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Shareholders' Rights & Shareholder Activism

Canada

Law & Practice
and
Trends & Developments

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Law and Practice

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Contents

1. Shareholders' Rights p.3
- 1.1 Types of Company p.3
- 1.2 Type or Class of Shares p.3
- 1.3 Primary Sources of Law and Regulation p.3
- 1.4 Main Shareholders' Rights p.3
- 1.5 Shareholders' Agreements/Joint-Venture Agreements p.3
- 1.6 Rights Dependent Upon Percentage of Shares p.4
- 1.7 Access to Documents and Information p.4
- 1.8 Shareholder Approval p.4
- 1.9 Calling Shareholders' Meetings p.5
- 1.10 Voting Requirements and Proposal of Resolutions p.5
- 1.11 Shareholder Participation in Company Management p.5
- 1.12 Shareholders' Rights to Appoint/Remove/ Challenge Directors p.6
- 1.13 Shareholders' Rights to Appoint/Remove Auditors p.6
- 1.14 Disclosure of Shareholders' Interests in the Company p.6
- 1.15 Shareholders' Rights to Grant Security over/ Dispose of Shares p.6
- 1.16 Shareholders' Rights in the Event of Liquidation/Insolvency p.7

2. Shareholder Activism p.7
- 2.1 Legal and Regulatory Provisions p.7
- 2.2 Level of Shareholder Activism p.7
- 2.3 Shareholder Activist Strategies p.8
- 2.4 Targeted Industries/Sectors/Sizes of Companies p.8
- 2.5 Most Active Shareholder Groups p.9
- 2.6 Proportion of Activist Demands Met in Full/Part p.9
- 2.7 Company Response to Activist Shareholders p.9

3. Remedies Available to Shareholders p.10
- 3.1 Separate Legal Personality of a Company p.10
- 3.2 Legal Remedies Against the Company p.10
- 3.3 Legal Remedies Against the Company's Directors p.11
- 3.4 Legal Remedies Against Other Shareholders p.11
- 3.5 Legal Remedies Against Auditors p.11
- 3.6 Derivative Actions p.11
- 3.7 Strategic Factors in Shareholder Litigation p.12

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1. Shareholders' Rights

1.1 Types of Company

Most Canadian business entities with shareholders are business corporations incorporated under either the federal Canada Business Corporations Act (CBCA) or provincial or territorial business corporations' statutes, most of which are based on the CBCA model.

A business incorporated under the CBCA is subject to provincial legislation of general application, and possesses the basic right to carry on business in any province.

A business incorporated under provincial legislation has the right to carry on business in the province of its incorporation, but only the capacity to carry on business beyond the limits of that province. In order to carry on business outside its province of incorporation, the corporation must register as an extra-provincial corporation in the provinces in which it intends to operate.

There is substantial overlap between provincial and federal law, albeit with some meaningful points of differentiation. Unless otherwise specified, this article assumes that the subject corporation is a corporation federally incorporated under the CBCA.

1.2 Type or Class of Shares

The most common type of shares issued by Canadian corporations are common shares and preferred shares. The rights associated with these shares are identified in **1.4 Main Shareholders' Rights**.

If a corporation has only one class of shares, the CBCA requires that each of the three basic rights identified in **1.4 Main Shareholders' Rights** is affixed to that class of shares. If a corporation has multiple classes of shares, each of these rights must be attached to at least one class of shares. Notably, the three rights can be dispersed across multiple classes, such that, for example, one class of shares could have the right to vote while another class of shares has the right to receive dividends.

1.3 Primary Sources of Law and Regulation

Canada is a federation comprised of ten provinces and three territories. Responsibility for the governance of corporations is divided between the federal and provincial or territorial jurisdictions.

Notably, Canada does not have a federal securities regulator, making securities law in Canada a patchwork system. Within the provinces, provincial securities regulators enforce their respective provincial securities law. At the national level, securities regulation is co-ordinated by way of "National Instruments", wherein the provincial regulators work together to agree on certain rules that apply across all jurisdictions.

In summary, the following constitute the primary sources of law and regulation of corporations in Canada:

- the federal Canada Business Corporations Act;
- provincial or territorial business corporations' legislation;
- provincial securities legislation (eg, Ontario's Securities Act);
- requirements of securities exchanges, such as the Toronto Stock Exchange (TSX) and the TSX – Venture (TSX-V);
- for all provinces other than Quebec and all territories, the English common law; and
- for the province of Quebec, the Civil Code of Quebec.

1.4 Main Shareholders' Rights

Rights vary, depending on the class of shares being considered. Common shares generally confer the following basic rights upon their holders:

- to vote at any meeting of shareholders;
- to receive dividends declared by the board of directors; and
- on the winding-up of the corporation, to receive the property of the corporation remaining after the claims of creditors and others ranking in priority are satisfied.

As stated in **1.2 Type or Class of Shares**, if a corporation has only one class of shares, the CBCA requires that each of the three basic rights listed be affixed to that class of shares. If a corporation has multiple classes of shares, each of these rights must be attached to at least one class of shares. Notably, the three rights can be dispersed across multiple classes, such that, for example, one class of shares could have the right to vote while another class of shares has the right to receive dividends.

The corporation's constating documents will specify the rights, privileges, restrictions and conditions for each class of shares. Subject to limitations imposed by statute and common law, these shares can carry any rights contemplated by the parties drafting the articles of incorporation.

The rights attaching to preferred shares are determined by contractual agreement. Preferred shares are treated "preferentially" in respect of the return of capital (including on liquidation) and dividends. Preferred shares may be voting or non-voting, and they can be convertible, redeemable or retractable.

1.5 Shareholders' Agreements/Joint-Venture Agreements

Shareholders' and joint-venture agreements are a common mechanism by which shareholders can codify additional rights

and exert control over a corporation. Shareholders' agreements are permissible under both the common law and the CBCA.

Shareholders' agreements can be made in the form of either (i) a general shareholders' agreement or (ii) a unanimous shareholders' agreement.

Under a general shareholders' agreement, some, but not all, of a corporation's shareholders pool their votes and agree to certain restrictions on their voting rights. Shareholders' agreements can be used to address procedural matters, such as the timing or frequency of board meetings, or to confront more substantive matters, such as to whom certain shares can be sold. A general shareholders' agreement must be consistent with the corporation's constating documents.

Under a unanimous shareholders' agreement, all of a corporation's shareholders pool their votes in pursuit of an objective, achieved by way of contract. The CBCA provides that a unanimous shareholders' agreement can restrict the powers of the board of directors to manage or supervise the management of the corporation. This power makes the use of unanimous shareholders' agreements a uniquely powerful weapon in the shareholders' arsenal.

Another means by which shareholders may organise their relationships with other shareholders is through joint-venture agreements. The joint venture assumes the ownership of the shares, and the management of the rights afforded to the shares is structured in reference to the terms of the joint-venture agreement.

1.6 Rights Dependent Upon Percentage of Shares

The CBCA does not confer specific rights to shareholders based on their percentage holdings in a corporation, although any such rights can be enshrined under the corporation's constating documents.

1.7 Access to Documents and Information

The CBCA confers rights to access information about the corporation upon shareholders. These rights include access to information about past meetings of shareholders and certain financial records of the corporation. These rights allow shareholders to scrutinise the decision-making of directors and officers and, if necessary, hold them accountable.

Recent amendments to the CBCA have made it easier for shareholder activists to solicit proxies and target those larger shareholders of the corporation, particularly in light of the existing exemption from distributing a circular if the solicitation is from fewer than 15 shareholders. Under the amendments, companies are required to maintain a register of shareholders with "significant control." An individual with significant control is any individual who, directly or indirectly, holds registered or beneficial ownership of (i) shares that carry 25% or more of the voting rights attached to the corporation's shares, or (ii) 25% or more of the corporation's shares measured by fair market value.

The share register must contain specified information about each individual with significant control, including that shareholder's name, birth date, address, jurisdiction of residence, the date on which they became or ceased to be an individual with significant control, and a description of the way in which each individual is an individual with significant control (ie, a description of the individual's interests and rights in respect of shares of the corporation). This share register must be regularly updated by the corporation.

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

- in an effort to influence the voting of shareholders of the corporation;
- in connection with an offer to acquire securities of the corporation; or
- for any other purpose relating to the affairs of the corporation.

1.8 Shareholder Approval

Shareholder votes may occur at either (i) annual meetings of shareholders or (ii) special meetings called for the purpose of such votes. Voting at either of these meetings may be done in person or by proxy. In addition, consent for such actions may be taken in writing, if permitted by the constating documents of the corporation and governing statute. This obviates the need for formal meetings.

The CBCA contemplates two different types of shareholder resolution: ordinary resolution and special resolution. The two types of resolution differ in so far as they require different levels of support in order to pass. An ordinary resolution requires approval by a simple majority of the votes cast (eg, 50% + one of all votes cast, excluding votes not cast for reason of abstention).

Certain fundamental changes affecting the corporation must be approved by a special resolution, which requires approval of at least two thirds of the votes cast with respect to that resolution or signed by all the shareholders entitled to vote on that resolution. These fundamental actions can be broadly described as fitting into one of three categories:

- changes requiring an amendment to the articles of incorporation;
- changes to the share structure that must be approved by each class and series of shares, even if that class and series is ordinarily non-voting; and
- any other significant fundamental changes, including amalgamation, reduction of share capital, repurchase of shares from capital, or changes to certain procedural matters.

Shareholders opposing fundamental changes have a right to dissent. If exercised, this compels the corporation to purchase the dissenting shareholders' shares at fair market value.

1.9 Calling Shareholders' Meetings

Responsibility for calling annual and special meetings of shareholders rests with the corporation's directors. However, shareholders possessing at least 5% of the voting shares in a corporation may require the directors to call a meeting by submitting a requisition.

A valid requisition must state the business to be transacted at the meeting, and must be sent to each director as well as to the registered office of the corporation. Upon receipt of a valid requisition, directors must call the requested meeting within 21 days, failing which the requisitioning shareholder may call the meeting, with the corporation obliged to reimburse the requisitioning shareholder for expenses associated with the meeting. Meetings called as a result of a shareholder's requisition must be scheduled within a reasonable time period as defined by applicable case law.

Directors are not obliged to call the requisitioned meeting if another meeting has already been called to address the business matters identified in the requisition or if the requisition is improper. Where an annual meeting is proximate, it is common for the directors to join the requisitioned items of business to the annual meeting, which proceeds as an annual and special meeting.

1.10 Voting Requirements and Proposal of Resolutions

Any registered or beneficial shareholder holding at least 1% of the outstanding voting shares or shares with a fair market value of at least CAD2,000 is entitled to submit a proposal to the corporation to be considered at the subsequent shareholder meeting. Any shareholder wishing to make a proposal involving the election of directors must hold at least 5% of the outstanding voting-shares. However, if no advance-notice by-law is in place, any shareholder may propose to nominate directors at an annual shareholder meeting. Advance-notice by-laws, which have recently come into fashion in Canada after widespread adoption in the United States, require advance notice of shareholder proposals to nominate individuals for election to the board.

A corporation that receives a valid shareholder proposal must include the text of the proposal in its next management information circular. The circular must also include the shareholder's statement supporting the proposal, provided that statement contains fewer than 500 words.

If a shareholder proposal is deficient for one of the following reasons, the corporation is not required to include the proposal in its management information circular:

- the proposal was not submitted within the prescribed time period;
- the primary purpose of the proposal is to enforce a personal claim or address a personal grievance;
- it clearly appears that the proposal does not relate in a significant way to the corporation's business or affairs; or
- substantially the same proposal was submitted to shareholders within the past five years.

Other than the 500-word description of the proposal included in the management information circular, shareholders making a proposal are limited in how they may advocate their position and garner support. However, a corporation, through the management information circular, has significant latitude to control its message (for example, by providing reasons elsewhere in the circular explaining why the shareholder proposal is contrary to the corporation's best interest). Accordingly, while shareholder proposals are sometimes a useful tool, activist shareholders tend to favour other tactics to achieve their objectives.

A current trend in activism is the submission of shareholder proposals touching on environmental, social and governance matters (ESG). Many companies seek to negotiate ESG proposals with the proposing shareholder, in preference to open conflict in which the proposing shareholder may solicit withheld votes from directors perceived as opposing the proposal.

1.11 Shareholder Participation in Company Management

The CBCA provides that the business and affairs of a corporation are managed by the board of directors, which in turn supervises the corporation's management. There is no specific right of shareholders to participate in the management of the corporation or to sit on the board of directors.

1.12 Shareholders' Rights to Appoint/Remove/Challenge Directors

In Canada, directors are responsible for the management of the corporation, while shareholders are responsible for appointing and, if necessary, replacing the directors.

Shareholders may, by ordinary resolution at the first meeting of shareholders and at each successive annual meeting, elect directors to hold office for a term expiring not later than the close of the third annual meeting. It has become customary in Canada, and is required of all companies listed on the TSX, that the entire slate of a corporation's directors be elected annually, for a one-year term. This requirement prevents board entrenchment through "staggered" elections, in which one half or one third of directors are up for election in each year. The prohibition on staggering of director terms for TSX listed companies allows activists to challenge the entire slate of directors each year at the corporation's annual meeting.

If a majority of shareholders are unhappy with the board of directors' management decisions, they can replace the board of directors by either (i) voting for their removal at the next annual shareholders' meeting or (ii) requisitioning a special meeting for the purpose or removing and replacing some or all directors.

1.13 Shareholders' Rights to Appoint/Remove Auditors

Although usually made on the recommendation of management, the appointment and removal of auditors is a decision for the corporation's shareholders. It is an item of business generally addressed at a corporation's annual meeting of shareholders.

Auditors are appointed by ordinary resolution of the shareholders at the first annual meeting. At each successive annual meeting, an incumbent auditor can be reappointed in the absence of a unanimous shareholders' agreement in certain circumstances, or a different auditor appointed.

If the shareholders do not wish to appoint an auditor, as may be the case for smaller, private corporations, shareholders may by unanimous resolution choose not to appoint an auditor. This option is generally unavailable for public companies, who are "distributing corporations" under the CBCA.

Shareholders can remove auditors from office by ordinary resolution at a special meeting.

1.14 Disclosure of Shareholders' Interests in the Company

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

- beneficial ownership of, or control or direction over, directly or indirectly, securities of the reporting issuer; and
- an interest in, or right or obligation associated with, a related financial instrument involving a security of the reporting issuer.

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

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

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

Recent amendments to the CBCA implemented new disclosure requirements for shareholders deemed to be "individuals with significant control". Shareholders of private corporations registered under the CBCA who have:

- an interest or right in shares that carry 25% or more of all voting rights of all of the corporation's outstanding voting shares; or
- shares equal to 25% or more of the fair market value of the corporation's outstanding shares, as well as individuals who have direct or indirect influence that, if exercised, would give the individual "control in fact" of the corporation,

must provide the corporation with their name, date of birth, current address, and jurisdiction of residence for the purposes of inclusion by the corporation in the ISC Register.

1.15 Shareholders' Rights to Grant Security over/Dispose of Shares

There are no statutory restrictions on a shareholder's ability to grant security over, or dispose of, their shares in a corporation.

However, there are often contractual limitations imposed on this right contained in a corporation's constating documents.

1.16 Shareholders' Rights in the Event of Liquidation/Insolvency

The Canadian insolvency regime is primarily governed by the following two federal statutes:

- the Bankruptcy and Insolvency Act (BIA), which sets out Canada's bankruptcy regime and is the statute used to liquidate a business. It also provides a proposal regime to allow debtors to reorganise and reach compromises with their creditors; and
- the Companies' Creditors Arrangement Act (CCAA), which is a restructuring statute, sets out a framework for the reorganisation of insolvent companies with debts totalling over CAD5 million. It provides for plans of arrangement to allow debtors to reach compromises with their creditors or a sale of the business under the supervision of the court.

In addition to these insolvency statutes, in recent years the arrangement provisions of the CBCA have been used to restructure financially distressed corporations. The advantages of a CBCA restructuring include relatively expeditious procedures, avoiding the stigma of a formal insolvency proceeding, and with no requirement for a court-appointed monitor, which is required in proceedings under the CCAA.

Unfortunately for Canadian shareholders, they are often relegated to the lowest rung of the priority ladder when a corporation in which they hold shares enters insolvency. Barring preferential treatment or an alternative arrangement codified by contract, shareholders will be the last to receive a distribution from the corporation's assets.

2. Shareholder Activism

2.1 Legal and Regulatory Provisions

Shareholder activism is governed by the same legal framework that governs interactions broadly between shareholders and companies in Canada, as detailed in **1.3 Primary Sources of Law and Regulation**.

2.2 Level of Shareholder Activism

Canada has seen an uptick in shareholder activism in the decade following the global recession. A 2018 report by Activist Insight placed Canada behind only the United States and Australia in terms of the number of reported activist campaigns. Activity peaked in 2018, when Canadian companies subjected to public demand hit a record of 69, according to Activist Insight. This increase can be attributed in part to the emergence of foreign investors seeking new investment opportunities, the relatively weak performance of certain large Canadian companies and a perception that Canada is an "activist-friendly" jurisdiction. Although initially many of the more prominent activists were foreign-based, in recent years capable domestic activists have played a more prominent role in activist campaigns.

Certain elements of Canada's regulatory framework are particularly hospitable to shareholder activism. These include:

- rights of shareholders to requisition meetings with a 5% ownership interest, including for the purpose of removing and replacing directors;
- entitlement to shareholder lists;
- the ability of shareholders to include proposals on the election of directors in management proxy circulars;
- the ability of shareholders to conceal planning steps, given both:
  - (a) the ability to communicate with up to 15 shareholders without issuing a dissident proxy circular; and
  - (b) the presence of the 10% interest reporting threshold;
- a wide range of judicial remedies for aggrieved activists, including access to the oppression remedy.

The driving forces behind shareholder activism in Canada mirror those seen in other jurisdictions. Except for more recent activism animated by ESG concerns, activist shareholders are typically motivated by a belief that a corporation's share price is undervalued. Such beliefs are often based on the following:

- under-performance (for example, a low valuation multiple or market capitalisation relative to peers or apparent asset value);
- missed transactional opportunities;
- balance sheet characteristics (eg, strong cash-generating capability and/or excess cash; extremes of financial leverage); and/or
- weakness in corporate governance/management.

Two recent shareholder-activism campaigns in Canada are illustrative of the broader trend in shareholder activism in Canada — namely, that most activist campaigns involve concerns with management decisions:

- Detour Gold Corporation: in 2018, Paulson & Co Inc successfully launched an activist campaign against Detour Gold Corp arguing that the corporation was mismanaged and lacking proper board oversight. Paulson highlighted the fact that Detour Gold had been the worst performer relative to its peers since July 2016, trading at a 47% discount to its reported net asset value. Paulson was successful in its activ-

ist campaign, electing a new slate of directors and appointing a new CEO;
- Hudbay Minerals Inc: also starting in 2018, Waterton Global Resource Management Inc engaged in an activist campaign against Hudbay Materials Inc to replace its board of directors, accusing management of "massive value destruction and chronic under-performance". The proxy battle ended with a settlement agreement between Waterton and Hudbay wherein the parties agreed on a slate of 11 directors. Senior management changes occurred after agreed board changes were implemented.

While activist campaigns ostensibly serve to benefit all shareholders, they are often led by hedge funds or institutional shareholders seeking to enhance the value of their substantial investments in the corporation on a short-term basis, often with a view to a monetising transaction or other exit opportunity. Shareholders with comparatively smaller interests typically lack the requisite financial incentive to incur the considerable time and expense necessary for an effective activist campaign.

The onset of the COVID-19 pandemic, and the havoc wreaked on corporate balance sheets, has resulted in mergers and acquisitions activity, much of it opportunistic or distress-based. Some commentators have noted that, while declining share prices typically lead to an increased appetite for shareholder activism, institutional shareholders may be leery of their own financial well-being or concerned about the public relations blow-back inherent in launching a costly activism campaign at a time of widespread uncertainty. Further, traditional activist demands (such as share buy-backs and increased dividends) may struggle to resonate amid the global uncertainty.

Companies, especially those suffering dearly as a result of the pandemic, should prepare accordingly for activist campaigns as the market stabilises and the post-COVID-19 economy begins to take shape.

2.3 Shareholder Activist Strategies

A typical first step in a shareholder-activism campaign is to approach the board confidentially with proposals that the corporation is asked to adopt under implicit or explicit threat of a public campaign if proposed measures are not adopted. As described in **2.2 Level of Shareholder Activism**, the measures proposed may vary. Many boards will be amenable to making concessions by agreement in preference to a disruptive public contest by an experienced activist.

If private dialogue does not produce the results sought by the activist, the activist may take public steps, such as:

- requisitioning a shareholder meeting at which replacement directors are nominated;
- media campaigns highlighting the activist shareholder's concerns;
  - (a) the aforementioned activist campaign led by Paulson & Co against Detour Gold Corp involved a successful media campaign as Paulson pushed for the sale of the corporation and replacement of the entire board, ultimately successfully convincing the shareholders to alter the bulk of the Canadian miner's board of directors and winning control of the board;
- "vote no" campaigns, wherein incumbent directors resign after obtaining less than a majority of votes for re-election;
- making a shareholder proposal;
- pursuing an exempt solicitation;
- engaging in a proxy contest; and
- launching an unsolicited takeover bid.

However, the range of activities and level of interaction with the public and other shareholders can be quite varied, from quiet "behind-the-scenes" engagement to public campaigns.

2.4 Targeted Industries/Sectors/Sizes of Companies

Natural Resource and Energy

The natural resource and energy sector has been the subject of a number of activist campaigns in Canada in recent years. Of the 69 companies targeted by activist campaigns in 2018, the most recent year for which Activist Insight has reported, 28 were in the natural resource and energy sector.

In March 2019, M&G Investments launched an activist campaign with respect to Methanex Corporation, a Canadian supplier of methanol. M&G, an investment management firm based in the UK, objected to Methanex's strategy to pursue significant capital expenditures without a partner. The activist campaign, which lasted three weeks, produced a settlement entitling M&G to two board seats and an established process for re-evaluating the proposed capital expenditure project.

Cannabis

Cannabis was legalised in Canada in the autumn of 2018. Within a year, over 200 publicly listed cannabis companies had sprung up across the country. Many of the companies in this nascent industry have been and will continue to be targets of shareholder-activism campaigns. Activist concerns typically involve questions of management competence and governance structure. Founders, including those of Canopy Growth and Aphria Inc, have departed cannabis companies after seeing their companies targeted by short-sellers' reports or class action litigation. As mergers and acquisitions intensify in the cannabis space and other jurisdictions move towards legalisa-

tion, shareholder activism in the Canadian cannabis marketplace is expected to continue to increase. Most recently, there has been consolidation, as broader trends have turned against the cannabis sector, leading to restructurings and opportunistic acquisitions.

Size of Companies

Of the companies targeted by activist campaigns since January 2019, approximately one third of the companies had market capitalisations exceeding CAD1 billion. Conversely, one third of the companies targeted by activist campaigns had market capitalisations beneath CAD100 million CAD, illustrating that public businesses, both large and small, can face pressure from activist shareholders.

2.5 Most Active Shareholder Groups

Recent data from Activist Insight indicates that 91 activist campaigns have been active at some point since January 2019. The data collected by Activist Insight provides that no activist shareholder has been involved in more than three campaigns during this period. The following activist shareholders have either been involved in multiple activist campaigns or one activist campaign in a corporation with a significant market capitalisation:

- Advent International Corporation;
- Catalyst Capital Group;
- Discovery Key Investments Limited;
- FrontFour Capital;
- Lion Point Capital;
- M&G Investment Management Limited;
- SailingStone Capital Partners LLC; and
- Tribeca Investment Partners.

2.6 Proportion of Activist Demands Met in Full/Part

A 2019 Report on Trends in Corporate Governance by Laurel Hill found that 63% of board-related proxy fights in Canada resulted in either a partial or full win for the dissident shareholders. The Report categorised a "partial win" as a situation in which the dissident achieved some of its publicly stated objectives, and a "full win" as a situation in which the dissident achieved all of its publicly stated objectives. The 63% success rate falls between the 2018 success rate of 50% and the 2017 success rate of 73%. From 2014 to 2016, Laurel Hill did not report a dissident win rate over 50%.

2.7 Company Response to Activist Shareholders

Before an Activist Emerges

In general, companies should run their business as if an activist could emerge at any time. Regular contact with shareholders and internal review of their potential vulnerabilities are well-advised.

Companies should take the following proactive steps to prepare themselves against the threat of activist shareholders:

- consider implementing procedural protections. Advance-notice by-laws, which are now commonly adopted, require shareholders to provide advance notice to the corporation, including where a dissident slate of directors is proposed. This prevents stealth campaigns to change the board at an annual meeting, where a small number of like-minded shareholders hold a sufficient number of shares to elect a dissident slate. Notice of a dissident campaign gives the corporation an opportunity to run an active campaign to solicit proxies for the management slate;
- maintain generally open (but careful) communications with shareholders, as disgruntled shareholders in particular can be the source of potentially useful information and a willingness to hear their concerns can potentially deflect them from engaging in activist activities;
  - (a) this suggestion is especially germane in the context of the COVID-19 pandemic, which has introduced unprecedented levels of uncertainty into the market. Proactive communication with shareholders conveying the corporation's COVID-19 response plans (and alternative plans) are critical in maintaining confidence and staving off any agitation for change;
- be alert to the accumulation of ownership positions or the formation of "joint actors" as identified in press releases and early-warning report filings announcing the acquisition of beneficial ownership of, or power to exercise control or direction over, common shares of the corporation, that in the aggregate constitute 10% or more of the outstanding common shares of the corporation;
  - (a) the historic activity of new shareholders should be researched, focusing on whether they have a history of shareholder activism or proposed changes to the business plan;
- establish a board succession and renewal plan;
- monitor requests from shareholders;
  - (a) activist shareholders may take steps revealing their intentions, including by:
    - (i) transferring beneficial-share ownership into registered share ownership, which can aid in requisitioning meetings;
    - (ii) seeking shareholder lists;
    - (iii) seeking corporate records;
    - (iv) seeking lists of non-objecting beneficial holders;
  - (b) to view the list of shareholders entitled to receive notice of a meeting prepared in connection with a shareholders' meeting;
  - (c) for a list of non-objecting beneficial owners; and
  - (d) in the case of private corporations, for access to the shareholder register;

- establish a proxy defence team;
- during the period leading up to a shareholders' meeting, monitor the number of proxies returned to the transfer agent and any changes in patterns from previous years.

When an Activist Campaign is Revealed
Directors' duties in the context of a shareholder-activist situation are the same as those in an acquisition situation; directors may oppose action that on reasonable grounds is believed to be contrary to the corporation's best interests.

Once an activist campaign has begun, the target corporation must have a unified and comprehensive response. The following are among the steps a corporation can take after an activist campaign has come to light:

- maintain a unified and comprehensive response, such that messaging remains consistent;
- engage with the substance of the activist's proposals, as opposed to focusing on any personal animus with the activist shareholder. Ad hominem attacks on an activist shareholder signal desperation to the market, and could distract attention from the target corporation's day-to-day management;
- do not lose sight of the importance of continued, competent stewardship of the corporation, even in the face of an activist campaign;
- seek out alternative, friendlier shareholder groups to counterbalance the influence of the activist shareholder. Reforms to provincial securities laws in May 2016 have shifted the regulatory framework by increasing the amount of time a target corporation has to respond to a hostile bid to 105 days. These changes afford target corporations significantly more time to respond to unsolicited bids and seek out alternative transactions;
- finally, the legal system exists as an avenue for redress available to the target corporation. Target corporations can challenge the dissident shareholder before the securities commission or the courts for, among other things, deficient disclosure and proxy solicitation violations. While protracted litigation can be costly, it may be a necessary step to defend the corporation's best interests.

3. Remedies Available to Shareholders

3.1 Separate Legal Personality of a Company

Canada, like the United States and common-law jurisdictions, recognises the separate legal personality of a corporation as distinct from its shareholders. Typically, the incorporation of a business shields individual shareholders from such liability. A corporation is viewed as an independent legal entity and as such, can be held liable for wrongful acts.

However, there are some circumstances in which those individual shareholders can be held personally liable, an occurrence referred to as "piercing the corporate veil". Piercing the corporate veil typically occurs when the corporation is incorporated for an illegal, fraudulent or improper purpose. However, the corporate veil can also be pierced if, when incorporated, "those in control expressly direct a wrongful thing to be done". In such circumstances, the courts will disregard the separate legal personality of a corporate entity where it is being used as a shield for the improper conduct of its dominating mind.

3.2 Legal Remedies Against the Company

Minority shareholders are typically the claimants seeking legal remedies against a corporation. Unlike majority shareholders, minority shareholders are usually incapable of exerting pressure or control over the governance of a corporation. Accordingly, when a minority shareholder finds itself disagreeing with management's decisions, its only recourse may be to turn to the courts.

The Oppression Remedy
The most powerful weapon in the minority shareholder's arsenal is the oppression remedy. The oppression remedy is a statutory remedy that seeks to rectify harmful conduct arising from the activities or governance of a corporation.

A wide range of corporate conduct has formed the grounds for successful oppression remedy claims, including:

- an act or omission of the corporation or any of its affiliates that effects an oppressive result;
- the business or affairs of the corporation or any of its affiliates being (or having been) conducted in an oppressive manner;
- the powers of the directors of the corporation or any of its affiliates being (or having been) exercised in an oppressive manner.

The test for establishing oppression was set out as follows by the Supreme Court of Canada set out in BCE Inc, Re:

- whether there was a breach of the complainant's reasonable expectations; and
- if so, whether that breach involved unfair conduct.

The CBCA and concordant provincial legislation afford the court wide discretion to tailor orders after a finding of oppression. When crafting such an order, the court must adhere to the following general principles:

- the remedy requested must be a fair way to deal with the situation;
- the order should go no further than necessary to rectify the oppression;
- the order may only serve to vindicate the reasonable expectations of the claimant in their capacity as corporate stakeholders.

The CBCA goes on to enumerate a list of potential orders which a court may make and includes, among other things, orders to:

- restrain the conduct complained of;
- appoint a receiver or receiver-manager;
- regulate the corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement; or
- liquidate or dissolve the corporation.

3.3 Legal Remedies Against the Company's Directors

Shareholders can sue the corporation's directors or officers for breaching their statutory or contractual duties. Directors must also act in accordance with their fiduciary duties to the corporation and its shareholders. If a director breaches these duties, a stockholder is able to sue them.

Directors are fiduciaries of their corporations, required to act "honestly and in good faith with a view to the best interests of the corporation" in exercising control over the corporation's affairs. This fiduciary duty is both enshrined in statute and found in the common law.

Subsumed in this fiduciary duty is a duty of loyalty. The directors' paramount loyalties must rest with the corporation which they serve, rather than with individual shareholders or external actors. Directors should avoid conflicts of interest which could imperil their ability to act in a corporation's best interests. Even the mere appearance of a conflict of interest should generally be avoided. Directors will be found to have breached their duty of loyalty when they take advantage of an opportunity otherwise intended for the corporation.

Also contained within the broader fiduciary duty is the duty of care to the corporation. This duty requires directors to act with the level of care expected of an ordinarily careful and prudent person. Canadian courts, like their counterparts in other common-law jurisdictions and the United States, afford a wide degree of latitude to corporate defendants and are loath to interfere with the "business judgement" of a corporation's directors. Under the "business judgement" rule, if a board acts in good faith and on an informed basis, following a proper process, and after taking advice, a court may defer to decisions made by directors within a range of reasonable decisions, even if the court might have reached a different decision.

The duty of loyalty requires directors to protect the interests of the corporation and avoid conduct that would harm the corporation and its shareholders.

The business judgement rule will be applied in most cases concerning a director's fiduciary duties, except those cases alleging that the director breached their duty of loyalty as a result of a conflict of interest. Where the business judgement rule does apply, a plaintiff stockholder is required to prove that the director failed to stay informed, act in good faith or take action in the best interests of the corporation, in order to dispel this rule.

3.4 Legal Remedies Against Other Shareholders

A controlling shareholder can be liable as a director where the powers of the directors have been limited under a unanimous shareholder agreement. Shareholders may pursue oppression claims against controlling shareholders where the controlling corporation carries out actions that are prejudicial to shareholders.

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

3.5 Legal Remedies Against Auditors

While minority and majority shareholders can theoretically sue a corporation's auditors or other advisers, it is very difficult to establish primary liability of such actors. Shareholders can sue auditors in some circumstances for misrepresentations in prospectuses and other disclosure documents under provincial securities legislation. The auditor may be able to rely on statutory defences and other protections, including liability limits for secondary market claims.

3.6 Derivative Actions

Shareholders can bring derivative actions on behalf and in the name of the corporation. While the shareholder will be listed as the plaintiff, the claim belongs to the corporation. A derivative action is typically brought against directors and officers, or to pursue claims where the cause of action belongs to the corporation and the board refuses to sue, often due to conflicts of interest. Where a derivative action is brought, the shareholder stands in the shoes of the corporation to bring an action on its behalf when the corporation's board refuses to do so.

While the derivative action is brought on the corporation's behalf, any benefit accrues to the corporation and shareholders

benefit from any monetary or non-monetary relief only through their shareholding interests.

A derivative action may be especially beneficial to a shareholder where the corporation is a closely held corporation and the shareholder holds a substantial interest.

Obtaining Leave
Derivative actions, if successful, can have significant consequences on a corporation and its shareholders. Accordingly, the CBCA and concordant provincial legislation requires that a court grant leave before a derivative action can be commenced. This leave requirement allows the court to ensure that unmeritorious claims do not proceed on the corporation's behalf.

In order to grant leave, the court must find that the following requirements are satisfied:

- the applicant has given adequate notice to the directors of the corporation or its subsidiary of its intention to apply for leave;
- the applicant is acting in good faith; and
- it appears to be in the interests of the corporation to bring the action.

Applications for leave typically are strongly contested, and can take a long time to resolve. Corporations will often ask unconflicted directors to take independent advice and recommend to the board whether the proposed litigation is in the corporation's interests, and will ask the court to defer to the business judgement of unconflicted directors on that issue.

Available Orders
After finding the test for leave has been satisfied, the applicant stands in the shoes of the corporation to prosecute (or, less commonly, defend) the derivative action. As the derivative action proceeds, the court is available to make any order it thinks fit, including orders:

- authorising the shareholder or any other person to control the conduct of the action;
- giving directions for the conduct of the action;
- directing that any amount judged payable by a defendant in the action be paid directly to the shareholder instead of to the corporation or its subsidiary;
- requiring the corporation or its subsidiary to pay reasonable legal fees of the shareholder in connection with the action.

3.7 Strategic Factors in Shareholder Litigation
Litigation is now a common element of shareholder activism in Canada. In the most hotly contested disputes, the parties will seek remedies before the courts and before provincial securities commissions with jurisdiction over the dispute, sometimes bouncing between the two fora. The TSX also often becomes involved where a corporation seeks to issue shares in the face of an activist campaign, possibly to dilute the activist.

Activists often launch shock and awe campaigns on multiple fronts, directed at pressuring concessions from a target company. While individual litigation steps taken by an activist might stand a low prospect of success, a single win can be decisive. The cumulative effect of litigation can be wearying, especially if the target company is unaccustomed to hostile litigation. Many activists rely on the target to lose resolve and settle, especially if the activist can find a basis to target directors and officers personally. This is one context in which the derivative action is sometimes sought. For these reasons, activists frequently choose to advance proceedings and claims, any one of which has a low prospect of success.

Litigation also can be a distraction where management is seeking an alternative bid in the face of an unsolicited takeover bid. The utility of the distraction is diminished under the new 105-day minimum bid regime. While litigation over shareholder rights' plans is greatly diminished under the new 105-day regime, rights' plans continue to be adopted to address creeping bids and exempt purchases, and will continue to be the subject of litigation.

Litigation also offers potential discovery into the internal deliberations of the opponent. Corporations under attack may choose to produce minutes and third-party advice in an effort to obtain the protection of the business judgement rule. Whether or not the discovery proves wrongful conduct by the corporation or its board or management, the information disclosed to blunt such claims may offer strategic insights into the thinking of the opponent.

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Trends and Developments

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Introduction

Whether the heyday of "shareholder primacy" is truly over — as many proclaimed after the Business Roundtable issued its announcement to that effect in 2019 — remains to be seen. If such a change is truly imminent, it is due in large part to the emergence of Environmental, Social and Governance (ESG) investor criteria.

ESG investor criteria are non-traditional ways of assessing asset value. Broadly speaking, these criteria fall under one of the following three pillars:

Environmental

Is the company practising environmental stewardship? Has the company taken steps to minimise its carbon footprint? How has the company responded to the challenges posed by climate change?

Social

What health and safety measures does the company use to protect its employees and other stakeholders? What impact does the company have on the local and global community? What projects has the company undertaken to support marginalised communities?

Governance

Does the company promote diversity through its hiring practices? How does executive compensation compare to that of other employees? How responsive is the company to shareholder concerns?

Canadian investors, in keeping with a worldwide trend, are looking beyond traditional Return on Investment (ROI) metrics and adopting this more socially conscious approach to investing. The 2019 Edelman Trust Barometer Special Report found that 91% of institutional investors agreed that "maximising shareholder returns should no longer be a company's primary goal".

Responding to ESG concerns can be akin to navigating a minefield for companies. Solving one ESG-related problem may cause another, and it can be difficult to prove to investors that their concerns are being addressed in the absence of quantitative data (which may be in short supply, given how amorphous ESG-related demands can be). Further, ESG demands can seem fundamentally incongruent with certain types of Canadian companies — particularly regarding the energy sector. Yet ESG-based investing is here to stay, and companies with a greater appreciation for both the challenges and opportunities it presents are well-positioned to respond to ESG-focused activism campaigns.

This article provides a high-level overview of ESG, tracing its history from the early 1900s up to 2020. Examples involving Canadian companies and investors are canvassed, and the effects of the COVID-19 pandemic on ESG-based investing are also considered.

A Brief History of ESG

ESG traces its roots to the turn of the twentieth century, when the Quakers Friends Fiduciary adopted a "sin-free" portfolio which avoided investments in weapons' manufacturing, alcohol and tobacco.

From the sin-free portfolio emerged "socially responsible investing", which took hold during the Great Depression and reached its apex in the 1990s, when investors used their power to place pressure on Apartheid South Africa. Major institutional investors in Canada and across the world began to screen out South African investments, prompting capital flight. By the early 1990s, roughly CAD600 billion in investments had been redirected away from South African companies. Apartheid as state policy ended shortly thereafter, and by 1993 South Africa had a new constitution.

In the early 2000s, SRI evolved into what is the present-day ESG investing. In 2006, the United Nations released the Principles for Responsible Investing, which includes a tenet related to incorporating ESG principles in investment analysis and decision-making.

How Shareholders Pursue ESG Goals

ESG-based change is primarily accomplished through two methods: persuasion and divestment. In attempting to persuade corporations to make ESG changes, investment managers make it known what they expect in terms of an ESG profile from companies they will invest in.

Shareholder proposals are another vehicle through which ESG-related goals can be achieved. Such proposals target purported weak spots in a company's ESG profile. They can include pres-

suring the company to reduce its carbon footprint, compelling it to increase hourly pay for lower-income workers, and demanding greater transparency regarding corporate hiring policies.

Divestment in connection with failure to comply with ESG demands is often seen as a measure of last resort by institutional investors. However, increasingly vocal divestment movements — led by students and political activists — could pose challenges for Canadian companies, going forward.

The ESG Landscape in Canada

Given the size of Canada's energy sector, it should come as little surprise that ESG-related activism in Canada typically focuses on environmental concerns.

The highest-profile example of ESG-based shareholder activism in Canada involved Kinder Morgan Energy Partners LP. In 2018, Kinder Morgan was the owner of the controversial Trans Mountain Pipeline. The Pipeline, which had become a political lightning rod in both Canada and the United States, transported crude and refined oil from Alberta to the coast of British Columbia. In a May 2018 shareholders' meeting, two proposals passed over the protests of Kinder Morgan's management.

The first proposal demanded improvements with regard to Kinder Morgan's ESG reporting. The second, which drew substantial media attention, requested that Kinder Morgan produce a detailed report outlining how its business was impacting the efforts, codified in the 2015 Paris climate change accord, to limit the global temperature increase to two degrees Celsius. The "two-degree scenario" resolution also compelled Kinder Morgan to explain to shareholders how the company planned to navigate the transition to a low-carbon future.

Expect more environmentally based activism in this vein in the years to come. The Caisse de dépôt et placement du Québec, the second-largest pension fund in Canada and among the largest in the world, has signalled its desire for "stewardship investing". The Caisse has stated its intentions to increase investments in "low-carbon assets" and has adopted an investment strategy which aims to factor climate change considerations into "every investment decision".

Mitigating the Risk of ESG Activism

Proxy advisory firms such as Institutional Shareholder Services have begun to prepare ESG "scorecards" as part of their annual reviews of listed companies. These scorecards evaluate a company's performance with respect to a variety of ESG metrics, and often compare the company to its industry peers.

Government regulators have also entered the ESG fray. In August 2019, the Canadian Securities Administrators issued a Staff Notice providing guidance on risk identification and disclosure by companies relating to climate change. The issuance of the Notice underscored the fact that investors are searching for more information regarding climate change-related risks.

Risk-factor disclosure

Companies should weigh the merits of providing information related to their risk and mitigation systems in place. Where possible, companies should avoid boilerplate language, as investors prefer specificity and quantitative evidence to back up a company's assertions. Inadequate disclosure has been the subject of investor ire in the recent past. David Salmon, president of leading corporate communications firm Laurel Hill, noted that there is a "disconnect between what is being disclosed and what shareholders are looking for. Until we get more consistent types of disclosure, we are going to see this as a big issue".

Consider compliance with ESG frameworks

The Sustainability Accounting Standards Board and Global Reporting Initiative maintain reporting frameworks and standards related to ESG. These standards often overlap with those used by proxy advisory firms when they are assessing a company's ESG score. The costs and benefits associated with voluntary compliance should be considered.

Monitor opinions of major investors

Institutional investors are taking an increased interest in ESG and its disclosure. It is important that corporations understand the ESG-related stances of its major investors.

Recruit leadership well versed in ESG issues

According to the aforementioned 2019 Edelman Trust Barometer Special Report, 60% of institutional investors in Canada say they vote their shares more often for board candidates they believe will increase the company's attention to ESG issues.

ESG and COVID-19

The economic headwinds created by COVID-19 led some to wonder at the pandemic's outset whether ESG would be relegated to the back seat. The opposite has turned out to be the case. A Bloomberg report from June 2020 found that net inflows into Canadian exchange-traded funds that invest based on ESG-factors had surged, relative to previous years. The pandemic, which disproportionately hurt marginalised communities, and the anti-racism movement that swept across the world after the killing of George Floyd, have brought social concerns to the fore. ESG investments have increased as a result.

A May 2020 report prepared by Millani, an ESG advisory and consulting firm, surveyed a number of Canadian institutional investors regarding the anticipated effects of COVID-19 on ESG matters. The report found that, while in the past "environ-

mental" considerations had typically been the main focus of ESG activism, "social" considerations were becoming of greater importance as a result of the pandemic.

Additionally, the investors surveyed in the Millani report indicated that they were increasingly interested in a company's long-term vision when evaluating potential investments. The uncertainty created by the pandemic has created obvious challenges in the short term, but companies with well-articulated long-term strategies are positioned to attract capital from ESG-conscious investors.

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