DAVIES

Guide to Shareholder Activism and Proxy Contests in Canada

About This Guide

This guide discusses the principal legal and practical issues faced by both activists and target companies, as well as notable recent development and key differences between Canadian and U.S. requirements.

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01. Applicable Rules

In Canada, the rules governing shareholder activism are derived from four principal sources: the target's corporate statute and constating documents, securities legislation, common law and stock exchange rules. The target may be federally or provincially incorporated or may be a creation of contract (for example, a trust governed by provincial law). Canada does not have a single federal securities regulator; rather, each province and territory has its own securities legislation and regulatory body. For purposes of this guide, our analysis is generally based on the *Canada Business Corporations Act* (CBCA), the most common incorporation statute among companies listed on the Toronto Stock Exchange (TSX) and the *Securities Act* (Ontario), the provincial securities statute that applies to all companies listed on the TSX. The corporate statutes and securities laws of the other major Canadian jurisdictions are substantially similar with respect to proxy solicitation and shareholder rights, with some exceptions.

In addition to applicable legal requirements, shareholder activism is also governed by the rules of the TSX or the TSX Venture Exchange (TSXV) and informed by the guidance published by Institutional Shareholder Services (ISS) and Glass Lewis & Co. (Glass Lewis). In Canada, ISS has published the leading source of guidance on proxy voting for companies listed on the TSX and TSXV.

02. Right to Requisition a Shareholders' Meeting

One of the most powerful rights that shareholders of Canadian corporations enjoy is the right of holders of not less than 5% of the issued voting shares to requisition the directors to call a shareholders' meeting. On receiving a valid requisition proposing proper shareholder business—most commonly to remove and elect directors—the directors must, within 21 days, call a meeting of shareholders to transact the business stated in the requisition.[1]

CONTENT OF REQUISITION

While significant, the requisition right is not quite as powerful as it may appear due to a series of judicial decisions that have added content and procedural requirements not found in the statute, making the practical use of the requisition right difficult. Canadian courts have held shareholders to a high standard of technical compliance in submitting requisitions and have demonstrated a propensity to invalidate requisitions on technical grounds. For example, in *Wells v Bioniche Life Sciences Inc.*[2] (*Bioniche*), a 2013 decision of the Ontario Superior Court of Justice, the Court upheld a board's decision to reject a requisition on the basis that it had not been signed by a registered holder of 5%, even though the shareholder who had submitted the request was known by the board to beneficially own a sufficient number of shares to requisition a meeting.

1 CBCA, s. 143.

2 2013 ONSC 4871.

In addition, in *Bioniche*, the Court found the shareholder's requisition to be invalid because the dissident proposed the removal of the directors but did not provide any names or biographical information for new directors to be proposed by the dissident. The Court's finding in *Bioniche* constituted a new court-imposed requirement since the corporate statute did not in fact contemplate that a shareholder requisitioning a meeting to remove directors will necessarily propose nominees to fill the vacancies created by the removals. Consequently, a requisitioning shareholder will typically have to recruit its nominees well in advance of the date by which notice would be required under the company's advance notice bylaw (typically 30 days) prior to the meeting.

TIMING OF MEETING

Canadian courts have interpreted the directors' statutory obligation to "call" a meeting within 21 days of the requisition as being satisfied simply by the announcement of a date for the meeting. The board need not actually hold the meeting or even mail a notice of meeting within the 21 days. Rather, the meeting must be held within a reasonable time determined in the good faith business judgment of the directors. What is regarded as a reasonable time will depend on the circumstances—for example, whether the requisitioned meeting pertains to a specific transaction or pending event and whether the requisitioning shareholder would be prejudiced by delay. Delays as long as four to seven months have been accepted by the courts.

Often, boards responding to a requisition will schedule the requisitioned meeting to be held at the same time as the annual general meeting, even if the annual meeting is as much as six months away. This was the case in *Marks v Intrinsyc Software International*[3] (*Intrinsyc Software International*), in which the board, citing the disruption and expense of holding a separate special meeting of shareholders, scheduled the requisitioned meeting for the same time as the annual general meeting, 155 days after the date of the requisition. In considering the dissident's complaint over the delay, the Ontario Superior Court deferred to the business judgment of the board, accepting as reasonable the board's scheduling of the requisitioned meeting to avoid unnecessary costs.

More recently, however, in reviewing a board's decision to hold a meeting five months after the date of the requisition, the Ontario Superior Court questioned the board's business judgment in its exercise of discretion in calling a meeting of *trustees*. In *Sandpiper Real Estate Fund 4 Limited Partnership v First Capital Real Estate Investment Trust*[4] (Sandpiper), two unitholders of a REIT requisitioned a meeting of unitholders with the goal of replacing four of nine of the issuer's trustees to oversee the implementation of a capital allocation plan, which included the sale of certain assets by the issuer. The activists requisitioned the trustees to hold a unitholder meeting no later than March 1, 2023, but the board called a combined annual and special meeting of unitholders for May 16, 2023, five months after the requisition.

3 2013 ONSC 727.

4 2023 ONSC 794.

The Court noted that there is a "fundamental right" for unitholders to have the requisitioned meeting held expeditiously. While this does not imply a right to have the meeting held immediately, or even at the soonest available date, it does imply an obligation to hold the meeting "without unreasonable or unjustifiable delay." In this, boards still generally enjoy deference under the business judgment rule in determining the appropriate timing for the meeting.

The Court then considered whether the board was entitled to the protection of the business judgment rule. It first looked at the board's process to examine whether the board applied an appropriate level of prudence and diligence in its decision-making. The Court took issue with the fact that the board had held only one two-hour meeting at which the requisition of the activists was only one item on the agenda and that the trustees targeted by the activists participated in the deliberation. On the whole, the Court found that the process failed to demonstrate the required independence and objective process that would warrant deference, and the reasons cited by the board did not justify a five-month delay in holding the meeting.

The Court also examined the reasons cited by the board for the delay. The board argued that (i) holding two separate meetings would be too expensive; (ii) the unitholders should be given greater time to consider the issues to be raised at the meeting; and (iii) the meeting should be delayed to allow for the *issuer's* business plans to unfold. On the first argument, the Court in Sandpiper found that, given the large size of the issuer, a "cost saving" argument was not persuasive (in contrast to the small size of the issuer in Intrinsyc Software). On the second and third arguments, the Court found that allowing for additional time before holding the requisitioned meeting would have the potential to defeat the very purpose of the meeting and was therefore not an appropriate argument.

The *Sandpiper* decision is a cautionary tale for boards seeking to delay the timing for a requisitioned meeting. A board's decision-making in this context will be heavily scrutinized and will focus on the management of conflicts and adequacy of the board's process. Boards should consider establishing a special committee, or meet *in camera*, without the presence of conflicted board members who are subject to the shareholder's requisition. Boards should also be careful to tailor their response to the specific circumstances, and their reasons for delaying a meeting should make sense in the context of the issuer's size and potential near-term material developments.

MEETING CALLED BY SHAREHOLDERS

If the directors do not call a meeting within 21 days of receiving the requisition, any shareholder who signed the requisition may call the meeting. The corporation is required to reimburse the shareholders for expenses they reasonably incurred in requisitioning, calling and holding the meeting unless shareholders resolve otherwise at the requisitioned meeting. However, what happens when the shareholder calls the meeting is not entirely clear: the statute provides little guidance, and there is scant precedent to look to because in virtually all cases the corporation calls the requisitioned meeting.

Although this statutory right is clearly enshrined, the *Bioniche* case casts some uncertainty over whether this right would be supported by the courts if challenged. Following their first failed attempt to requisition a meeting, the dissident shareholders of Bioniche Life Sciences Inc. (*Bioniche*) submitted a second, fully compliant requisition. Before the requisition was submitted, the Bioniche board of directors announced that it had set a date for the company's annual shareholders' meeting and established a record date for the meeting. The announcement was made six months prior to the meeting date, much earlier than the date the meeting would normally be announced. The board then relied on a provision in the corporate statute that relieves a board from having to call a shareholders' meeting in response to a requisition if a record date for a meeting has already been set. Although the Court concluded that the right of a shareholder to call a meeting applies when a board declines to do so, even if a board has already fixed a record date, the Court added that "a court would be unlikely to *uphold a meeting* called by a shareholder" in circumstances in which one of the statutory exceptions applies to the board's obligation to call a meeting. The *Bioniche* case is another example of the courts' propensity to limit shareholders' access to statutory rights.

Bioniche also illustrates how Canadian courts have allowed boards to use technicalities to defeat requisition rights. The Court agreed with the dissident Bioniche shareholders that the board's early announcement of the record date for the annual meeting was clearly calculated to allow the board to reject a valid requisition. However, the Court declined to find fault with the board's actions, applying the deferential business judgment rule standard of review to the board's actions and concluding that the effect of delaying the dissidents' ability to challenge management by six months was reasonable in order to allow the board to pursue the business plan that it believed was in the company's best interests.

STANDARD OF REVIEW OF BOARD ACTION

Bioniche is only one of many judicial decisions illustrating the propensity of Canadian courts to apply a deferential standard of review to board decisions in proxy contests. Although the business judgment rule has been imported by Canadian courts from the United States, Canadian courts have applied the rule more liberally and with less focus on the prerequisites for its application. Canadian law has not adopted anything akin to the standard developed by Delaware courts in *Blasius Industries, Inc. v Atlas Corp.*,[5] which places the burden on the board to demonstrate a "compelling justification" for actions that have the primary purpose of impeding the exercise of shareholder voting power. However, it is possible that the recent *Sandpiper* decision may signal an emerging judicial willingness to apply the business judgment rule with more skepticism in the context of the exercise of shareholder rights.

5 564 A.2d 651 (Del. Ch. 1988).

03. Stake-Building and Beneficial Ownership Reporting

Shareholders acquiring a significant position in a Canadian listed company are required to publicly disclose their ownership once they acquire beneficial ownership of 10% or more of any class of equity or voting securities of the company. Beneficial ownership includes shares that the filing shareholder has the right or obligation to acquire within 60 days, whether or not such right or obligation is conditional (for example, shares underlying options and other convertible securities or shares underlying physically settled derivatives). Equity derivatives may constitute beneficial ownership of the reference shares if the filer has the ability, formally or informally, to obtain the shares or to direct the voting of the shares held by the counterparty. Upon reaching 10%, the shareholder is required to promptly announce its acquisition by press release, file an early warning report within two trading days of the acquisition and stop acquiring any further securities of the relevant class for one full trading day after filing the early warning report.[6] Thereafter, the shareholder must report increases and decreases in its holdings of 2% or more, as well as when shareholdings fall below the 10% ownership threshold.

Similar to the requirements of Rule 13d under the U.S. *Securities Exchange Act* of 1934, the early warning reporting rules require disclosure of the purpose of the shareholder and its joint actors in acquiring or disposing of the issuer's securities and any plans or future intentions the shareholder and its joint actors may have that relate to or would result in, among other things, a corporate transaction, changes to the issuer's capitalization or dividend policy, board or management changes or proxy solicitations.[7]

Canadian early warning reporting requirements are regarded by some as being more lenient than those under Rule 13d because the Canadian requirement is triggered at 10%, whereas the U.S. requirement is triggered at 5%. However, the U.S. rules provide a considerably longer grace period for disclosing one's position—the initial report must be filed within 10 calendar days (soon to be 5 business days[8]) in contrast to Canada's requirement for an immediate press release—and the U.S. rules do not impose a trading moratorium.

ALTERNATIVE MONTHLY REPORTING

For institutional investors, such as investment funds eligible to use the Alternative Monthly Reporting System (AMRS)[9], there is an exception from the trading moratorium and the obligation to issue an immediate press release and file an early warning report within two days. To rely on the AMRS, the shareholder must be an "eligible institutional investor." This includes financial institutions, mutual funds and pension funds, and generally includes investment funds such as hedge funds that are managed by a registered investment adviser (including advisers registered by the U.S. Securities and Exchange Commission (SEC) under the

6 National Instrument 62-103, *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (NI 62-103), Part 3 and National Instrument 62-104, *Take-Over Bids and Issuer Bids* (NI 62-104), Part 5.

7 NI 62-103, Form 62-103F1, Item 5 and Form 62-103F2, Item 5.

8 See https://www.dwpv.com/en/Insights/Publications/2023/SEC-Amends-Beneficial-Ownership-Reporting-Rules.

9 NI 62-103, Part 4.

U.S. *Investment Advisers Act of 1940*). Under the AMRS, the shareholder must file a report within 10 days of the end of the month in which the 10% threshold is crossed and thereafter must file updated reports when its ownership increases or decreases above or below specified levels (i.e., 12.5%, 15%, 18.5%, etc.), when the filer's ownership falls below 10% or there is a change in a material fact contained in the prior report.

DISQUALIFICATION FROM AMRS

A shareholder will be disqualified from AMRS eligibility if it intends to make a formal takeover bid for the company or to propose a transaction that would give the shareholder effective control over the company. A shareholder is also disqualified if it solicits proxies (including via private solicitation under an exemption) in support of dissident board nominees or in support of a merger not supported by the issuer's management or in opposition to a merger proposed by the issuer's management.[10] Notably, merely having an intention to propose a dissident slate at a shareholders' meeting or holding securities for the purpose of influencing the control or management of the company do not disqualify the shareholder from relying on the AMRS. This is in contrast to Rule 13d, which requires a shareholder to switch from a Schedule 13G filing to a Schedule 13D filing if its intention changes from being a passive investor to being active (for example, as a result of deciding to propose a nominee for the board or merely having the purpose or effect of influencing the control of the company).

TREATMENT OF DERIVATIVES

Cash-settled equity derivatives are not required to be included in determining whether an early warning report obligation is triggered. However, for a filer that is otherwise a 10% or greater holder, any equity derivatives it holds must be described in the early warning report, including a description of the material terms of the derivatives and their impact on the filer's security holdings.

To address concerns that derivatives could be used to "park" or hide ownership of shares, the Canadian Securities Administrators (CSA) has provided guidance regarding circumstances in which an investor will be deemed to beneficially own shares underlying an equity derivative. For example, an investor could be deemed to beneficially own shares underlying a derivative (whether or not cash-settled) when it has the ability, formally or informally, to obtain the securities or to direct the voting of securities held by a counterparty to the derivative.

The CSA announced in 2022 that it was undertaking a review of the early warning reporting regime to consider the scope of disclosure requirements relating to equity derivatives. This was prompted, in part, by a 2021 decision of the Alberta Securities Commission (ASC) in *Re Bison Acquisition Corp.*[11] (*Re Bison*), in which the ASC found the use and non-disclosure of cash-settled total return swaps by a hostile bidder in a competitive bid situation to be "contrary to the public interest" in the circumstances of that case.

10 NI 62-103, s. 4.2.

11 2021 ABASC 188.

04. Competition and Antitrust Legislation

Canada's antitrust regime does not impose notification or government-clearance obligations at the early stake-building stage by an activist and does not, unlike the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (HSR Act) in the United States, distinguish between shareholders with passive intent and those with an intention to effect change in the policies of the target company.

In Canada, notification under the *Competition Act* is not required until the acquirer acquires more than 20% of the target company's voting shares, and notification under Canada's *Investment Canada Act* (ICA) is not required for an acquisition of less than a one-third voting interest in a Canadian business.

In contrast, in the United States, the HSR Act can work, in effect, as an early warning system requiring notification to the target and government clearance at the early stake-building stage and a lengthy moratorium on purchases after the filing with the regulatory authority—even where the target is a Canadian company.

The notification regime under the HSR Act is largely based on (i) the value of voting securities of the target company to be held as a result of the transaction, (ii) the size of the parties and (iii) whether the target company is considered a foreign issuer or a U.S. issuer. A Canadian company may be considered either a foreign issuer or a U.S. issuer; it is a foreign issuer if it is not incorporated in the United States and does not have its principal offices there. An issuer's principal offices will be considered to be in the United States if at least 50% of any of its (i) directors, (ii) officers or (iii) assets are located in the United States.

For 2023, notification may be required for an acquisition of voting securities of a U.S. issuer where (i) the acquirer will hold voting securities of the target company valued in excess of US$445.5 million or (ii) the acquirer will hold voting securities of the target company valued in excess of US$111.4 million and one party to the transaction has total assets or annual net sales in excess of US$222.7 million and the other party has total assets or annual net sales in excess of US$22.3 million. These thresholds are adjusted annually.

An acquisition of voting securities of a foreign issuer is subject to the same thresholds. However, in addition, thresholds relating to the value of the target company's U.S. assets or sales apply. For 2023, this threshold requires that the foreign issuer have U.S. assets or annual sales of at least US$111.4 million. Furthermore, if the purchaser is also a foreign person, no notification is required unless the transaction will confer control over the target foreign issuer.

If the applicable thresholds are satisfied, the investor is required to make a filing with the U.S. antitrust agencies (the Federal Trade Commission and the Antitrust Division of the Department of Justice) and to not acquire control of the target company or voting securities of the target company in excess of the US$111.4 million threshold until the expiry of the applicable waiting period (generally 30 days after the notice has been filed).

There is an exemption to the requirement to file an HSR Act notice if the investor acquires less than 10% of the voting securities of the company and has a passive intent. In addition, some investors use cash-settled equity-based derivatives in order to obtain an economic exposure to companies subject to the HSR Act because such instruments do not count toward the applicable thresholds for the purposes of HSR Act notification.

05. Group Formation: Insider Trading and Joint Actor Characterization

One of the challenges faced by activists in Canada is gauging and organizing support from major Canadian institutional investors. Canadian institutions are wary about aligning themselves publicly with a dissident shareholder, at least at the beginning of a contest, primarily out of concern to preserve their freedom to trade in the securities of the target issuer. Their concern stems from two considerations: insider trading and joint actor characterization.

INSIDER TRADING

Under Canadian insider trading rules, a person in a special relationship with a public company (which includes, in addition to Canadian public companies, any issuer, wherever situated, whose securities are publicly traded) is prohibited from trading with knowledge of material non-public information (MNPI). This prohibition extends to anyone who learns of MNPI from a special relationship person. The Canadian rules are statutory and do not turn on notions of “duty” and “misappropriation.” The category of “special relationship” persons is large and includes tippees and a person that beneficially owns more than 10% of the voting securities of the target company. Thus, an activist holding more than 10% of a company’s shares is a person in a special relationship with the company. Information that the activist may learn in discussions with the target company about, for example, the target’s business plans or the target’s response to the activist’s proposals may amount to MNPI that, if communicated by the activist to an institutional shareholder, will restrict that shareholder’s ability to trade. It is even possible in these circumstances that information about the activist’s own plans vis-à-vis the target company could amount to MPNI that, if disclosed to an institutional shareholder, would similarly restrict that shareholder’s ability to trade. Even if the activist is not a special relationship person, securities regulators may nonetheless take the view that the disclosure unfairly advantaged the recipient of the information in a manner that was “contrary to the public interest,” as securities regulators have done in Canada in other contexts.

JOINT ACTORS

The second concern relates to the issue of “joint actor” characterization, which under Canadian securities law is relevant both for purposes of the early warning disclosure requirements and for compliance with Canada’s takeover bid regime.

Under Canadian securities legislation, if an activist has an agreement, commitment or understanding with another shareholder that they intend to exercise voting rights in concert, they will be presumed to be joint actors. If the agreement, commitment or understanding is with respect to the acquisition of shares of the target company, they will be *deemed* to be joint actors. As a consequence, their holdings will be aggregated for purposes of determining whether the 10% early warning disclosure obligation has been triggered, and the joint actor will have to be named in the activist shareholder's early warning report. The mere formation of a group holding more than 10% will not trigger a filing obligation unless it is a change in a material fact stated in a previously filed report.

Perhaps more significantly, their holdings will also be aggregated for purposes of determining whether the mandatory takeover bid rules have been triggered. Canadian securities legislation requires that the acquisition of more than 20% of the outstanding voting or equity securities of an issuer be made through a formal takeover bid to all shareholders, subject to limited exceptions. The mere formation of a group holding more than 20% will not trigger the rule, but the first purchase of even a single share by a member of the group will require compliance with the bid regime unless the purchase can be made under one of the limited statutory exemptions. Accordingly, the activist and the institutional shareholder will need to ensure that their purchases and sales are coordinated in a manner to ensure compliance with the takeover bid rules and with Canada's early warning disclosure rules. As a result, the activist and the shareholder will be unable to trade without each other's knowledge and, presumably, agreement.

Canadian case law confirms that the issue is not merely a theoretical one. In the August 2013 Alberta Queen's Bench decision in *Genesis Land Development Corp. v Smoothwater Capital Corporation*,[12] the Court found that the activist shareholder, Smoothwater Capital Corporation, was acting jointly and in concert with other shareholders of the targeted company from the date on which the parties participated in a conference call together with a proxy solicitation firm, reasoning that it could be inferred from such conduct that the parties had reached an understanding that they would support the proposed new slate of directors by voting in favour of the slate.

06. Selective Disclosure

In Canada, the extent to which an activist can communicate information to other shareholders is not entirely resolved and therefore requires caution. Disclosure of material non-public information (MNPI) by a special relationship person (for example, a 10%-plus shareholder or a tippee who receives MNPI from the company) to another person constitutes "tipping" under Canadian securities law. Moreover, unlike in the United States, tipping is prohibited regardless of how the recipient acquired the MNPI and regardless of whether the recipient enters into an agreement to maintain the confidentiality of the MNPI.

12 2013 ABQB 509.

There is a specific carve-out for a person considering, evaluating or proposing a takeover bid, business combination or substantial asset acquisition that allows the person to disclose MNPI in the necessary course of the discloser's business to effect such a transaction. However, no similar statutory exception exists for disclosures made by a person proposing a board change or proxy contest.

For the activist shareholder holding more than 10% of a company's shares or is otherwise a special relationship person, the question is whether the activist's disclosure to others of its intention to pursue a board change or proxy contest constitutes prohibited tipping. If the activist's plans amount to a "material fact"—that is, a fact "that would reasonably be expected to have a significant effect on the market price or value of the securities"—the only basis upon which disclosure of those plans to another person would not constitute tipping would be if the disclosure were made in the necessary course of business.

There is very little guidance on the meaning of "necessary course of business" and, until October 2023, we had no substantive decision relating to the interpretation of the exception. The October 2023 decision of the Ontario Capital Markets Tribunal (Tribunal) in *Kraft* (*Re*)[13] (*Kraft*) dealt with disclosure by a board chair of a public company to a long-time friend of near-final draft documentation relating to a transaction material to the issuer. The chair sent the materials for the purpose of seeking his friend's input on the transaction and was found to have breached the tipping prohibition. The decision establishes four rules of interpretation: the tipper bears the onus of proving that the disclosure was made in the necessary course of business; the applicable standard is an objective one—the tipper's subjective belief regarding whether the disclosure was necessary is not sufficient; the exception should be interpreted narrowly in light of the rationale for the tipping prohibition—namely, to ensure that everyone in the market has equal opportunity to receive and act on material information; and necessary course of business does not mean in the "ordinary course of business" and does not connote a mere business purpose, but rather imports a level of importance, including something that is "essential," "indispensable" or "requisite" to the business. Helpfully, although the Tribunal held that, on the specific facts in *Kraft*, the necessity exception was to be understood with reference to the "issuer's" business, it noted that it was not concluding that "in all factual situations the...exception is limited to a consideration of what may be in the necessary course of the issuer's business." In other words, the Tribunal left the door open to a finding that selective disclosure may be defensible where made in the necessary course of the tipper's business.

Nonetheless, given the lack of guidance on the application of the necessity exception to disclosures made by activists in the course of a campaign, activists in a special relationship with the company must exercise caution and may be practically constrained from communicating information to other shareholders whose support they are seeking. Caution is also dictated by the fact that Canadian securities regulators have demonstrated a willingness to use their "public interest" jurisdiction to sanction conduct that does not technically offend the statute, but that results in some unfair advantage to the trader or the tippee.[14]

13 2023 ONCMT 36.

14 *Cormark Securities Inc. (Re)* (2023), ONCMT 23; *Finkelstein v. Ontario Securities Commission* (2018), ONCA 61; *Re Suman* (2012), 38 OSCB 2809; *Re Paul Donald* (2012), 35 OSCB 7383; and *Re Hariharan* (2015), 38 OSCB 3356, 3373.

07. Poison Pills

Many Canadian and U.S. public companies have adopted poison pills (also known as shareholder rights plans), which provide that if an "acquiring person" exceeds a specified level of ownership (typically 20%), all shareholders other than the acquiring person can purchase stock at a substantial discount to the market price of the shares, resulting in significant dilution to the acquiring person. Canadian poison pills, like their U.S. counterparts, treat an acquiring person as the beneficial owner of shares owned by it and its joint actors. However, Canadian pills have evolved differently from U.S. pills, given the TSX requirement that pills be approved by a shareholder vote. This requirement has given shareholders, and ultimately ISS, considerable influence over the terms of poison pills. One way in which Canadian pills differ from U.S. pills is that typically the definition of "joint actor" will not include persons with whom the acquiring person has an agreement to jointly vote shares, but rather only persons with whom the acquiring person has an agreement with respect to the acquisition of shares. Attempts to include provisions, sometimes seen in U.S. pills, that expand definitions of "beneficial ownership" or "acting jointly or in concert" to capture agreements among investors to vote together or campaign to change or influence the control of an issuer have not gained ground in Canada. Commentary by Canadian securities regulators that echoes the voting guidelines of proxy advisory firms in Canada has made clear that rights plans should be effective only against takeover bids and should not apply to transactions or circumstances involving a shareholder vote such as contested director elections.

Securities commissions in Canada are divided on the question of whether poison pills can impose on shareholders restrictions more onerous than those under the statutory takeover bid rules. In *Aurora Cannabis Inc.*,[15] the Ontario Securities Commission (OSC) sent a clear message to the market that it will not tolerate poison pills with unusual terms that interfere with the established features of the takeover bid rules. In ruling that the rights plan at issue should be cease-traded for public interest reasons, the OSC stated that poison pills that vary the requirements of the takeover bid regime would confuse the market and serve "no useful purpose."

In the Alberta Securities Commission's (ASC) 2021 decision in *Re Bison*, the ASC implicitly rejected this principle. The ASC supported the target company's amendment to its poison pill in the face of competing bids to include a shareholder's economic exposure under cash-settled swaps in determining the shareholder's "beneficial ownership" under the pill. The ASC concluded that the pill amendments preserved "shareholder choice" in the context of competing bids by preventing one bidder from acquiring "negative control" by increasing its ownership position, and thereby facilitated an open and even-handed auction for the target. The ASC's determination seemed to be driven by an assumption that the bidder would have the ability to acquire, or influence the voting of, the shares underlying the cash-settled swaps and a concern that, whether or not the underlying shares were voted against an alternative transaction or not voted at all, the swaps had the potential to unfairly distort the outcome of the auction.

15 2018 ONSEC 10.

This decision has left the law unsettled on the use of cash-settled derivatives in the M&A context. It remains undetermined how the law in this area might be applied to proxy contests, but as the *Re Bison* decision concerned the voting, rather than the tendering, of shares, it is not difficult to anticipate the arguments that would be made in extending the application of the decision to proxy contests. In the meantime, other issuers (such as Elemental Royalties in response to a hostile bid by Gold Royalty) have already followed suit by including in their poison pills an extended definition of beneficial ownership that includes economic interests under cash-settled derivatives and other provisions that do not align with the Canadian takeover bid rules.

08. Voting Shares Acquired After the Record Date

The question of who is entitled to vote at a shareholders' meeting is determined by the particular corporate statute under which a company is incorporated. The CBCA stipulates that only a shareholder whose name appears on the shareholders list on the stated record date for the meeting is entitled to vote at the meeting. However, corporate legislation in several provinces and territories of Canada allows a purchaser of shares after the record date to vote at the meeting so long as the purchaser produces properly endorsed share certificates or otherwise establishes the purchaser's ownership of the shares and asks the corporation (typically no later than 10 days before the meeting) to have his or her name included in the list of shareholders entitled to vote.

09. Advance Notice Bylaws

Advance notice bylaws (or policies) set out requirements for shareholders to provide advance notice to a corporation of their proposal to nominate directors for election to the board at a shareholders' meeting. Failure to comply with an advance notice bylaw can result in the shareholder being denied the right to nominate a director.

Although the United States has a long history of adopting advance notice bylaws, Canadian advance notice bylaws were extremely rare prior to 2012. In 2012, Canadian courts condoned the use of these bylaws on the basis that they foster an orderly nomination process and informed decision-making by providing shareholders with reasonable notice of, and information concerning, a contested election of directors. As a result of the courts' support, a majority of Canadian issuers have since adopted advance notice bylaws.

Although bylaws and bylaw amendments can become effective immediately upon the board's approval, they must be approved by the shareholders at the next meeting of shareholders following their passage to remain in place. The requirement for a shareholder vote has given ISS and Glass Lewis significant influence over the provisions of advance notice bylaws in Canada. In late 2014/early 2015, ISS and Glass Lewis reformulated

their policies for evaluating advance notice bylaws in Canada. This was largely in response to the Ontario Superior Court's 2014 decision in *Orange Capital, LLC v Partners Real Estate Investment Trust et al.*,[16] in which the Court found that advance notice requirements are to be used only as a "shield" to protect shareholders and management from ambush and not as a "sword" to exclude nominations given by shareholders on ample notice or to buy time for management to develop a strategy for defeating an activist. In 2017, the TSX also weighed in on advance notice bylaws and provided guidance on which features of advance notice bylaws will and will not be viewed as acceptable for its listed issuers.[17]

Key elements of the guidance provided by ISS, Glass Lewis and the TSX include the following:

- The notice period should not be less than 30 days before the shareholders' meeting (if notice of the meeting is given 50 or more days prior to the meeting date), or 10 days following notice of the meeting if notice is given less than 50 days prior to the meeting date.
- The notice period should not be subject to any maximum notice period.
- If a shareholders' meeting is adjourned or postponed, the bylaw should not restrict the notice period to that established for the originally scheduled meeting.
- The bylaw should not require disclosure that exceeds what is required in a dissident proxy circular or goes beyond what is required under law or regulation.
- The nominees identified in the notice should not be required to agree, in advance, to comply with the director policies and guidelines of the corporation.
- The nominating shareholder should not be required to be present at the shareholders' meeting, either in person or by proxy.
- The board should have the ability to waive all sections of the advance notice bylaw in its sole discretion.

Given the level and type of guidance provided in Canada, a typical Canadian advance notice bylaw will differ significantly from its U.S. counterpart. In particular, in Canada, advance notice bylaws rarely impose a requirement that a director nominee complete a questionnaire. Moreover, the company's board typically has limited discretion to reject a director nomination. This contrast between Canadian-style and U.S.-style advance notice bylaws places Canadian companies that qualify as "U.S. domestic issuers" under SEC rules in a unique and largely uncharted position, which was highlighted in the 2023 Legion Partners' proxy contest for Primo Water. Primo Water, a Canadian corporation cross-listed on the TSX and New York Stock Exchange qualified as a "U.S. domestic issuer." Following initial engagement with activist Legion Partners, the company adopted a new advance notice bylaw that introduced the requirement that a director nominee complete a lengthy questionnaire and that gave broad discretion to the company to request additional information from

16 2014 ONSC 3793.

17 TSX Staff Notice 2017-0001 (March 9, 2017).

director nominees following the submission of their nomination. Although these features are fairly common in U.S.-style advance notice bylaws, they are virtually unseen in the Canadian context. Primo Water used its new U.S.-style advance notice bylaw as a tool to reject all the director nominations submitted by Legion Partners. It was this set of facts which led Legion Partners to launch an oppression application in the Ontario Superior Court of Justice seeking, among other things, a declaration that its director nominations were valid and an order to invalidate or amend the controversial provisions in the company's U.S.-style advance notice bylaw. In its application, Legion Partners cited Canadian guidance and the established legal principle that, in Canada, advance notice bylaws be used as a shield to protect shareholders and not as a sword to exclude nominations given on ample notice. Similar complaints were made by the activist to the OSC and the TSX. Primo Water ultimately acceded to all of Legion's demands in the litigation in a settlement agreement accepting all of Legion Partners' director nominations and including such nominees on its universal proxy card. Shortly prior to the meeting of shareholders in which the contested election would take place, the parties settled the proxy contest on terms that required Primo Water to put two of Legion Partners' nominees on the board and to adopt certain governance enhancements, including revisions to the advance notice bylaw to bring it in line with Canadian standards.

10. Universal Proxy Cards

Canadian proxy rules have always permitted an issuer or a shareholder to use a "universal" proxy card. A universal proxy card lists the names of all of the duly nominated director nominees for election at an upcoming shareholders' meeting, regardless of whether the nominees were nominated by management or shareholders. Universal proxy cards allow shareholders to vote for a combination of director nominees from competing slates, as they could if they voted in person at the shareholders' meeting.

When one party deploys a universal proxy card, that card becomes the more attractive option because shareholders can tailor their votes by voting for their preferred mix of management and dissident nominees. For example, if a shareholder supports a dissident who uses a universal proxy, but believes that the dissident slate put forward is too large, a universal proxy card would allow the shareholder to vote for a subset of the dissident nominees and also vote for one or more management nominees.

In addition, the use of a universal proxy can provide an important informational advantage since, in the absence of agreement between a dissident and the issuer, typically neither side will have advance access to proxies submitted on the other side's card. By using a universal proxy and persuading shareholders to use that proxy to cast their votes, a party may be able to secure a clearer picture of their prospects for success in advance of the meeting.

In Canada, a universal proxy was first used successfully in Pershing Square's 2012 proxy contest for Canadian Pacific Railway.[18] In that contest, both sides ended up using universal proxy cards—management doing so pre-emptively, presumably so that its card would not be viewed as less flexible than Pershing Square's. Similarly, in JANA Partners' battle with Agrium in 2013, JANA used a quasi-universal proxy, in which it offered shareholders the choice of voting among seven incumbents that JANA would accept, plus five of JANA's nominees on its proxy card. This contrasted with Agrium, which listed only the 12 management incumbents on its card. In the years since those contests, universal proxy cards have been used with some frequency in contests involving larger cap companies, including the 2014 proxy contest for Americas Gold and Silver Corporation, the 2017 proxy contest for Granite Real Estate Investment Trust, the 2018 proxy contest for DavidsTea Inc. and the 2019 proxy contests for Methanex Corporation and Knight Therapeutics Inc., to name a few.

In contrast, amendments to the U.S. proxy rules, which came into effect on August 31, 2022, now require the use of universal proxy cards by both management and dissident shareholders for all shareholder meetings involving contested director elections. In addition, the U.S. proxy rules provide for certain advance notice requirements, dissident proxy statement filing deadlines and mandatory solicitation requirements. Although most cross-listed Canadian companies are not subject to the new U.S. proxy rules because they qualify as "foreign private issuers" under SEC rules, Canadian companies that qualify as "U.S. domestic issuers" under SEC rules are required to comply. For companies and shareholders operating in this scenario, we would observe that typical Canadian advance notice bylaws do not mesh well with the new U.S. proxy rules. For example, a nominating shareholder that submits its notice of nomination within the 30-day minimum notice period prescribed by the bylaws may nevertheless be in breach of the U.S. proxy rules, which require the notice of nomination to be submitted no later than 60 days prior to the anniversary date of the company's previous year's annual meeting.

11. Requests for Corporate Records

The ability of a shareholder to inspect a corporation's corporate records is limited in Canada in comparison to the right of shareholders of U.S. corporations. Accordingly, U.S.-style "books and records requests" are not a useful tool for activists in Canada.

In Canada, the right of a shareholder to inspect a corporation's corporate records is governed by the corporation's governing statute (for example, the CBCA in the case of a federally incorporated corporation). Anyone may request copies of the articles and bylaws of a public company incorporated under the CBCA and may examine the minutes of shareholder meetings and notices of change of directors, during the usual business hours of the corporation. Although shareholders are generally not entitled to request board meeting minutes, under the CBCA, they are entitled to examine the portions of any minutes of meetings of directors

18 The dissidents in Biovail Corporation's 2008 proxy contest also used a form of universal proxy, but were unsuccessful in that campaign.

or of committees of directors that contain disclosure of conflicts of interest by directors or officers of the corporation, during the usual business hours of the corporation. Additionally, anyone can request a copy of the shareholder list of such corporation upon payment of a reasonable fee and submission of a prescribed affidavit, which the corporation is required to provide within 10 days of such request.

Under the CBCA and Canadian securities laws, the person requesting a shareholder list must refrain from using the shareholder list except in connection with (i) an effort to influence the voting of shareholders of the corporation, (ii) an offer to acquire securities of the corporation or (iii) any other matter relating to the affairs of the corporation. Under the CBCA, the corporation is required to provide a copy of its registered holder list as well as any holder of an option or right to acquire shares of the corporation. Under Canadian securities laws, the corporation is also required to provide a copy of the most recently prepared non-objecting beneficial owner list.

These rights are considerably narrower than the right of a shareholder to inspect a corporation's corporate records under Delaware General Corporation Law. Under that law, shareholders have the right to inspect the corporation's books and records for a "proper purpose," unless the shareholder is only seeking a shareholder list, in which case the burden is on the corporation to prove that a proper purpose does not exist. A proper purpose is one reasonably related to the shareholder's interest as a shareholder. Although the scope of accessible documents might vary from state to state, it is considerably broader than the scope of documents available in Canada and generally includes the corporation's governing documents, minutes from board meetings, minutes of shareholder meetings and records of other shareholder actions, shareholder lists and the corporation's financial and accounting records.

12. Canadian Resident Director Requirements

The CBCA, unlike most provincial statutes, prescribes Canadian residency requirements for the board of directors of a corporation. In contrast, Canadian stock exchanges like the TSX and the TSXV do not impose any such restrictions.

Under the CBCA, a minimum of 25% of a CBCA corporation's directors must be resident Canadians. Higher percentages are prescribed in certain cases. For instance, if a CBCA corporation operates in certain prescribed industry sectors—such as uranium mining, book publishing or sales, or film or video distribution—the *majority* of its directors must be resident Canadians. This higher threshold also applies to CBCA corporations that are subject to an act of Parliament mandating specific levels of Canadian ownership or control, or restricting the number of voting shares any single shareholder may hold. The CBCA defines a "resident Canadian" as (i) a Canadian citizen ordinarily resident in Canada, (ii) a Canadian citizen not ordinarily resident in Canada who is a member of prescribed class of persons, or (iii) a permanent resident ordinarily resident in Canada—excluding those who have resided in Canada for more than one year after becoming eligible for Canadian citizenship.

Additionally, widely held Canadian companies that are not majority owned by Canadians may seek to qualify as Canadian-controlled under the *Investment Canada Act* (ICA) by having at least two-thirds of their board members be Canadians. Investments in Canadian businesses by a Canadian-controlled entity are not subject to either the "net benefit" or "national security" review provisions of the ICA, regardless of the size of the investment or nature of the target business. For an entity to qualify as a Canadian-controlled entity under the ICA, it must satisfy one of two criteria: either (a) a majority of the entity's voting interests must be held by a Canadian or Canadians, or (b) where non-Canadians own a majority of the entity's voting interests, at least two-thirds of its board members must be Canadian. In either case, it must also be established that the entity is not controlled in fact by a non-Canadian or a voting group of non-Canadians. The ICA defines a "Canadian" as either a (i) Canadian citizen or (ii) permanent resident—excluding those who have resided in Canada for more than one year after becoming eligible for Canadian citizenship. Notably, this is a different standard from the one set by the CBCA, which generally requires the individual to reside in Canada.

Canadian public companies that are also listed on U.S. exchanges may seek to qualify as foreign private issuers (FPIs) in order to benefit from less stringent reporting requirements under the Canadian-U.S. multijurisdictional disclosure system compared with U.S. domestic issuers. Importantly, a Canadian FPI is not subject to U.S. proxy rules and can instead rely on Canadian proxy rules. To qualify as an FPI, a Canadian company must either:

1. Have over 50% of its voting securities owned by non-U.S. residents; or
2. If the majority of voting securities are U.S.-owned, the company must ensure
   - the majority of its executive officers or directors are not U.S. citizens or residents;
   - fewer than 50% of its assets are located in the United States; and
   - its business is not administered principally in the United States.

If the company determines that 50% or less of its outstanding voting securities are held by U.S. residents, it would qualify as an FPI and it need not consider the second criterion. However, if the company determines that over 50% of its outstanding voting securities are held by U.S. residents or it is unable to make the determination, it must ensure all three conditions of the second criterion are met, including ensuring that the majority of its directors are not U.S. citizens or U.S. residents. Generally speaking, the SEC's rules only require the company to confirm its FPI status once a year, on the last day of a company's second fiscal quarter (i.e., June 30 for companies with a December 31 fiscal year-end).

13. Shareholder Proposals

Shareholders of Canadian corporations have long had the ability to use the shareholder proposal regime to submit nominations for the election of directors. Nominees submitted by a proposal must be included in the management proxy circular for the corporation's annual general meeting.

To be eligible to submit a shareholder proposal, a shareholder must hold voting shares equal to at least 1% of the outstanding voting shares or whose fair market value is at least $2,000. Such shares must have been held for at least six months prior to the shareholder submitting the proposal.[19] In addition to these requirements, a shareholder proposal to nominate a director must be signed by one or more holders of shares representing in the aggregate not less than 5% of the shares entitled to vote at the meeting.[20] There is no limit on the number of nominees that may be submitted by proposal.

The corporation can reject a proposal on a number of grounds, including that the proposal does not relate in a significant way to the business or affairs of the corporation. In addition, a corporation is not required to include a shareholder proposal in its management proxy circular if the proposal is not submitted to the corporation during the prescribed period. CBCA amendments that came into effect in 2022 require proposals to be submitted at least 90 days (and not more than 150 days) before the anniversary of the prior year's annual meeting of shareholders[21] (other corporate statutes, such as the Ontario *Business Corporations Act (*OBCA*)* calculate the deadline differently). This change (from the former requirement of at least 90 days prior to the anniversary of the previous year's *notice of meeting*) effectively relaxes the deadline for submission of a proposal to three months, from four to six months, prior to a meeting. This will allow for later submissions of shareholder proposals and could lead to greater use of the proposal mechanism for director nominations.

That said, these long-available Canadian shareholder proposal provisions have rarely been used for director nominations. This is likely due to several factors:

- Prior to the 2022 CBCA amendments, the deadline for submitting a proposal typically occurred four to six months prior to a meeting date and would have often passed before a dissident had firmed up its plans to take action.
- The statutory word limitation is not conducive to advocacy. The word count of the proposal and the supporting statement together cannot exceed 500 words.[22]

19 CBCA, s. 137(1.1) and CBCA Regulations, s. 46.

20 CBCA, s. 137(4).

21 CBCA, s. 137(5)(a) and CBCA Regulations, s. 49.

22 CBCA Regulations, s. 48.

- As discussed above, shareholders with 5% of the shares also have the right to requisition a meeting. Prior to the 2022 CBCA amendments, the deadline for requisitioning a meeting would typically occur much later than the deadline for submitting a proposal. Thus, any shareholder considering submitting a nomination via a proposal could instead submit a requisition at a later date and then agree with management that the requisitioned business (for example, to elect the dissident's nominees) could be dealt with at the annual meeting instead.
- Mere inclusion of a dissident's nominees in management's circular and on management's proxy card is generally not viewed as being sufficient to give a dissident any significant likelihood of success unless the initiative is accompanied by a robust solicitation effort by the dissident. In addition, such inclusion does not relieve the dissident of an obligation to mail its own circular to shareholders if it wishes to engage in a general solicitation of proxies. Moreover, management has considerable control over how the dissident's nominees are presented in the circular and management proxy card. Thus a dissident will typically prefer to mail its own circular to present its nominees and use its own proxy card.

With the elimination of some of these drawbacks, the shareholder proposal mechanism is a potentially useful tool for a shareholder wishing to put its nominees up for election in the least expensive way possible. This could be particularly effective for a significant shareholder or group of shareholders that are not dependent on a broad public solicitation to win support for a dissident slate. Relying on management to include the dissident's nominees on the management proxy card and then privately soliciting up to 15 shareholders under a limited private solicitation (discussed below) could be sufficient in some cases to achieve a low-cost proxy contest victory.

PROXY ACCESS

U.S.-style proxy access proposals have generated relatively little interest in Canada. A brief flurry of proposals in 2017 resulted in two of Canada's largest banks—Royal Bank of Canada (RBC) and The Toronto-Dominion Bank (TD Bank)—receiving proposals to adopt proxy access bylaws. The proposals were submitted to the banks by the same shareholder asking that the boards adopt bylaws similar to the most typical U.S.-style proxy access bylaw, allowing shareholders beneficially owning 3% or more of the bank's outstanding common shares continuously for three years to nominate directors. The proposal narrowly passed at TD Bank's 2017 annual shareholders' meeting, with 52.2% shareholder support. The same proposal was narrowly defeated at RBC's 2017 annual shareholders' meeting, with 53.2% of shareholder votes against. TD Bank and RBC adopted proxy access policies following their respective 2017 annual shareholders' meetings that entitle shareholders that beneficially own 5% or more of the bank's outstanding common shares continuously for three years to nominate directors, provided that they satisfy the other requirements of the proxy access policy. Shortly afterward, six other Canadian financial institutions adopted similar proxy access policies (Canadian Imperial Bank of Canada, Bank of Montreal, The Bank of Nova Scotia, National Bank of Canada, Sun Life Financial Inc. and Manulife Financial Corporation).

For now, proxy access in Canada is limited to large financial institutions and its broader adoption seems unlikely. ISS has not provided specific parameters for shareholder proposals relating to proxy access and states in its 2023 Guidelines that it will take a case-by-case approach in evaluating these proposals.

14. Compensation Arrangements for Director Nominees

One of the principal challenges that an activist faces is recruiting credible and compelling board candidates for a dissident slate. The use of universal proxy cards in Canada and, more recently, in the United States has focused on the quality and independence of individual director nominees; this in turn has raised the bar for activists: the credibility of the activist will be judged on its ability to attract high-quality dissident candidates.

In the past, in order to attract the best candidates, some activists have provided incentive compensation arrangements to those willing to serve as director nominees. In two high-profile proxy contests in 2013, this practice came under attack: one in Canada in which U.S. hedge fund JANA Partners sought to compensate its nominees who were proposed for election to the board of Agrium Inc., and one in the United States, in which Elliott Management Corp. entered into compensation arrangements with its nominees in its proxy fight with Hess Corp. In these cases, the director nominees were provided with compensation that included an incentive component tied to the performance of the target companies' shares over a certain period of time. In addition, compensation agreements often include a more modest fixed stipend as well as indemnity arrangements; however, these components have not attracted notable criticism.

Activists argued that incentive payments were consistent with good corporate governance because they help link director pay to performance, which can benefit all shareholders. They also argued that these arrangements were necessary to attract better candidates who would otherwise have no compensation for their significant efforts unless ultimately elected to a board. On the other side, critics labelled director compensation arrangements as "golden leashes" leading to "poisonous conflicts" that create a subclass of directors, compromise the nominees' independence and create dysfunctional boardrooms. In particular, criticism highlighted instances in which time frames of the incentive arrangements were too short to align the dissident nominees with the long-term interests of shareholders.

Today, although compensation and indemnities for an activist's candidates during the pendency of a proxy contest are acceptable, activists are advised to avoid post-election compensation arrangements.

15. Proxy Solicitation

Under Canadian corporate and securities laws, unless an exemption is available, the solicitation of proxies by a shareholder requires the preparation and mailing of a prescribed form of dissident proxy circular and form of proxy to every shareholder whose proxy is solicited. "Solicitation" is very broadly defined under the CBCA to include a "communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy."

For example, in *Smoothwater Capital Partners LP1 v Equity Financial Holdings Inc.*[23] (*Smoothwater*) in 2014, the Ontario Superior Court of Justice had to consider whether a press release issued by a company following the commencement of proxy solicitation by an activist amounted to illegal proxy solicitation by the company. In that case, the activist, Smoothwater Capital Partners LP, requisitioned a meeting of shareholders and commenced its proxy solicitation in reliance on the public broadcast exemption. Smoothwater Capital issued a press release criticizing the board's decision to delay the requisitioned meeting. In response, the company issued a press release defending the actions of its directors and outlining its concerns with Smoothwater Capital's nominees and confirming that a proxy circular was forthcoming. Smoothwater Capital challenged the press release as an illegal solicitation of proxies under the CBCA, claiming that the release constituted a "communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy" prior to the filing of the management proxy circular. The Court held that whether a communication is a solicitation is a question of fact that depends on the nature of the communication and the circumstances of the transmission. Looking at the principal purpose of the document, the Court held that the press release was simply a defence of the company's leadership and of the date that it chose to hold the meeting, and that the release did not encourage shareholders to provide proxies to the company.

In determining whether a communication is a solicitation, it is necessary to consider the motives and intention of the sender, as well as the likely effect that the communication will have on recipient shareholders. Further, timing could also be important in assessing whether a given communication can be described as a "solicitation." For instance, where there is a substantial period of time between the initial communication and the ultimate formal solicitation, the initial contact is likely not going to be deemed to constitute a solicitation.

23 2014 ONSC 324.

16. Limited Private Proxy Solicitation

Canadian securities laws and most corporate statutes provide an exception to the proxy solicitation rules, allowing shareholders (but not the company) to avoid having to send a dissident proxy circular to shareholders if the total number of shareholders whose proxies are solicited is not more than 15 (joint holders being counted as one shareholder).[24] This method of solicitation is inexpensive and may be effective when the ownership of voting shares is concentrated in the hands of a few shareholders.

Aside from the limit on the number of shareholders that a person may solicit, there are very few constraints on the manner in which a shareholder relying upon this exemption may solicit proxies. In some past instances, dissidents have quietly conducted limited solicitations of proxies from a small number of large shareholders and "ambushed" management at an annual meeting by nominating their own alternative slate of directors from the floor without any prior warning.

Private proxy solicitation has been simplified by a decision of the British Columbia Supreme Court in 2019 in *Russell v Synex International Inc.*[25] Adopting the finding of an earlier Ontario case, the Court held that a dissident shareholder conducting a private solicitation could use the company's form of proxy to appoint himself as the proxyholder (instead of management's appointees) and then rely on the discretionary authority granted by a proxy to vote in favour of the candidates nominated from the floor of the meeting. The Court concluded that this result best gave effect to shareholders' voting intentions, noting that the entire regulatory scheme for the voting of proxies is geared to facilitate the exercise of shareholders' right to vote.[26]

17. Solicitation by Public Broadcast

Canadian securities laws and most corporate statutes provide a "public broadcast" exemption that can be used alone or in combination with the 15-shareholder exemption discussed above to enable a dissident (but not the company) to solicit proxies and support for its campaign without "sending" a proxy circular to shareholders.[27] The exemption allows the shareholder to solicit proxies through the media—by public broadcast or publication (for example, by press release, statement on radio or television, publicly available website or public speech)—and avoid the expense and time required to mail a proxy circular. For shareholders relying on this exemption in connection with the election of directors, a document containing prescribed information concerning the proposed nominees must be filed on SEDAR, together with the communication intended to be published.[28]

24 CBCA, s. 150(1.1) and National Instrument 51-102, *Continuous Disclosure Obligations* (NI 51-102), s. 9.2(2).

25 2019 BCSC 34.

26 Additional information is available in our article titled "Policy Prevails over Fine Print: Successful Ambush in British Columbia Clarifies the Use of Blank Proxies" (May 6, 2019) (available at https://www.dwpv.com/en/insights/publications/2019/policy-prevails-over-fine-print).

27 CBCA, s. 150(1.2) and NI 51-102, s. 9.2(4).

28 NI 51-102, s. 9.2(6).

Pershing Square's successful campaign to elect its nominees to the board of Canadian Pacific Railway serves as a good example of the utility of the broadcast exemption to activists and the flexibility it affords to engage in a robust solicitation campaign, particularly in the early stages, without incurring the additional costs and burdens of mailing a dissident information circular. In the case of Pershing Square, reliance on the exemption, combined with the filing of an initial "pre-emptive" proxy circular, enabled Pershing Square to mount a multi-faceted solicitation campaign involving public town hall meetings, press releases, speeches, media interviews, shareholder one-on-one meetings and a customized website, over the course of months and long before Canadian Pacific Railway's management had filed its proxy circular. Since then, other activists proposing governance and board changes have relied on the public broadcast exemption to build shareholder support for their proposals before filing, or in the absence of, a dissident proxy circular.

As the *Smoothwater* decision (discussed above) illustrates, issuers are not completely handcuffed from responding to an activist that relies on the broadcast exemption to get its narrative out ahead of management's proxy circular. Issuers have some scope to issue press releases in defence without crossing the line into illegal proxy solicitation. Accordingly, an activist relying on the broadcast exemption cannot expect to go unchallenged by the issuer in the lead-up to filing the management proxy circular.

18. Soliciting Dealer Fees

The high-profile proxy contest in which JANA Partners sought to have five nominees elected to the board of Agrium Inc. brought under scrutiny the practice of companies compensating brokers through the payment of so-called soliciting dealer fees for soliciting shareholders' votes in favour of management.

The use of soliciting dealer fees was originally seen only in connection with takeover bids. In these transactions, bidders seeking to ensure that they meet their minimum tender condition would retain a dealer to form a soliciting dealers' group that would compensate brokers (at the bidders' cost) for getting their retail clients to tender to the bid. The fees served as a form of commission to brokers for shares tendered by their clients. This practice became fairly common despite some objection from shareholder advocates who maintained that the fees compromised the brokers' ability to provide unbiased advice to shareholders on whether to tender to a bid.

The use of soliciting dealer fees then migrated to Canadian M&A transactions conducted by way of a shareholder vote. In these situations, brokers are compensated for soliciting their clients' votes in favour of the transaction. In some cases, rival bidders have offered fees to encourage brokers to get their clients to vote against a competing transaction. Despite the variety of situations in which soliciting dealer fees have been seen, until 2012, the use of these fees had been limited to corporate transactions and the fees had never been used in proxy fights for the election of a board of directors.

In 2012 and 2013, Canada witnessed the introduction of soliciting dealer fee arrangements by the incumbent board in the proxy contest context, including the 2012 proxy contest involving EnerCare Inc., the 2012 battle between TELUS Corporation and Mason Capital Management LLC (Mason) and the 2013 proxy contest between JANA Partners and Agrium. In the JANA/Agrium proxy contest, Agrium offered to pay soliciting dealer fees of $0.25 per share for each share voted in favour of the election of all of Agrium's incumbent directors. Agrium did not make any public disclosure of the payment of soliciting dealer fees, offering the fees in a confidential communication to broker-dealers.

Agrium's use of soliciting dealer fees generated intense media coverage and negative reaction from shareholders, academics, the marketplace and international press. It also focused attention on the propriety of the practice, not only in proxy contests for board elections but also in the context of M&A. Following the Agrium contest, numerous shareholder organizations and commenters condemned the practice, particularly in the context of a board election, characterizing it as "vote buying." It was noted that dealers in the United States will not engage in the practice on the grounds that by taking compensation for soliciting votes, they would run afoul of proxy solicitation rules in Rule 14a-2 under the *Securities Exchange Act* of 1934.

After, another controversial use of soliciting dealer fees by Liquor Stores N.A. Ltd. in defending a proxy contest launched by PointNorth Inc. in 2017, in which the Alberta Securities Commission declined to intervene to sanction the conduct, the Canadian Securities Administrators (CSA) sought comment on the use of, and regulatory approach to, soliciting dealer fee arrangements. In response, in 2019, the Canadian Investment Regulatory Organization (CIRO), Canada's investment dealer self-regulatory organization, published a guidance note to address the management of conflicts of interest concerning such arrangements. In the guidance note, CIRO stated that soliciting dealer fee arrangements that relate to contested director elections involving fees that are paid only for votes in favour of one side and/or only if a particular side is successful raise significant conflicts of interest for a dealer which are unmanageable and as such should be avoided. As a result, while soliciting dealer fees are not yet prohibited by Canadian law, it is expected that the dealer community will move away from these arrangements with respect to contested director elections in Canada, especially if they are one-sided or contingent on a particular result. Since the adoption of the CIRO guidance, we are not aware of any Canadian issuer using soliciting dealer fee arrangements in a contested director election.

19. Classified Boards

Canadian corporate statutes generally provide that shareholders may, by vote of a simple majority at a special meeting, remove one or more directors from office and elect their replacements. This right, coupled with the right of shareholders to requisition meetings to remove directors, prevents Canadian corporations from implementing "classified" or "staggered" boards in which directors are elected for multiple-year terms with only a subset of the board subject to turnover at any given annual meeting. Moreover, the TSX rules prevent classified boards for TSX-listed issuers by requiring that shareholders be permitted to vote on the election of all directors at each annual meeting of shareholders. As a result, at each annual meeting, a dissident has the opportunity to take control of the board.

20. Majority Voting

Majority voting is firmly entrenched in Canada for TSX-listed issuers, with the result that shareholders have a meaningful opportunity to annually express their views on individual directors in director elections. Majority voting replaces the historical practice of electing directors as a slate on a plurality basis in uncontested elections, requiring that shareholders vote "for" or "against" individual director nominees, rather than "for" or withhold."

Under the TSX rules, all TSX-listed issuers (other than majority-controlled corporations) must have a majority voting policy and disclose the results of that vote. In an uncontested election, each director nominee is required to receive at least a majority of the votes cast (50% plus 1 "for" votes). An incumbent director nominee who fails to receive the requisite vote must tender his or her resignation for acceptance by the board and the board must accept the resignation within 90 days of the date of the election, absent "exceptional circumstances." To date, several reporting issuers have relied on the exceptional circumstances carve-out to decline the resignation of an incumbent director who failed to receive the requisite majority vote, allowing the director to remain on the board, despite the will of shareholders to the contrary. Once a board decision is made, the issuer must promptly issue a news release announcing such decision, including the reasoning if the board has decided to decline the incumbent director's resignation.

For corporations incorporated under the CBCA, majority voting for directors is now the law. Effective August 31, 2022, directors of reporting issuers governed by the CBCA must receive a majority of the votes cast (or such greater percentage as specified in the articles), failing which he or she will not be elected as a matter of law. Where such director nominee is an incumbent director, he or she will still be permitted to continue in office until the earlier of (i) 90 days following the date of the election and (ii) the date on which a successor is appointed or elected. In limited circumstances, where it is required to satisfy statutory director independence or Canadian residency requirements, the board may fill such vacancy by reappointing the incumbent director who failed to be elected. If the shareholders fail to elect the number or minimum number of directors required under the corporation's articles, the elected directors may exercise all their powers as directors provided that they constitute a quorum.

21. Withhold Campaigns

A cost-effective option for shareholders to effect board change at an issuer is to engage in a "withhold campaign" (or "vote no campaign")—that is, a public campaign to encourage shareholders to withhold their votes on the election of one or more director nominees of an issuer.

Shareholders launching withhold campaigns can rely on the public broadcast and private solicitation exemptions (discussed in sections 16 and 17 of this guide) to solicit shareholders to vote "withhold" or "against" a director. Because a withhold campaign does not require the preparation and mailing of a circular, it is significantly less expensive than a full-fledged proxy contest. Further, a withhold campaign need not be successful to count as a win. The fact that the campaign is initiated and enjoys some take up, without necessarily unseating a director, can stimulate the desired engagement of the board on the investor's issue. As CBCA incorporated public companies are now subject to "true" majority voting (discussed in section 20 of this guide), vote-no campaigns may become a more useful tool for shareholders of such companies. The CBCA majority voting rules provide that a director who fails the vote is simply not elected. This is in contrast to the majority voting policies that the TSX requires listed companies to implement which give the board discretion to decline a resignation in "exceptional circumstances." Further, CBCA companies listed on junior exchanges, which do not require issuers to adopt a majority voting policy, will now need to comply with majority voting for the first time.

A withhold campaign is a flexible tool in the hands of a shareholder that wishes to target a specific director or committee without necessarily causing broad disruption in the boardroom. For example, a shareholder could mount a withhold campaign against the chair of the compensation committee to express concern over compensation decisions. A withhold campaign can be tailored to target specific directors who are, for example, long-tenured, over-boarded or not independent. In addition, a withhold campaign does not require the shareholder to advance an alternative nominee, thus depriving the issuer of a target to take aim at.

A withhold campaign can also be used by a shareholder that has missed a nomination window under an issuer's advance notice bylaw or whose slate was disqualified. By launching a withhold campaign, the shareholder can continue to pressure the board to effect change, notwithstanding that the shareholder's proposed slate of candidates cannot be elected at the meeting.

22. Virtual Contested Meetings

WHAT ARE VIRTUAL MEETINGS?

Virtual meetings allow shareholders to participate and vote at a meeting of shareholders through an online platform that provides shareholders and proxyholders the ability to ask questions and vote. Virtual meetings may be held in tandem with an in-person meeting (i.e., a hybrid meeting) or may be held without offering an in-person component. Virtual-only meetings are often audio-only broadcasts in which the chair of the meeting and certain management representatives are given the right to speak in order to call the meeting to order, make motions, call for votes and address questions.

Prior to the 2020 COVID-era proxy season it was relatively uncommon for Canadian public companies to hold virtual meetings and almost no issuers held virtual-only meetings. For example, in the 2019 proxy season less than 1% of meetings held by TSX Composite and Small Cap indices issuers were virtual-only. It is now common for Canadian public companies to hold meetings in a virtual-only or hybrid format.

AUTHORITY TO HOLD A VIRTUAL MEETING

An issuer's ability to hold a virtual shareholder's meeting depends on its governing corporate legislation, articles and bylaws. Some statutes, such as the OBCA, allow a shareholders' meeting to be held by telephonic or electronic means unless the corporation's articles or bylaws provide otherwise. Other statutes, such as the CBCA, allow a meeting to be held by electronic means only if the corporation's bylaws expressly permit it. The provisions of an issuer's applicable corporate statute, its articles and bylaws also determine the means by which electronic voting is permitted and the degree to which shareholders must be able to communicate with each other.

Amendments to the OBCA that came into force on October 1, 2023 now give an Ontario corporation the ability, by way of its articles or bylaws, to limit the manner in which a meeting of shareholders may be held and specify requirements that apply with respect to the holding of a meeting of shareholders. The open-endedness of these provisions gives issuers wide scope for creating rules on the holding of shareholder meetings and could invite abuse, such as setting different rules for meetings requisitioned by shareholders or other types of contested meetings. While attempts by an issuer to prescribe discriminatory meeting requirements in its constating documents may not survive a court challenge, the costs of litigation and timeliness of obtaining a court date may put this option out of reach for many shareholders. The OBCA amendments also require that all persons entitled to attend a virtual or hybrid shareholder meeting be able to "reasonably participate." This requirement may open the door for dissidents to complain that virtual meeting procedures offered at the meeting did not allow them to reasonably participate (for further information, see our bulletin on the OBCA amendments).

Although meeting mechanics largely fall within the purview of corporate law, securities regulators retain broad public interest jurisdiction to intervene—even when there has not been a breach of securities law—and might be prompted to do so if there is evidence to suggest that an issuer is holding a virtual-only meeting for tactical reasons. Staff of the CSA provided guidance in 2022 on virtual shareholder meetings (2022 CSA Guidance) and stated that they recommend issuers adopt practices at virtual meetings that are transparent and consistent with practices used at in-person meetings. Similarly, proxy advisory firms ISS and Glass Lewis have historically been opposed to virtual-only shareholder meetings out of concern that they disenfranchise shareholders. This view was relaxed, out of necessity, during the COVID-19 pandemic as in-person meetings were effectively prohibited by “stay at home” orders. Now, Glass Lewis is permissive of virtual-only meetings provided that issuers take steps to ensure that the virtual meeting “approximates” an in-person meeting experience by providing for certain participation and information rights and ensuring effective disclosure regarding such rights. Although ISS proxy voting guidelines for Canadian issuers do not refer to virtual meetings, its advice for U.S.- and European-based companies is substantially similar to Glass Lewis’ and is permissive of virtual-only meetings provided companies do not take steps to preclude in-person meetings and that steps are taken to ensure virtual meetings provide comparable rights and opportunities for shareholders to participate electronically as they would during in-person meetings.

VIRTUAL CONTESTED MEETINGS

From a tactical perspective, there are a number of advantages for an issuer in holding a virtual-only meeting. Given that the meeting is held entirely online, the lack of a physical presence and ability for shareholders to speak at the meeting means that there is less risk that a newsworthy event occurs at the meeting. As most virtual-only meetings are audio-only broadcasts controlled by the issuer, third parties would be unable to block access to the meeting and dissidents would be unable to display signs, symbols or props in making their commentary. Additionally, shareholders would not be able to hear any applause or other supportive reactions to speeches made by dissidents. As comments and questions are generally submitted through a portal moderated by the chair, who is then asked to read the comments and questions out loud, the chair is able to control how they are presented and to edit them prior to reading them out loud or to rule comments and questions out of order. Even if a dissident is given the ability to speak at a virtual meeting, the issuer could limit this right or the chair could use the virtual meeting software to shut off the dissident’s microphone if they are out of order.

The 2022 CSA Guidance also encourages issuers to enter into meeting protocols with dissidents ahead of a virtual contested meeting. Such protocols can reduce the instances of “tactical gamesmanship” seen at in-person shareholder meetings and can also reduce the likelihood that the chair’s rulings will be subsequently challenged in court. Meeting protocols establish procedural rules for the meeting, such as the identification of the chair of the meeting, provision of a draft of the script of the meeting to the dissident, the right to review proxies received and tabulated by the scrutineers prior to the cut-off time and after the meeting, rules with respect to the authenticity and validity of proxies (such as the Securities Transfer Association of Canada (STAC) Proxy Protocol) and limitations on introducing new items of business at the meeting.

In Canada, it has been difficult to hold a virtual-only contested meeting as the meeting scrutineers, which are generally the transfer agents for the issuer, have been unwilling to act unless the issuer and dissident sign a meeting protocol to settle procedural matters prior to the meeting. More recently, scrutineers have relaxed their opposition to acting as scrutineers at virtual contested meetings without a meeting protocol being in place, provided that they are able to proceed with protocols established by STAC and to operate in the normal course. In a recent virtual contested meeting, the issuer Magnet Forensics, Inc. publicly filed a protocol for its contested meeting of shareholders which it had adopted unilaterally without the approval of the dissident. This approach could provide further comfort to scrutineers that are reluctant to act at virtual contested meetings.

23. Private Placements During Proxy Contests

The private placement of shares into the hands of a friendly shareholder as a defence to a proxy contest has never been a common tactic in Canada. Among other things, the issuance of shares as a means of defeating a dissident's bid to oust incumbent directors could give rise to claims of breach of fiduciary duty and oppression of minority shareholders. However, this tactic was employed in a 2017 Canadian proxy contest involving Eco Oro Minerals Corp. (Eco Oro), prompting the OSC to reverse a private placement before a contested shareholders' meeting that threatened to tip the scales in favour of management.[29]

For companies listed on the TSX, any private placement of shares must first be reviewed and accepted by the TSX. The TSX's rules generally require that a private placement be submitted for shareholder approval if it will have a material impact on control, or if it will result in the issuance of more than 25% of the outstanding shares at a discount to the current market price. Shareholder approval is also required if the placement will result in an issuance of more than 10% to insiders of the company. Failure to comply with these requirements can result in the company being delisted.

In 2017, the TSX approved (without requiring shareholder approval) the issuance of common shares by Eco Oro upon conversion of notes eight days prior to the record date for a contested shareholders' meeting. The notes that were converted were held by certain insiders of the company and shareholders who were friendly to management. The notes had only recently been issued in connection with a financing that shareholders had vigorously opposed. The TSX's approval was based on its determination that the private placement did not "materially affect control of Eco Oro" because the issuance of the shares would not result in a single shareholder, or a combination of shareholders acting together, holding more than 20% of the outstanding voting securities. The dissident shareholders appealed the decision of the TSX to the OSC.

29 2017 ONSEC 23.

The OSC reversed the TSX decision and cease-traded the shares issued upon conversion of the notes and ordered that if shareholder approval for the issuance of the shares was not obtained, Eco Oro must unwind the private placement. In addition, the OSC ordered that until shareholder approval was obtained, the shares could not be voted.

In considering whether the TSX properly considered whether the private placement “materially affected control of Eco Oro”, the OSC found that looking exclusively at whether a new 20% shareholder was created was insufficient and contrary to the TSX’s own listing manual,[30] which requires the TSX to consider the particular fact situation (in this case, a proxy contest) where a transaction materially affects control of the issuer. The OSC found that the TSX had failed to consider the impact that the private placement may have on the upcoming vote in assessing whether it “materially affected control,” and that “the public interest requires an evaluation of whether an issuance of shares by a listed issuer is for the purpose of entrenching management in the face of a proxy contest.” The OSC concluded that there was overwhelming evidence of a tactical motivation by Eco Oro to influence the vote at the upcoming meeting and that the issuance of the shares to the friendly shareholders “could reasonably tip the balance in favour of management.” Moreover, the OSC found no compelling business objective for the private placement to be completed prior to the record date for the requisitioned meeting so as to negate this tactical motivation. Indeed, the OSC found that the private placement, which provided no new funds and no covenant relief under the convertible notes, had little practical positive effect for Eco Oro.

In concurrent proceedings before the British Columbia Supreme Court, the Court found that the share issuance was not oppressive because its primary purpose was debt reduction.

As a result of *Re Eco Oro*, companies, shareholders and regulators more closely scrutinize private placements proposed during the pendency or in anticipation of a proxy contest and consider what impact proposed share issuances will have on battles for control. The decisions may also drive shareholders to seek remedies before securities commissions rather than the courts, which are more reluctant to question a company’s decisions due to the deference paid to directors under the business judgment rule.

30 TSX Company Manual, Part I, sections 603-604. See also Request for Comments – Amendments to Parts V, VI and VII of the Toronto Stock Exchange Company Manual in Respect of Non-Exempt Issuers, Changes in Structure of Issuers’ Capital and Delisting Procedures (2004), 27 OSCB 249, at 319.

24. Empty Voting

The issue of empty voting (exercising voting power without a corresponding equity interest) garnered significant attention as a result of the 2012 proxy contest between TELUS and Mason. In February 2012, TELUS proposed an arrangement to collapse its dual-class share structure by converting all non-voting shares to voting shares (which, aside from voting rights, were essentially identical) on a one-to-one basis, which required a two-thirds majority vote of each share class. Following the announcement of the proposal, the historical 4%–5% spread between the trading prices of the two classes of shares narrowed. In response, Mason, a New York-based hedge fund, acquired almost 19% of the voting shares, but hedged that position by selling short a similar number of voting and non-voting shares. This resulted in Mason's economic exposure amounting to a mere 0.21% of TELUS's outstanding shares. It was this discrepancy between Mason's right to vote almost 19% of the TELUS voting shares and Mason's relatively insignificant economic interest in the company that led to Mason being labelled an "empty voter." Mason's strategy was to defeat the share collapse proposal and profit when the spread between the trading prices of the voting and non-voting shares was restored. Ultimately, TELUS was successful in accomplishing the share collapse.

During the contest between TELUS and Mason, the courts of British Columbia had several occasions to comment on the concept of empty voting. The first occasion arose in the context of a TELUS application to the B.C. Supreme Court to invalidate on technical grounds a requisition for a shareholders' meeting made by Mason.[31] Although the Court did not rule on the empty voting issue, it issued a strong statement against empty voting, stating in obiter that a court might use its power to deny an empty voter the right to requisition a meeting. On appeal, the B.C. Court of Appeal reinstated Mason's requisition and disagreed with the lower Court's statement that the courts have the authority to intervene in cases of empty voting, even on broad equitable grounds.[32] The appeal Court stated that any remedy must lie in legislative or regulatory change. The third occasion arose in the final court proceeding (to approve the plan of arrangement under which the collapse was effected). In that proceeding, the B.C. Supreme Court was again critical of Mason's tactics and considered Mason's lack of economic interest, despite its voting interest, to be relevant to the Court's consideration of Mason's objections to the fairness of the collapse. However, Mason's right to vote its shares, despite its lack of a commensurate economic interest, was never in doubt.

Canadian corporate and securities regulators have continued to grapple with the question of what, if any, legal changes might be appropriate in light of commenters' expressed concerns over empty voting. In 2016, the CSA amended the early warning reporting regime to require that a person that borrows securities under a "securities lending arrangement" include those securities in that person's ownership calculation for purposes of the early warning reporting rules, unless the borrowing is for purposes of short selling activities for commercial/investment purposes and not with a view to influencing voting or intending to vote the borrowed

31 2012 BCSC 1582.

32 2012 BCCA 403.

securities. In addition, where a person is required to file an early warning report, the report must include disclosure of the material terms of all securities lending arrangements to which such person is a party, even if such arrangements are exempt from the ownership calculation. These disclosure requirements were intended to address transparency concerns involved in empty voting by requiring more comprehensive disclosure about a shareholder's economic and voting interests.

25. Mini-Tenders

An activist seeking to build or increase its stake in a public company and, at the same time, obtain proxies on the tendered shares may elect to do so in a public manner by pursuing a so-called mini-tender. A shareholder making a mini-tender seeks to build a stake of up to 19.9%, therefore, staying below the 20% threshold at which Canada's takeover bid regime and associated requirements would be triggered. The shareholder offers to acquire shares from other shareholders within a very short time frame at a small premium to the trading price or, if made in response to a change of control transaction in which shareholder approval is required, the applicable transaction price. While used infrequently in Canada, the mini-tender may be an effective means for a minority shareholder to build its equity stake while also securing proxies to vote the tendered shares; this, in turn, can help a minority shareholder block (or influence changes in the terms of) a deal or influence a campaign for board change.

A mini-tender was recently successfully deployed by an activist challenging an insider bid in which the activist made a mini-tender for shares at a premium to the bid price and was able to accumulate a meaningful minority stake. The strategy ultimately gave leverage to the activist, resulting in the bidder increasing the consideration under the bid. In another recent case, a mini-tender made by an activist challenging a transaction was cease-traded by securities regulators on the basis that it was structured in a manner that was abusive and contrary to the public interest. The regulators took issue with, among other things, the fact that the mini-tender gave the activist the right to vote shares tendered even if the activist did not ultimately take up and pay for any of the tendered shares and was made on a very tight timeline.

Mini-tenders in Canada remain relatively unregulated with the exception of historical CSA Staff Notice 61-301 – Staff Guidance on the Practice of Mini-Tenders, which contains guidance by the CSA concerning mini-tenders made at a discount to the market price. Recent mini-tenders in Canada led to some renewed regulatory interest in mini-tenders; however, Canadian securities regulators have not stepped into the arena with more concrete guidance, including as to the acceptable timelines, terms and required disclosure associated with mini-tenders.

Key Contacts

If you are interested in receiving more information, please contact us or visit our website at www.dwpv.com. The information in this guide should not be relied upon as legal advice. We encourage you to contact us directly with any specific questions.

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