their remuneration as a director, officer, employee, agent, mandatary or affiliate of the corporation, or that relates to directors' insurance or directors' indemnities, or that is with an affiliate of the corporation.

Public companies are also subject to specific rules that may prohibit or impose requirements upon related party transactions, which include transactions with a director or an entity in which a director has an interest. These requirements can include prescribed disclosure, and minority approval and valuation, unless prescribed exemptions apply.

23. Does the board have to include a certain number of non-executive, supervisory or independent directors?

Private companies are not statutorily required to have a prescribed number of non-executive, supervisory or independent directors. Independent directors play an important role for publicly traded corporations (reporting issuers) in Canada. Under the CBCA a reporting issuer is required to have a minimum of three directors, at least two of whom are not officers or employees of the corporation or its affiliates. Further, Canada's provincial and territorial securities regulators have adopted a "best practices" policy known as National Policy 58-201 Corporate Governance Guidelines (NP 58-201), which recommends that reporting issuers have a majority of independent directors on their boards, appoint an independent board chair or a lead director; and hold regularly scheduled meetings of independent directors without non-independent directors or management.

The definition of independence that applies to board members of public companies generally is found in National Instrument 52-110 Audit Committees (NI 52-110). While the definition set out in the Audit Committee Rule applies to all board and committee members for the purposes of determining whether they are independent, audit committee members are restricted by additional relationships that will not necessarily taint other board members.

Under NI 52-110, a director is independent if they have no direct or indirect material relationship with the issuer, where a material relationship is defined as a relationship that could, in the view of the issuer's board, be reasonably expected to interfere with the exercise of a board member's independent judgment.

In addition to this broad, principled definition of independence, NI 52-110 also deems certain relationships or people to be non-independent. Generally, these deeming provisions will taint a director by virtue of the director, or the director's family member, having current or past employment relationships with the issuer or with the issuer's auditor, or having received compensation or fees above a minimum threshold. Independence requirements are also prescribed by stock exchange rules and proxy advisors.

There are resident director requirements under federal corporate laws that at least 25% of the directors of a corporation must be resident Canadians (if a corporation has less than four directors, at least one director must be a resident Canadian). These residency requirements are lower or not applicable under certain provincial statutes.

There are no statutory quotas for diverse directors in Canada, but there are certain disclosure obligations with regard to women, Aboriginal peoples, persons with disabilities and members of visible minorities for public corporations. In addition, proxy advisory firms and institutional investors have implemented certain voting guidelines related to director diversity.

24. Do directors' remuneration and service contracts have to be disclosed? Is shareholder approval of directors' remuneration required?

Subject to the articles, bye-laws or any unanimous shareholder agreement, the directors of a corporation may fix the remuneration of the directors, officers and employees of the corporation. Shareholder approval is not required. Public companies are subject to specific disclosure requirements requiring the disclosure of remuneration paid to directors, whether cash, equity-based or otherwise. Recent amendments to the CBCA will require prescribed corporations to disclose information to shareholders regarding the recovery of benefits paid to directors and senior management, commonly referred to as "clawbacks". It is also becoming increasingly common for publicly traded corporations to have advisory non-binding "say-on-pay" votes in respect of executive compensation. Under recent amendments to the CBCA, prescribed corporations will be required to hold these votes annually and develop a director remuneration plan for submission to shareholders at every annual meeting. The public consultation process for these amendments ended in early 2021 and it is not known when these will be adopted (to date there has been no further announcement as to when the specific amendments will come into force).

Shareholders' Rights Against a Company's Auditors

25. What is the procedure to appoint and remove the company's auditors? What restrictions and requirements apply to who can be the company's auditors?

Appointment

The directors of the corporation may appoint an auditor to hold office until the first annual meeting of the shareholders. The shareholders of a corporation will, by ordinary resolution, at the first annual meeting of shareholders and at each successive meeting, appoint an auditor to hold office until the close of the next annual meeting. If an auditor is not appointed at a successive annual meeting, then the incumbent auditor continues in office until a successor is appointed. The shareholders of a private enterprise (that is, not a reporting issuer) may resolve not to appoint an auditor.

Removal

Generally, the shareholders can remove an auditor from office by ordinary resolution at a special meeting.

Qualifications

An auditor must be independent of the corporation, any of its affiliates and the directors and officers of any such corporation or its affiliates. Independence is a question of fact. A person is disqualified from being an auditor of a corporation if that person, or that person's business partner:

- Is a business partner, a director, an officer or an employee of the corporation or any of its affiliates.
- Beneficially owns or controls, directly or indirectly, a material interest in the securities of the corporation or any of its affiliates.
- Has been a receiver, receiver-manager, sequestrator, liquidator or trustee in bankruptcy of the corporation, or any of its affiliates, within two years of the person's proposed appointment as auditor.

It is possible for an interested person to apply to the court for an order exempting an auditor from disqualification.

Rules applicable to public companies require that any public accounting firm that prepares auditors' reports with respect to the financial statements of a reporting issuer be a "participating audit firm" and be in compliance with any restrictions or sanctions imposed by the Canadian Public Accountability Board. To be a participating audit firm, the firm must have entered into a written agreement with the Canadian Public Accountability Board governing practice inspections and requirements. The applicable rules also require the audited financial statements of a reporting issuer, when filed, to be accompanied by an auditor's report prepared by a public accounting firm that is a participating audit firm and is in compliance with any restrictions or sanctions imposed by the Canadian Public Accountability Board.

26. What is the potential liability of auditors to the company and its shareholders if the audited accounts are inaccurate? Can their liability be limited or excluded?

The Supreme Court of Canada, in its decision in *Deloitte & Touche v Livent Inc (2017) SCC 63*; *(2017) 2 SCR 795* (the *Deloitte* case), upheld that a duty is owed by an auditor in preparing a statutory audit and, under certain circumstances, a claim by the corporation for losses resulting from a negligently prepared statutory audit could succeed. The Court stated that a statutory audit is prepared in order to allow shareholders to collectively "supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporation", which permits "the shareholders, acting as a group, to safeguard the interests of the corporation" (paragraph 3, the *Deloitte* case). By reason of a negligently prepared statutory audit, shareholders, in certain circumstances, will be unable to discharge their aforementioned duty to safeguard the interests of the corporation, therefore providing a sufficient basis for auditor liability. In addition, auditors may be liable under provincial securities laws for misrepresentations contained in audit reports, or in information derived from the audited financial statements, to primary and secondary market purchasers of an issuer's securities, and may be subject to enforcement actions by the provincial securities regulators.

Disclosure of Information to Shareholders

27. What financial or other information about the company do the directors have to provide and disclose to its shareholders? What information and documents are shareholders entitled to receive?

The directors must provide to shareholders, at every annual meeting:

- Comparative financial statements.
- The report of the auditor (if any).
- Information relating to the diversity of their board and executive officers.
- Information regarding "clawbacks" (*see Question 24*).
- Any further information concerning the financial position of the corporation.

Shareholders are entitled to receive, and have a statutory right to access, the following information concerning the corporation:

- Articles of incorporation.
- Bye-laws.
- Unanimous shareholder agreement.
- Minutes of meetings and resolutions of shareholders.

- Minutes of meetings and resolutions of directors.
- Initial registered office address.
- First board of directors.
- Any notice of change regarding the registered office or board of directors.
- Share register of the corporation.
- Register of individuals with significant control of the corporation (not applicable to public corporations).

See *Question 24* and *Question 28* for public company disclosure requirements.

28. What information about the company do the directors have to disclose under securities laws (where applicable)?

Public companies are subject to substantial continuous and timely disclosure requirements, including requirements to publish, and deliver where applicable:

- Interim and annual financial statements and management discussion and analysis (MD&A).
- Annual audited financial statements and MD&A.
- Annual information forms.
- Management proxy circulars (with prescribed governance disclosure).
- Material change reports.
- Business acquisition reports.

In addition, public companies are subject to the general requirement to ensure that material information is generally disclosed to the public in a timely manner, and are prohibited from making selective disclosure of material information to certain persons or audiences without also generally disclosing such information to the public.

29. Is there a corporate governance code in your jurisdiction? Do directors have to explain to shareholders in the company's annual report if they have not complied with it (comply or explain approach)?

Governance disclosure is prescribed by National Instrument 58-101 Disclosure of Corporate Governance Practices, whereas governance best practices are prescribed by the associated NP 58-201. The instrument and policy generally apply to all reporting issuers other than investment funds.

Broadly speaking, NI 58-101 requires issuers to disclose their corporate governance practices in their information circulars or annual information forms, and to file a copy of any code of ethics adopted (as well as any amendments to it) on the System for Electronic Document Analysis and Retrieval (SEDAR). Failure by an issuer to provide adequate disclosure constitutes a breach of securities laws and exposes the issuer and others to enforcement proceedings and sanctions. By mandating corporate governance related disclosure, the goal of NI 58-101 is to provide greater transparency on how issuers apply various corporate governance principles.

Recognising that many corporate governance matters cannot be prescribed in a "one size fits all" manner, neither NI 58-101 nor NP 58-201 are intended to prescribe what an issuer must do. NP 58-201 is designed to reflect best practices, which have been formulated with desirable corporate governance principles in mind with the requirement to make corresponding "comply or explain" disclosure. In particular, NP 58-201 recommends the following best practices:

- Maintaining a majority of independent directors on the board of directors.
- Appointing an independent board chair or a lead director.
- Holding regularly scheduled meetings of independent directors without non-independent directors or management.
- Adopting a written board mandate.
- Developing position descriptions for the chair of the board, the chair of each board committee, and the chief executive officer.
- Providing comprehensive director orientation and continuing education opportunities.
- Adopting a written code of business conduct and ethics.
- Appointing a nominating committee composed entirely of independent directors.
- Adopting a process for determining the competencies and skills the board as a whole should have, and applying this result to the recruitment process for new directors.
- Appointing a compensation committee composed entirely of independent directors.
- Conducting regular assessments of each board's effectiveness, as well as the effectiveness and contribution of each board committee and each individual director.

NI 58-101 also requires that if an issuer has adopted a written code of business conduct and ethics, that code and any amendments to it must be filed on SEDAR no later than the time of filing the issuer's next financial statements after the date of adoption or amendment. The corporate governance guidelines recommend that the following matters be covered by the code, although the content and tone of the code are left to the issuer's discretion:

- Conflicts of interest.
- Protection of corporate assets.
- Confidentiality of corporate information.
- Fair dealing with security holders and others.

- Compliance with laws.
- Reporting of illegal or unethical behaviour.

Meanwhile, National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings (NI 52-109) requires reporting issuers to file interim and annual certificates, certified by the CEO and CFO (or equivalent) of the issuer. The certificates include certifications regarding fair presentation of financial condition, financial performance and cash flow and confirmation that the interim and annual filings do not contain any misrepresentations. The certificates must also include certifications regarding the establishment, maintenance and effectiveness of disclosure controls and procedures (DCP) and internal control over financial reporting (ICFR). In addition, certified corresponding disclosure is required in the issuer's management discussion and analysis regarding the effectiveness of DCP and ICFR, along with any changes in ICFR during the relevant period that have materially affected, or are reasonably likely to materially affect, the issuer's ICFR.

30. What information can shareholders request from the board about the company? On what grounds can disclosure of company information be refused? Are shareholders entitled to inspect the company's books and similar company documents?

See *Question 27* and *Question 28*. Shareholders can make a request to the corporation to examine the securities register or obtain a list of the shareholders. The request must be accompanied by an affidavit stating, among other things, that the list of shareholders or information from the securities register will not be used except:

- In an effort to influence the voting of shareholders of the corporation.
- In connection with an offer to acquire securities of the corporation.
- For any other matter relating to the affairs of the corporation.

The financial statements (*see Question 25*) can be omitted in their entirety or in part on application of a corporation. The director can authorise such an omission if the director reasonably believes that disclosure of the information contained in the statements would be detrimental to the corporation or under any other reasonable conditions that the director thinks fit.

Shareholders' Agreements

31. Briefly set out the main provisions of a typical shareholders' agreement.

Shareholders' agreements are mechanisms by which shareholders can pool their votes and agree on specific limitations regarding how they can vote. Other matters can also be addressed, such as liquidity mechanisms and restrictions on share transfers, board representation, veto rights, approval of fundamental changes and financing needs.

32. Are there circumstances where the shareholders' agreement can be enforceable against third parties?

Shareholders' agreements are not generally enforceable against third parties. However, under the CBCA, any purchaser or transferee of shares in a corporation is deemed to be a party to any unanimous shareholder agreement in effect (they are deemed to be a "constructive party"). However, if the unanimous shareholder agreement, or a reference to it, is not conspicuously noted on the security certificate, and therefore no notice of its existence was given, and the purchaser or transferee has no actual knowledge of the agreement, then the purchaser or transferee may, no later than 30 days after they become aware of the existence of the agreement, rescind the transaction by which they acquired the shares. However, it is unresolved as to whether or not purchasers of newly issued shares are "constructive parties" for these purposes. A shareholders' agreement that is not a unanimous shareholder agreement is only binding on a transferee or a person issued shares by the corporation if that individual signs the agreement.

33. Do shareholders' agreements have to be publicly disclosed or registered?

Shareholders' agreements for private companies do not have to be publicly disclosed or registered. Public companies are required to file copies of various types of documents, including:

- Articles of incorporation or other establishing documents of the reporting issuer.
- Bye-laws currently in effect.
- Securityholder or voting trust agreements that are accessible by the issuer and that can be reasonably regarded as material to an investor.
- Securityholders' rights plans (for example, poison pills).
- Any other contract of the issuer (or a subsidiary of the issuer) that creates, or can reasonably be regarded as materially affecting, the rights or obligations of its securityholders generally.
- Material contracts, other than in the ordinary course of business contracts unless they are of the nature prescribed.

Dividends and Distributions

34. What are the most common forms of distributions?

The most common form of distributions are quarterly cash dividends. Under the CBCA, a corporation must not declare or pay a dividend if there are reasonable grounds for believing that either the:

- Corporation is, or would after the payment be, unable to pay its liabilities as they become due.
- Realisable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

35. How can dividends be paid to shareholders and what procedures and restrictions apply? Is it possible to exclude or limit the right of certain shareholders to dividends? Is the payment of interim or special dividends allowed?

Dividends are payable when declared by the directors to shareholders of record as of the prescribed record date. Under the CBCA, a corporation must be able to meet two financial tests before a corporation's board of directors may declare and pay a dividend, and the financial tests must be met both at the time of declaration of the dividend and at the time of payment. Under these tests, a corporation must not declare or pay a dividend if there are reasonable grounds for believing that either:

- The corporation is, or would after the payment be, unable to pay its liabilities as they become due.
- The realisable value of the corporation's assets would as a result of the distribution be less than the aggregate of its liabilities and stated capital of all classes.

Public companies must also comply with stock exchange rules with respect to giving advance notice of the declaration and record date for payment of dividends, including the setting of a date when the shares commence trading on an ex-dividend basis. Where dividends are declared for a class or series of shares they must be paid to all holders of the applicable class or series.

Financing and Share Interests

36. Can shareholders pledge or grant security interests over their shares? If so, what effect does it have on the shareholders' right to vote or receive dividends?

Shareholders are generally permitted to grant security interests over their shares unless prohibited from so doing by the articles or bye-laws of the corporation or by contractual restrictions. Public companies may voluntarily adopt anti-pledging policies.

37. Are there restrictions on loans or other financial assistance for the purchase of a company's shares?

There is no prohibition under the CBCA against the provision of financial assistance, although the directors are obligated to act in the best interest of the corporation with respect to decisions on financial assistance. The provision of financial assistance is also subject to specific disclosure requirements under the corporate laws of certain provinces and for public companies.

Share Transfers, Issues of New Shares and Exit

38. Are there any restrictions on the transfer of shares by law? Can the transfer of shares be restricted? What are the rights of shareholders in the case of an issue of new shares (pre-emption rights)?

The transfer of shares may be restricted by the articles or bye-laws of the corporation or by contractual restrictions. Distributions of shares under exemptions from the prospectus requirement (referred to as a private placement) may also be subject to statutory restrictions on transfer under applicable provincial securities laws. For public companies, these restrictions generally result in a four-month restricted period. For private companies these impose a "seasoning period" requiring reliance on further private placement exemptions for any transfers within Canada and, in certain circumstances, to shareholders outside of Canada.

Pre-emptive rights may be granted in the articles or bye-laws of the corporation or under contractual restrictions, but do not otherwise apply. Pre-emptive rights are not common in Canada in the public company context where the corporation's shares are widely held. However, pre-emptive rights may be negotiated by significant shareholders in specific circumstances.

39. Can minority shareholders alter or restrict changes to the company's share capital structure?

Minority shareholders cannot alter or restrict changes to a company's share capital structure other than through exercising their voting rights.

40. When are shareholders required to notify changes to their shareholding to a regulatory authority?

Shareholders of public companies who have direct or indirect beneficial ownership, control or direction, or a combination of those things, over securities of a reporting issuer carrying more than 10% of the voting rights attached to all the reporting issuer's outstanding voting securities, are considered "reporting insiders" and must disclose their interests in the issuer under applicable insider reporting requirements under the applicable provincial securities laws. This disclosure includes disclosure of:

- Beneficial ownership of, or control or direction over, directly or indirectly, securities of the reporting issuer.
- Interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer.

In addition, reporting insiders are also required to disclose any agreement, arrangement or understanding that both:

- Has the effect of altering, directly or indirectly, the reporting insider's economic exposure to the reporting issuer.
- Involves, directly or indirectly, a security of the reporting issuer or a related financial instrument involving a security of the reporting issuer.

Prescribed "early warning" disclosure is also required under applicable provincial securities laws by every acquirer that acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the acquirer's securities of that class, constitute 10% or more of the outstanding securities of that class.

41. Can companies buy back their shares? Which limitations apply?

Under the CBCA, in order for an issuer to acquire its own shares, it must pass the solvency test, which provides that, after the share repurchase, both:

- The issuer is able to pay its liabilities as they become due.
- The realisable value of the issuer's assets is not less than its liabilities and stated capital of all classes.

Share buy-backs are also subject to securities law requirements that may impose prescribed disclosure and other requirements on formal issuer bids, unless conducted under specific exemptions from the formal issuer bid rules. A common exception is for public companies to buy back their shares through a "normal course issuer bid" conducted through the facilities of a stock exchange.

42. What are the main ways for a shareholder to exit from the company? Can shareholders require their shares to be repurchased by the company? Can shareholders be required to exit the company in certain circumstances? How are the shares valued in this case?

The main way for shareholders to exit from the company is through a transfer of their shares. Shareholders may also require the company to buy back their shares if such right is prescribed in the terms and conditions attaching to those shares, and may enter into contractual rights requiring shares to be purchased by the issuer or by other parties.

Share Capital

43. Can shares be cancelled after issue?

Under the CBCA, a corporation can cancel shares after they have been re-acquired by the corporation, such as following a redemption or purchase for cancellation.

Material Transactions

44. What rights do shareholders have in the case of material transactions, such as a sale of all or substantially all of the company's assets, and a company reorganisation such as a merger or demerger?

See *Question 14*.

45. What rights do shareholders have if the company is converted into another type of company (consider if applicable, a European Company (SE))?

See *Question 14*. Shareholders will generally have the right to vote on the special resolution to approve such a conversion or continuance and may have the right to dissent and be paid fair value for their shares.

Insolvency

46. What rights do shareholders have if the company is insolvent?

After the corporation adequately provides for the payment or discharge of all of its obligations, specifically towards all known creditors, the corporation will distribute its remaining assets among its various classes of shareholders according to the respective rights attached to their shares.

47. Can shareholders put the company into liquidation? What is the procedure to do this?

A shareholder who is entitled to vote at an annual meeting of shareholders, and who is eligible to submit a shareholder proposal, may make a proposal for the voluntary liquidation and dissolution of the corporation.

Shareholders may also, by special resolution, liquidate and dissolve the corporation. Where a corporation has more than one class of shares, shareholders may liquidate and dissolve the corporation by special resolutions of the holders of each class of shares, whether or not they are otherwise entitled to vote.

Corporate Groups

48. Is the concept of a corporate group recognised under specific legislation?

There is no specific concept of a "corporate group" under the CBCA. However, a holding corporation and its subsidiaries are referred to as "affiliated bodies corporate".

The terms "holding body corporate" and "subsidiary body corporate" are defined in sections 2(4) and 2(5) of the CBCA and are generally based on the concept of control through holding more than 50% of the votes, and the ability to elect a majority of directors on the board of directors.

49. Does a controlling company have any duties and liability to the shareholders of the company it controls? What are the rights of company shareholders if the controlling company carries out actions that are prejudicial to the shareholders?

A controlling shareholder can be liable as a director where the powers of the directors have been limited under a unanimous shareholder agreement. Company shareholders may pursue oppression claims against controlling shareholders where the controlling company carries out actions that are prejudicial to shareholders (*see Question 21*).

For public companies, controlling shareholders may also be liable under secondary market civil liability provisions of provincial securities laws for misrepresentations contained in disclosure documents or public oral statements, or for failure to make timely disclosure of material changes.

50. What are the limitations on owning reciprocal share interests in companies?

In Canada, the concept of reciprocal shares is often referred to as "corporate incest". Corporate incest occurs where a corporation owns shares in itself or in its holding corporation. The CBCA prohibits both:

- A corporation (a body corporate subject to the CBCA) from holding shares in itself or in a body corporate of which it is a subsidiary (subsidiary goes up all levels).
- Subsidiary bodies corporate of a corporation from acquiring shares of the corporation.

The CBCA provides for four exceptional situations:

- Where a subsidiary body corporate of the corporation holds shares of the corporation, the corporation must cause it to sell or otherwise dispose of those shares within five years from the date:
    - the body corporate became a subsidiary of the corporation; or
    - the corporation was continued under the CBCA.

- Where the corporation holds shares in itself or in its holding body corporate in the capacity of a legal representative. This exception does not apply if the corporation, or the holding body corporate, or a subsidiary of either of them, has a beneficial interest in the shares.
- Cases in which a corporation holds shares in itself or in its holding body corporate by way of security for the purposes of a transaction entered into by it in the ordinary course of business that includes lending money (section 31(2), CBCA).
- Where the shareholding is for the purpose of Canadian ownership provisions relating to constrained share corporations.

A corporation that holds shares in itself or in its holding body corporate is prohibited from voting those shares or permitting them to be voted, except if the shares are held by the corporation in the capacity of a legal representative, and then only if it has complied with the provisions of section 153 of the CBCA with respect to requesting instructions as to how to vote the shares.

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Areas of Practice. Mergers and acquisitions; securities; capital markets; private equity; corporate governance; mining; REITs.

Recent Transactions

- Various issuers and activist shareholders in numerous proxy contests and contested meetings including Hudbay Minerals and Obsidian Energy.
- Teck Resources Ltd in the CAD1 billion sale of its 21.3% interest in the Fort Hills oil sands project and certain associated downstream assets to Suncor Energy Inc.
- Centerra Gold Inc in its USD900 million global arrangement agreement with Kyrgyzaltyn JSC and the Government of the Kyrgyz Republic.
- The Special Committee of Independent Directors of Stelco Holdings in its buyback of approximately 13% of its outstanding shares from its significant shareholder, LG Bedrock Holdings LP, for gross proceeds of approximately CAD400 million.
- OMERS in its USD375 million acquisition of a 14% interest in Lloyd's (re)insurer Brit Limited.

- OMERS in its USD600 million acquisition of a 40% interest in Fairfax Financial Holdings Limited's UK run-off insurance group, RiverStone UK.
- Vector Capital in its USD1.4 billion sale of Saba Software in a cash and stock transaction.
- Flutter Entertainment plc, as Canadian counsel, in its USD15 billion all-share business combination with The Stars Group Inc.
- Progressive Waste Solutions Ltd in its acquisition by Waste Connections, Inc in a CAD13 billion all-stock business combination effected by way of a reverse merger.
- Obsidian Energy Ltd in its unsolicited take-over bid to purchase all of the issued and outstanding common shares of Bonterra Energy Corp.

Professional Associations/Memberships. Member of the Law Society of Ontario.

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Recent Transactions

- Detour Gold Corporation in its CAD4.9 billion acquisition of all of its issued and outstanding common shares by Kirkland Lake Gold Ltd.
- Maxar Technologies Ltd (formerly MacDonald, Dettwiler and Associates Ltd) in its cross-border acquisition of DigitalGlobe, Inc for an equity value of approximately CAD3.1 billion, and an enterprise value of CAD4.7 billion.
- Potash Corporation of Saskatchewan Inc in its USD36 billion merger of equals by way of a plan of arrangement with Agrium Inc.
- Performance Sports Group in the USD575 million sale of its business to Sagard Capital and Fairfax Holdings through CCAA and Chapter 11 court proceedings (TMA, 2018 Transaction of the Year: Large Company winner and Turnaround Atlas Awards, 2018 Restructuring Transaction winner).
- MAV Beauty Brands Inc in its CAD240 million initial public offering.
- TA Associates in its acquisition of Petcurean Pet Foods.
- VERTU Capital in its acquisition of Firmex.

- Various issuers in connection with ongoing continuous disclosure and corporate governance/board and management advisory matters.
- Various issuers and underwriters in connection with their public offerings and private placements.

Professional Associations/Memberships. Member of the Law Society of Ontario.

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About Stikeman Elliott

Stikeman Elliott is a global leader in Canadian business law and the first call for businesses working in and with Canada. Our offices are located in Montréal, Toronto, Ottawa, Calgary, Vancouver, New York, London and Sydney. We provide clients with the highest quality counsel, strategic advice, and workable solutions. The firm has an exceptional track record in major U.S. and international locations on multijurisdictional matters and ranks as a top firm in our primary practice areas including mergers and acquisitions, securities, business litigation, banking and finance, competition and foreign investment, tax, restructuring, energy, mining, real estate, project development, employment and labour, and pensions.

For more information about Stikeman Elliott, please visit our website at www.stikeman.com.

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