

Corporate governance and directors' duties in Canada: overview

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CORPORATE GOVERNANCE TRENDS

1. What are the main recent corporate governance trends and reform proposals in your jurisdiction?

Shareholder democracy

Shareholder activism continues to be an important trend, demonstrated by more frequent shareholder proposals and an increasing level of engagement between shareholder activists and management.

In February 2014, the Toronto Stock Exchange (TSX) announced the adoption and approval of amendments to the TSX Company Manual (TSX Manual), effective 30 June 2014. The TSX Manual now requires all TSX-listed issuers, except listed issuers that are majority controlled, to implement majority voting for director elections at uncontested meetings. In particular, the rule requires that:

- Each individual director of a TSX-listed issuer must be elected by a majority of the votes cast with respect to his or her election (majority voting requirement).
- A TSX-listed issuer must adopt a majority voting policy if it does not otherwise satisfy the majority voting requirement in a manner acceptable to the TSX (for example, in its articles of or bye-laws).

In addition, if a TSX-listed issuer adopts a majority voting policy, it must include a full description of the policy annually in the materials provided to its shareholders in connection with its annual meeting. For 2015, proxy advisory firm Institutional Shareholders Services (ISS), a prominent proxy advisory firm, recommended that shareholders withhold votes from all directors nominated by slate ballot. Glass Lewis, another advisory firm, recommended that shareholders withhold votes from the members of the corporate governance committee if the issuer has not adopted majority voting.

For the 2016 proxy season, ISS is recommending, irrespective of whether the corporation has adopted a majority voting policy, that shareholders withhold votes for an individual director if this director is "overboarded" and has attended less than 75% of board and committee meetings in the past year, without a valid reason for such absences. ISS defines an "overboarded" director as either:

- A CEO of a public company who sits on more than two outside public company boards in addition to the company of which he/she is CEO.
- A director who is not a CEO of a public company and sits on more than six public company boards.

Glass Lewis' voting recommendations for "overboarding" in 2016 is based on a threshold of three total boards for a director who serves as an executive of a public company, and six total boards for

directors who are not public company executives. Glass Lewis has also indicated that, starting in 2017, it will generally recommend voting against:

- A director who serves as an executive officer of any public company while serving on a total of more than two public company boards.
- Any other director who serves on a total of more than five public company boards.

With the rise in shareholder activism, an increasing number of listed companies have implemented advance notice policies, which generally require that notice of director nominations and detailed information about nominees and dissident shareholders be provided to management in advance of a shareholder meeting. The advance notice policy has become an important mechanism to protect companies from activist shareholders who may otherwise attempt to ambush a shareholders' meeting by making a surprise motion to nominate directors. The advance notice policy device has now received endorsement from the Supreme Court of British Columbia, as well as limited endorsements from ISS and Glass Lewis. ISS recommends withholding votes for the election of directors where the board has adopted an advance notice policy but does not seek shareholder approval of the policy at the next shareholders' meeting. Glass Lewis recommends that shareholders approve advance notice policies, but only to the extent that the policies impose reasonable restrictions on the nomination right, and do not present excessive impediments on shareholders who wish to nominate directors under the policy.

Diversity on corporate boards

Many academics and industry sectors continue to actively comment on the significant and positive impact a diverse board can have on business outcomes, some arguing that the use of mandatory quotas is not the most effective way to improve board diversity. Effective 31 December 2014, securities regulators in all the provinces and territories (except Alberta and British Columbia) adopted "comply-or-explain" amendments to the existing corporate governance disclosure rules in National Instrument 58-101-Disclosure of Corporate Governance Practices (NI 58-101). This now requires, among other things, TSX-listed issuers to provide:

- Annual disclosure regarding the representation of women on companies' boards and in executive office.
- Disclosure of whether the corporation has a policy for identifying female candidates for executive office and board positions and, if not, disclosure of the reason for not adopting such a policy.

In April 2015, the Federal Government announced in its 2015 federal budget that it will propose amendments to the Canada Business Corporations Act (CBCA). These will require companies incorporated under the CBCA to disclose their policies regarding gender diversity on their boards of directors. With the election of a new Federal Government in October 2015, it remains to be seen whether the proposed amendments will be implemented.

In September 2015, the securities regulatory authorities in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec, Saskatchewan and Yukon published the results of an audit of compliance through CSA Multilateral Staff Notice 58-307. Groups such as the Canadian Board Diversity Council (Diversity 50) have been increasing in profile and identify board-ready candidates that meet their diversity criteria.

National securities regulator

Since the Supreme Court of Canada held in 2011 that the proposal to create a national securities regulator to replace the current system of provincial and territorial agencies was unconstitutional, the Federal Government has continued its efforts to work with the provinces toward establishing a national securities regulator under a model of co-operative federalism.

In September 2013, the Federal Government announced that it had reached an agreement in principle with the provinces of Ontario and British Columbia that would see the creation of a Cooperative Capital Markets Regulator (CCMR). The participating provinces would no longer have provincial securities regulators. Several other provinces and one territory have since announced their intention to join the contemplated CCMR. Consultation drafts of uniform provincial securities legislation to be introduced in those provinces and territory and federal systemic risk legislation, both to be overseen by the CCMR, were published in September 2014. Revised versions of the provincial securities legislation were published in August 2015. However, other Canadian provinces have historically been strongly opposed to the creation of a single regulator, and it is still unclear which level of support the proposed CCMR will have in those jurisdictions.

Board renewal

The December 2014 amendments to NI 58-101 (*see above, Diversity on corporate boards*) also provide that a TSX-listed issuer must disclose whether it imposes term limits on its directors, or otherwise employs mechanisms intended to promote board renewal. While there have been some calls for the implementation of term limits on directors, to date, proxy advisory firms (such as ISS and Glass Lewis) and organisations (such as the Institute of Corporate Directors and the Canadian Coalition for Good Governance) have continued to prefer assessment mechanisms over term limits. It remains to be seen whether term limits will become more common place for Canadian public companies.

Takeover bid regime

In March 2015, Canadian securities regulators published for comment proposed amendments to two of the main policies that regulate takeover bids in Canada:

- Multilateral Instrument 62-104 - Take-Over Bids and Issuer Bids (MI 62-104).
- National Policy 62-203 - Take-Over Bids and Issuer Bids (NP 62-203).

The proposed amendments are intended to address the issue of shareholder coercion in the context of an unsolicited takeover bid and to provide a target board with additional time to respond to such a bid.

The proposed amendments would require that:

- To be successful, takeover bids must meet a minimum tender requirement of 50% of the outstanding securities of an issuer which are subject to the bid (minimum tender requirement).
- A bid must be extended for a period of ten additional days on the satisfaction of the minimum tender requirement and all other terms and conditions of the bid.

The minimum tender requirement would ensure that a bid could only succeed if it was supported by a majority of the independent shareholders, while the ten-day extension would allow

shareholders to tender on the bid becoming successful, reducing the instances of shareholders feeling pressured to tender prematurely due to a fear of missing the tendering deadline.

Finally, the proposed amendments would require a bid to remain open for a minimum of 120 days, in order to provide target boards with additional time to respond to the bid. While it is uncertain whether MI 62-104 and NP 62-203 will be implemented, the proposed changes to the takeover bid regime would potentially provide target boards and target company shareholders with a greater opportunity to assess the merits of an unsolicited takeover bid.

Say-on-pay

The number of public companies that put a say-on-pay vote to their shareholders has grown significantly over the years to include a large majority of companies listed on the S&P/TSX 60 (an index of 60 large companies listed on the TSX). These votes are non-binding, advisory votes requesting shareholder approval of executive compensation. In 2015, some well-established Canadian companies had their advisory say-on-pay resolutions rejected by shareholders. Certain proxy advisory services, including ISS and Glass Lewis, are strongly supportive of say-on-pay votes and, increasingly, both firms are scrutinising issuers' compensation practices. While say-on-pay has become mandatory in many jurisdictions, it remains to be seen whether Canada will align its governance practices in this regard in the future.

Enforcement of anti-bribery legislation

While Canada has had anti-corruption legislation in place since the late 1990s in the form of the Corruption of Foreign Public Officials Act (Canada) (CFPOA), it has been limited in scope and minimally enforced by Canadian authorities. However, in June 2013, the Canadian Government enacted amendments to the CFPOA, implementing a variety of changes aimed at strengthening both the scope and application of the legislation. These changes include (among others):

- The introduction of several new offences focused on falsifying books and records for the purpose of bribing a foreign public official.
- The eventual elimination of the exception for facilitation payments made to foreign public officials in connection with non-discretionary decisions that cover acts of a routine nature.

In addition, the amendments have increased the maximum sentence of imprisonment for an individual convicted of a foreign bribery offence from five years to 14 years. The CFPOA does not provide a maximum fine amount.

This legislative initiative is consistent with the increased vigour that Canadian enforcement authorities have recently shown towards anti-corruption-related matters, which have included:

- Two significant convictions resulting in penalties in the range of Can\$10 million for each company.
- The first conviction of an individual under the CFPOA.

Canadian authorities indicated in February 2013 that they had over 35 ongoing investigations. In February 2015, CFPOA charges were brought against a Canada-based multinational consulting and engineering company. As a result, Canadian companies have started to recognise the importance of establishing their own anti-corruption compliance programmes. These policies are typically aimed at preventing the commission of an offence at the outset and include appropriate processes if potential breaches of the applicable legislation arise.

Risk management

Recent highly visible domestic and international risk management failures (for example, instances of cyber security privacy breaches, regulatory (including, environmental and health and safety) non-compliance, financial fraud and resulting litigation and exposures)

have thrust risk management back into the spotlight. In January 2013, the Office of the Superintendent of Financial Institutions Canada released revised Corporate Governance Guidelines for federally regulated financial institutions. These identify risk management as a main theme and contemplate enterprise-wide risk identification and focused management.

Corporate social responsibility (CSR)

Today, most large companies in Canada employ personnel that are specifically dedicated to developing socially responsible corporate practices. Among other things, boards have identified the need to engage stakeholders through a variety of different means, including ongoing dialogue. In many cases, corporations have voluntarily committed to international CSR standards, such as sustainability reporting. Various factors (including economic volatility and underperformance among many listed companies) have led to growing public scrutiny of corporate boards, including a renewed emphasis on the role of boards in promoting socially responsible corporate practices.

In response to an emerging demand for socially focused investment options (such as health, environmental, cultural and educational goals), investors can pursue social goals while seeking to make a profit through new hybrid corporate models such as:

- Community contribution companies in British Columbia.
- Community interest companies in Nova Scotia.

This supplements the traditional role of societies, associations and clubs. See also the Canada Not-For-Profit Corporation Act in the federal context.

CORPORATE ENTITIES

2. What are the main forms of corporate entity used in your jurisdiction?

This overview of Canadian corporate governance matters and directors' duties applies to the main corporate entities existing under corporate legislation, as described below, and does not address matters applicable to other entities, such as statutory corporations or financial institutions.

The main corporate entities used for business in Canada are federally or provincially incorporated corporations and increasingly, in certain provinces, unlimited liability corporations. The following answers focus on public companies, with the intention that private corporations will find it useful in structuring and measuring their own governance frameworks.

LEGAL FRAMEWORK

3. Outline the main corporate governance legislation and authorities that enforce it. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? List any such groups with significant influence in this area.

The principal sources of corporate governance requirements in Canada are:

- Corporate legislation.
- Securities legislation.
- Stock exchange rules.
- The common law.

In addition, shareholder advocacy groups and proxy advisory services, including the Canadian Coalition for Good Governance (comprised primarily of institutional investors such as pension

funds, mutual funds and third party money managers), Institutional Shareholders Services, Glass Lewis and the Institute of Corporate Directors, are influential through shareholder engagement and their publications of policy statements and guidelines. These organisations have become a reference point on best practices for corporate governance. Companies also often refer to the concepts of, and commentary on:

- Corporate social responsibility.
- General business ethics.
- Basic tenets of strategic planning.
- Risk management.
- Engagement.
- Accountability.
- Transparency.
- Efficiency and effectiveness.

Corporate legislation

Generally, a corporation in Canada is incorporated by filing articles of incorporation (or similar charter documents) with the appropriate federal or provincial government authority. The articles of incorporation specify certain corporate governance matters, which can include:

- The maximum and minimum number of directors.
- Any restrictions on the business that the corporation can carry on.
- Any rights attaching to each class of shares.

Usually, corporations also enact bye-laws (or similar documents), which address more procedural issues, such as quorum at meetings and authority of corporate officers.

Securities legislation

National Policy 58-201 - Corporate Governance Guidelines (NP 58-201) sets guidelines for most public companies in Canada in respect of governance matters, including:

- Composition and mandate of the board of directors.
- Directors' independence.
- Development of position descriptions for directors and officers.
- Codes of conduct.
- Nomination and remuneration of directors.
- Performance assessment of the board and individual directors.

Companies must disclose information about their corporate governance practices in accordance with National Instrument 58-101 - Disclosure of Corporate Governance Practices (NI 58-101). Generally, Canadian securities regulators require that corporations comply with the guidelines in NP 58-201 or explain their lack of compliance in their public disclosure.

Stock exchange rules

Public companies listed on the Toronto Stock Exchange (TSX) must:

- Comply with the provisions in the TSX Company Manual (TSX Manual) related to corporate governance.
- Seek shareholder approval for certain transactions (in particular those that represent a fundamental change to the business or will result in extraordinary dilution).

Generally, the requirements of the TSX Manual align with NI 58-101 and NP 58-201. Corporations listed on the TSX Venture Exchange (the emerging company exchange of the TSX) must comply with

Policy 3.1 – Directors, Officers, Other Insiders & Personnel and Corporate Governance of the TSX Venture Exchange's Corporate Finance Manual.

Common law

Directors' and officers' duties and conduct, shareholder rights and obligations, fiduciary duties and other corporate governance matters are increasingly addressed through a "made in Canada" approach in case law.

4. Has your jurisdiction adopted a corporate governance code?

No jurisdiction in Canada has adopted a corporate governance code in its corporate legislation. However, public corporations in Canada must comply with securities legislation and applicable stock exchange rules, which contain corporate governance guidelines and related disclosure requirements (see *Question 3*). For example, financial institutions and members of the S&P 500 or the TSX Composite Index are frequent targets of governance and action groups that insist on good governance practices.

CORPORATE SOCIAL RESPONSIBILITY AND REPORTING

5. Is it common for companies to report on social, environmental and ethical issues? Highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

Despite the continuing increase in public attention to corporate social responsibility (CSR) practices by corporations in Canada, Canadian corporate and securities laws do not generally regulate expectations for CSR, and attempts in recent years to pass such legislation have failed.

However, specific continuous disclosure obligations are triggered in certain circumstances where the corporation has undertaken particular initiatives. For example:

- Public companies that have implemented any social or environmental sustainability policies that are fundamental to their operations (such as policies regarding the environment, communities in which they operate or human rights) must describe these policies and steps taken to implement them in their annual information form.
- Corporations must outline the financial and operational effects of environmental protection requirements on their current and future capital expenditures, earnings and competitive position in their annual information form and/or management discussion and analysis.
- Corporations that violate federal environmental legislation can be ordered by a court to disclose these violations to their shareholders.

The Federal Government and various Canadian industry associations promote several widely recognised, but not mandatory, international CSR performance guidelines, such as the Global Reporting Initiative.

In addition, the Federal Government has established the Office of the Extractive Sector Corporate Social Responsibility Counsellor to perform both an advisory role and a dispute resolution role in managing issues related to CSR in Canada's extractive sector. In December 2013, the Federal Government launched consultations with civil society organisations to review the CSR strategy for the extractive sector. As a result of these consultations, the Federal Government passed legislation in December 2014 that requires Canadian extractive companies to disclose certain categories of payments made to government entities above a certain threshold,

and to publicly report such information. The Extractive Sector Transparency Measures Act came into force in June 2015, and requires mining, oil and gas, and other extractive companies to report all payments of Can\$100,000 or more made to governments in Canada or abroad. Payments made to aboriginal governments in Canada need not be reported until 1 June 2017.

BOARD COMPOSITION AND RESTRICTIONS

6. What is the management/board structure of a company?

Structure

Corporations in Canada have a unitary board structure.

Management

A corporation is managed by a board of directors. The board of directors is generally required to manage, or supervise the management of the corporation's business and affairs, subject to any unanimous shareholder agreement or transfer of such powers in the corporation's constating documents. There are also specific duties imposed on directors, including:

- Issuing periodic shareholder reports.
- Declaring dividends.
- Reviewing financial statements.
- Setting remuneration for senior management.
- Approving the issuance of shares.

Generally, except possibly for early stage businesses, directors are not actively involved in the day-to-day business and activities of the corporation, with a trend towards greater monitoring and oversight. Delegation to senior officers and other management and board committees for public companies and large corporations is common practice. All public companies must have at least an audit committee. Regardless of any delegation, directors remain responsible for the supervision of the management of the corporation, except for any transfer to shareholders by unanimous shareholder agreement or in the corporation's constating documents, where permitted.

Board members

Individuals are elected by shareholders to sit on the board of directors. In the case of public companies, these individuals are typically nominated for election by the officers or by a nominating committee of the board. Shareholders can also nominate directors. However, for public companies, the adoption of advance notice policies and the corporation's disclosure obligations can make shareholder nominations a relatively rare occurrence.

Employees' representation

Corporate legislation does not provide employees with a right to representation on the board of directors.

Number of directors or members

A private corporation must have at least one director, while a public corporation must have at least three directors.

7. Are there any general restrictions or requirements on the identity of directors?

Age

In Canada, anyone who is less than 18 years of age cannot be a director.

Nationality

There are no nationality requirements for being a director. However, there are requirements regarding Canadian residency. These vary across Canada, and although certain provinces have no residency requirements (including British Columbia), a number of jurisdictions require that at least 25% of the directors are resident in Canada.

Gender

There are no gender quotas for board composition in Canada. However, securities regulators in all of the provinces and territories (except for Alberta and British Columbia) now require the disclosure of board composition as part of a public corporation's corporate governance disclosure. More specifically, issuers listed on the Toronto Stock Exchange must now disclose (among other things):

- The level of representation of women on the board of directors.
- Whether the corporation has a policy for identifying female candidates for executive office and board positions. If the corporation does not have such a policy, the company must disclose the reasons for not adopting a policy.

8. Are non-executive, supervisory or independent directors recognised or required?

Recognition

In Canada, independent directors are recognised and have equal standing in comparison to other directors. Publicly traded companies must disclose the identity of independent directors in their annual corporate governance disclosure.

Board composition

There is no corporate legislation that requires Canadian corporations to have independent directors. However, both the Toronto Stock Exchange (TSX) and the TSX Venture Exchange require companies to have at least two independent directors. Similarly, the audit committee of the board of directors of a publicly traded corporation must have at least three directors and, subject to certain specified exemptions, the members of the audit committee must be independent directors.

Independence

Non-executive or supervisory directors are not required to be independent of the corporation.

9. Are the roles of individual board members restricted?

There are no restrictions on the roles of individual board members in Canada.

10. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors

Typically, directors are nominated by management of the corporation and are elected by the shareholders of the corporation at a corporation's annual general meeting. In some instances, the governing corporate legislation or the charter documents of the corporation can provide that, between annual meetings, the current directors can appoint additional directors up to a certain percentage of the current size of the board (typically one third) and can fill a board vacancy.

Removal of directors

Directors can be removed from office during their term by the corporation's shareholders. A majority of the shareholders must vote for a director's removal at a special meeting. Such a meeting can be called by the directors at any time.

11. Are there any restrictions on a director's term of appointment?

Directors commonly serve for one-year terms, although the shareholders can elect directors for terms of up to three years (subject to term limit requirements under applicable securities laws). There is no statutory limit on the number of terms that a director can serve. However, more and more corporations are adopting director term limits (see *Question 1, Board renewal*).

DIRECTORS' REMUNERATION

12. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company

Directors do not have to be employees of the corporation.

Shareholders' inspection

Unless otherwise specified in the corporation's charter documents or in a unanimous shareholders' agreement, the shareholders of a corporation cannot inspect directors' service contracts. However, publicly traded companies must disclose the quantum of fees and other benefits paid to the directors of the corporation.

13. Are directors allowed or required to own shares in the company?

Directors can own shares in the corporation they manage. Although there are no legal obligations for directors to own shares in the corporation, minimum shareholding requirements for directors are increasingly incorporated into director remuneration programmes in an effort to align the directors' interests with those of the corporation's shareholders.

14. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

Determination of directors' remuneration

Corporate statutes contain provisions relating to contracts with, and the remuneration of, directors. Generally, the directors of the corporation are responsible for determining directors' remuneration. In most public companies, remuneration is set by the compensation committee of the board of directors, in consultation with senior management. The charter documents or any unanimous shareholder agreement can limit this power.

Disclosure

Public companies must disclose annually the reasons for and amount of remuneration provided to their directors and certain senior executive officers, in accordance with the requirements of securities laws.

Shareholder approval

The remuneration of directors does not have to be approved by the shareholders of a corporation. However, public companies are increasingly incorporating advisory, non-binding say-on-pay

shareholder resolutions into their corporate governance regime. The Toronto Stock Exchange requires that a listed corporation receives approval from the majority of its directors and security holders of plans to provide certain security-based compensation arrangements (such as stock option plans) to its directors and officers.

General issues and trends

While there are no legal restrictions on the quantum of directors' or executive compensation, proxy advisory firms such as Glass Lewis and Institutional Shareholders Services are increasingly focusing on the nexus between shareholder value and executive compensation (pay-for-performance) for public companies. This nexus includes, among other things, the:

- Appropriate weighting of executive compensation between salary, short-term incentives and long-term incentives.
- Use of performance goals as a metric for determining executive compensation.

As directors set the compensation paid to executives, certain proxy advisory firms will recommend withholding voting for election to the director who serves as the chair of the compensation committee.

However, as independent directors are not involved in the day-to-day business and activities of the corporation, many shareholder advocacy groups and proxy advisory services often differentiate between executive and independent directors' compensation. For independent directors, tying compensation to performance can be seen to diminish a director's role in taking a longer-term view of the welfare of the corporation.

MANAGEMENT RULES AND AUTHORITY

15. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

The operation of internal management is generally regulated by the corporation's articles of incorporation and bye-laws, subject to any unanimous shareholder agreements and the applicable corporate statute.

A corporation has some freedom in determining the process for its meetings, subject to any applicable corporate law requiring meetings to be held in Canada. The corporation typically sets out in its articles or bye-laws the:

- Location and notice requirements.
- Quorum requirements.

In jurisdictions with Canadian residency requirements for directors, similar residency requirements may also apply to attendance at meetings.

Directors must attend meetings personally. Proxies or representatives are not permitted. However, attendance at meetings can be accomplished by telephone or other electronic means, provided that all participants can communicate adequately with each other.

Directors' resolutions can be passed by majority vote. Any dissenting positions regarding a proposed directors' resolution will be acknowledged and recorded in the corporation's minutes. Generally, resolutions can also be passed by a written consent resolution signed by all the directors.

16. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

The operation and management of a corporation is primarily the responsibility of directors, although certain fundamental matters require shareholder approval. Corporate legislation in Canada typically requires shareholder approval for (among others):

- Amendments to a corporation's articles or other charter documents.
- Selling all or substantially all of the corporation's assets.
- The amalgamation of a corporation with one or more other corporations.

In some Canadian jurisdictions, shareholders can enter into a unanimous shareholder agreement that restricts or transfers directors' usual powers of management and supervision to the shareholders. In other Canadian jurisdictions, the constating documents of the corporation can transfer these powers to one or more other persons. If this occurs, the individuals to whom those powers are transferred will have the same duties and obligations as directors, and actions that would normally be brought against directors can be enforced against these individuals.

17. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

Boards typically delegate some of their more specialised functions to committees of directors. Boards of publicly traded companies must form audit committees and delegate to them the responsibility to:

- Oversee the corporation's auditor.
- Resolve any disputes between management and the auditor.
- Recommend the auditor to shareholders.

However, in most cases, delegation does not relieve non-committee board members of their responsibility.

Certain matters cannot be delegated to a director or a committee of directors, such as the power to issue securities, declare dividends or fill a vacancy among the directors.

DIRECTORS' DUTIES AND LIABILITIES

18. What is the scope of a director's general duties and liability to the company, shareholders and third parties?

Directors have a duty to comply with:

- The governing corporate statute and regulations.
- Relevant securities regulations.
- Stock exchange rules.
- Industry or activity regulations.
- Employment-related, environmental and taxation regulations.
- The common law.
- Charter documents of the corporation.
- Any unanimous shareholder agreement.

Two overarching corporate duties imposed on directors are that directors must:

- Act honestly and in good faith, with a view to the best interests of the corporation.
- Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors can be held personally liable for breaching these duties.

19. Briefly outline the regulatory framework for theft, fraud, and bribery that can apply to directors.

Theft and fraud are both governed by the Criminal Code of Canada. A director found guilty of theft or fraud is liable to imprisonment and restitution. There are also civil law remedies for persons seeking damages for loss suffered from theft or fraud.

The Corruption of Foreign Public Officials Act (Canada) (CFPOA) prohibits the bribery or corruption of foreign public officials to obtain an improper advantage in business. Directors of a corporation found in breach of the CFPOA can be liable to fines and imprisonment.

20. Briefly outline the potential liability for directors under securities laws.

Securities legislation is a provincial matter in Canada. The exact offences and potential liabilities for directors will depend on the specific securities legislation of the jurisdiction in question. However, the provincial acts are highly similar to one another, and the following potential liabilities for directors apply under every act:

- Directors are liable for losses suffered by a purchaser of the securities of a corporation as a result of a misrepresentation made by the corporation in an offering document, although certain statutory defences are available.
- Directors can be found liable for losses suffered by a person who purchases securities in the secondary market due to:
 - a misrepresentation made by the corporation in its disclosure documents or public oral statements; or
 - the corporation's failure to make timely disclosure of a material change.
- A director can be found liable for insider trading if:
 - he or she buys or sells the corporation's securities with knowledge of a material fact or material change that has not been generally disclosed; or
 - he or she knowingly provides insider information to a third party other than in the necessary course of business.
- A director can be found liable for market manipulation if engaging in any conduct relating to securities that he or she knows, or reasonably ought to know, would result in a misleading appearance of trading activity in, or an artificial price for, a security or derivative of a security.

21. What is the scope of a director's duties and liability under insolvency laws?

Directors must ensure that a corporation carries on business only when it can meet its liabilities. Directors can be personally liable if the corporation conducts business while insolvent. When a corporation is insolvent, in addition to the basic fiduciary duty owed

to the corporation, directors owe special duties towards different stakeholders (including employees and creditors) and the environment.

22. Briefly outline the potential liability for directors under environment and health and safety laws.

The Canadian Environmental Protection Act and certain provincial environmental legislation provide that directors must take all reasonable care to prevent the corporation they serve from contravening environmental laws. Reasonable care generally includes the:

- Establishment of an environmental policy.
- Implementation of a proper system for preventing breaches of environmental laws.
- Establishment of an effective internal compliance and reporting system.

Directors are personally liable for participating in, or acquiescing to, conduct that contravenes environmental laws, regardless of whether the corporation is charged or convicted. In addition, directors can be liable for failing to prevent environmental contraventions through reasonable care.

Provincial occupational health and safety legislation, such as the British Columbia Workers Compensation Act, provide that directors must take reasonable care to ensure that the corporation they serve complies with the legislation and that the employees work in an environment that is safe and free of hazards and liability. A corporation's failure to comply with the applicable health and safety legislation can result in its directors' personal liability.

23. Briefly outline the potential liability for directors under anti-trust laws.

Anti-trust matters are governed by the federal Competition Act, which contains criminal and civil provisions proscribing a variety of anti-competitive conduct, including:

- Price-fixing.
- Bid-rigging.
- Deceptive marketing.
- Abuse of a dominant position.

A director in a position to direct or influence the policies of a corporation in relation to a prohibited conduct can be considered guilty of the offence, unless the director exercised due diligence to prevent it. If found guilty, the director can receive a prison term of up to 14 years, fines at the discretion of the court or administrative monetary penalties of up to Can\$10 million.

24. Briefly outline any other liability that directors can incur under other specific laws.

Directors can be personally liable under the Income Tax Act if the corporation fails to deduct or remit to the Canada Revenue Agency the prescribed amounts for certain payments by the corporation, including salaries, wages, and pension benefits, among others.

In certain jurisdictions, corporate legislation also imposes liability on directors for unpaid employee wages, including accrued vacation pay and termination pay, and various source deductions. In jurisdictions where corporate statutes do not impose such liability, employment standards legislation does.

Canada's Anti-Spam Legislation (CASL) expressly extends legal responsibility to directors of a corporation if the corporation contravenes CASL, regardless of whether there are proceedings against the offending corporation. A director can be personally liable if he or she directed, authorised, assented to, acquiesced in, or otherwise participated in the violation, unless the director exercised his or her due diligence before the violation. If a director is found liable, he or she can face significant monetary penalties of up to Can\$1 million.

25. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

A director's liability is limited to the extent that directors' powers have been transferred to another person, whether by a unanimous shareholder agreement or otherwise.

A corporation can indemnify its directors against liabilities and expenses they reasonably incur as directors in respect of any civil, criminal, administrative, investigative or other proceedings. However, to be eligible for an indemnification, a director must satisfy his or her duty to act honestly and in good faith with a view to promoting the best interest of the corporation. Where a monetary penalty is imposed, the director must also prove that he or she had reasonable grounds for believing that his or her conduct was lawful.

26. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

A director can purchase insurance to protect against personal liability. Corporations often pay the insurance premium for this type of insurance.

27. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

A person can be a de facto director and be liable as a director (although not formally appointed as such) in the following cases:

- The powers of the directors have been conferred to him or her.
- He or she represents himself or herself as a director.
- He or she exercises the role of director.

TRANSACTIONS WITH DIRECTORS AND CONFLICTS

28. Are there general rules relating to conflicts of interest between a director and the company?

At common law and under statute, directors have the fiduciary duty to act in the best interest of the corporation. In doing so, directors must:

- Avoid conflicts of interest.
- When unavoidable, disclose a conflict of interest pursuant to the specific conflict of interest rules under the common law, corporate statute or securities legislation.

The disclosure of a conflict of interest generally entails the disclosure of the nature and the extent of the conflict of interest. As a general rule, a conflicted director must not vote or influence the vote of non-interested directors, subject to specific exceptions.

In most jurisdictions, if a director does not disclose the conflict of interest in the specified manner, this director will be liable to the corporation for any profits realised from such conflict. Directors are generally not liable for profits realised if a sufficient disclosure was made to, and the transaction giving rise to the conflict was approved by a special resolution of, the shareholders.

The courts are generally less inclined to defer to board decisions in conflict situations, where the decision was not otherwise patently reasonable.

29. Are there restrictions on particular transactions between a company and its directors?

Generally, there are no formal restrictions on transactions between a director and the corporation. However, a director cannot be appointed as the auditor of a corporation.

30. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

Insider trading rules in securities legislation generally restrict a director from purchasing or selling shares or other securities of the corporation he or she serves, if, at that time of the sale or purchase, the director is in possession of material information that has not yet been disclosed publicly.

DISCLOSURE OF INFORMATION

31. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

The directors of a corporation are ultimately responsible for disclosure and transparency. However, routine compliance with continuous disclosure obligations is typically overseen by the management team that is accountable to the board. Many corporations have taken steps to formalise the process of meeting their disclosure obligations. Typically, the board will adopt a disclosure policy to guide members of management on issues of disclosure. Additionally, some corporations establish a disclosure committee in order to consider and review the corporation's disclosure and ensure that all disclosure requirements have been met fully and accurately.

Many senior issuers either voluntarily or under formalised requirements now participate in shareholder engagement on issues of interest to shareholders, such as executive compensation, diversity and board renewal, and other topics.

SHAREHOLDER RIGHTS

Company meetings

32. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

The law requires annual meetings of shareholders, including for the election of directors and the appointment of auditors. Shareholders of public companies must also appoint an auditor at each annual meeting.

Directors can also call a special meeting at any time, and shareholders can call a meeting as described in *Question 35*.

33. What are the notice, quorum and voting requirements for holding meetings and passing resolutions?

Shareholders' meetings must be attended personally or by proxy. Typically, shareholders tender proxies to either management or other representatives to vote their shares as indicated in their proxies.

Generally, notice, quorum and voting requirements are governed by the relevant corporate and securities laws and a corporation's articles or bye-laws.

Directors must provide notice to shareholders of each meeting. Public companies and certain widely-held private corporations must also either:

- Send a management proxy circular and related materials to shareholders.
- Make use of "notice-and-access" provisions to provide shareholders with access to such materials. "Notice-and-access" provisions allow corporations to disseminate meeting materials by posting the relevant materials online and delivering a notice informing shareholders that these materials have been posted electronically, and advising shareholders how to access them.

Certain shareholders can submit proposals to be included in the materials. Given the notice requirements under corporate and securities laws, the ability of a corporation to deal with matters put forward at a meeting for consideration by shareholders that were not outlined in the notice of meeting is very limited.

34. Are specific voting majorities required by statute for certain corporate actions?

Certain corporate actions must be approved by a special resolution of the shareholders, which generally requires at least 66 2/3% of the votes cast by the shareholders entitled to vote on the resolution. These actions include, among others:

- Amending the corporation's articles or bye-laws.
- Approving an amalgamation.
- Approving the sale or lease of all or substantially all of the corporation's assets.

35. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

In most Canadian jurisdictions, to be eligible to call a shareholders' meeting, a shareholder must hold at least 5% of the outstanding voting shares of the corporation. To submit proposals at a meeting already scheduled, the eligibility threshold is lowered to 1% of the outstanding voting shares of the corporation.

Minority shareholder action

36. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

Shareholders can call meetings or submit proposals to a previously called meeting provided that they hold the appropriate percentage of outstanding voting shares in the corporation (see *Question 35*).

Shareholders can also propose a different slate of directors (or one director) to be elected at the meeting than that nominated by management.

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

37. Are there any formal requirements or guidelines relating to the internal control of business risks?

Under National Instrument 52-109 - Certification of Disclosure in Issuers' Annual and Interim Filings, the chief executive officer and chief financial officer of a reporting issuer must implement and annually certify their responsibility for establishing and maintaining disclosure controls and procedures, and internal controls over financial reporting.

To date, there is no legal requirement in Canada to have an internal auditor in private and public corporations.

38. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

Directors can be held liable for breaching their fiduciary duty if they fail to ensure that the corporation they serve maintains proper books, records and accounts. A defence is available if a director reasonably relied on the financial statements provided by officials or auditors of the corporation, and would reasonably do so if managing his or her own affairs.

39. Do a company's accounts have to be audited?

Generally in Canada, a corporation's annual financial statements must be audited unless the corporation's shareholders resolve to waive the requirement to appoint an auditor for that year. However, shareholders of publicly traded companies cannot waive the auditor requirement. There is no requirement for a corporation's interim financial statements to be audited, subject to limited exceptions.

40. How are the company's auditors appointed? Is there a limit on the length of their appointment?

A corporation's auditors are appointed for a one-year term at the annual general meeting of shareholders. The auditors' term comes to an end at the next annual general meeting of shareholders. For publicly traded companies, potential candidates are generally identified by the corporation's audit committee.

41. Are there restrictions on who can be the company's auditors?

Only auditors that are registered with provincial regulatory bodies can act as auditors for a corporation. In addition, they must be independent of the corporation that they audit.

42. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

There are no restrictions on the non-audit work that auditors can perform for a corporation under corporate and securities laws. However, all non-audit services for a public corporation and its

subsidiaries must be specifically pre-approved by the audit committee of the corporation. This pre-approval requirement can be satisfied by the adoption of specific policies and procedures for the engagement of non-audit services.

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

As an expert, an auditor can be liable for professional negligence to a corporation if its report is inaccurate.

For publicly traded companies, an auditor can also be found liable in damages to a person who purchased or disposed of a security of the corporation in secondary markets during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected, regardless of whether the person relied on the misrepresentation. This secondary market liability is capped at the greater of Can\$1 million or the revenue that the auditor earned

from the issuer in the 12 months preceding the misrepresentation. If the auditor knew of the misrepresentation, there is no cap on the auditor's liability.

44. What is the role of the company secretary (or equivalent) in corporate governance?

The corporate secretary's role has expanded over the years and, at a minimum, generally consists of overseeing the corporation's corporate governance regime, which will typically involve:

- Organising and maintaining the corporation's corporate records.
- Participating in and managing the requirements of formal meetings.

In addition, the role of corporate secretary usually entails some reporting responsibilities to the corporation's directors and shareholders. Some provinces identify certain aspects of the corporate secretary's role as falling within the practice of law.

Practical Law Contributor profiles



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Professional qualifications. British Columbia, called to the bar, 1989; named Queen's Counsel, British Columbia, 2011

Areas of practice. Corporate governance; commercial law; administration, pension governance and investment; private equity and venture capital.

Recent activities

- Holds or has held director, committee chair (including audit committee) and corporate secretary roles for numerous entities.
- Designing or co-designing, advising, educating and orienting on and implementing corporate governance principles, strategic planning and risk management processes and frameworks for private and public entities, including government, quasi-government and not-for-profit entities.
- Working with other service providers or advisers (such as auditors and compensation consultants).

Professional associations/memberships. Certified director, Institute of Corporate Directors (ICD), completed the ICD's governance programme, 2014.

Publications

- Published articles and participated in media interviews, including on matters of corporate governance, business ethics, legal practice and regulation.
- 2011 LEXPERT Zenith national award winner for corporate social responsibility and governance.
- Board-ready per the Canadian Board Diversity Council 2014 Diversity 50 national listing.
- Consistently peer-review top-listed for Corporate Governance and Private Funds/Equity by Best Lawyers in Canada®.

Professional qualifications. British Columbia, called to the bar, 1997

Areas of practice. Corporate governance; commercial law; corporate finance and securities; energy; mergers and acquisitions; mining.

Recent activities

- Represented and worked with clients in a broad range of transactions, including public and private financings of equity and debt, acquisitions and divestitures, arrangements and corporate reorganisations.
- Advising public and private company clients and their boards of directors on corporate governance, directors' duties and responsibilities and regulatory compliance.
- Acting as counsel to special committees of boards of directors in related party transactions and other corporate transactions.
- Has served as corporate secretary to a major electric utility and acted as general counsel to the utility's subsidiary.

Professional associations/memberships. Certified director, ICD, completed the ICD's governance programme, 2009.

Publications

- 2011 LEXPERT Zenith national award winner for corporate social responsibility and governance.
- Peer-review top-listed for Corporate Governance by Best Lawyers in Canada®.