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GLOBAL GUIDE 2018
CORPORATE GOVERNANCE AND DIRECTORS' DUTIES

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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 engagement and activism

The trend towards increasing shareholder involvement in the governance of Canadian public companies has continued to develop. However, the more prominent trend has shifted away from shareholder "activism" in recent years towards "engagement" by management and boards with a wider base of shareholders. The number of proxy fights waned somewhat in 2017, while a number of major companies have implemented shareholder engagement policies. The corporate governance and investor stewardship principles espoused by many major US companies and investors, such as those of the Investor Stewardship Group, appear to be gaining traction in Canada as well.

The number and scope of shareholder proposals have also expanded, with 68 proposals in 2017 compared with 55 the year before. These proposals related to a broad range of stakeholder matters including 33 environmental, social and governance matters (ESG). Notably, the shareholders of two major Canadian banks voted on the adoption of "proxy access" bye-laws with more lenient thresholds than those required under Canadian corporate law. One of those proposals was narrowly approved.

Non-binding "say-on-pay" votes on executive compensation have also grown significantly in recent years. In 2017, two Canadian companies had their advisory say-on-pay resolutions rejected by shareholders. While say-on-pay has become mandatory in certain jurisdictions, it is not required in Canada.

Diversity in corporate leadership positions and board renewal

The importance of diversity on corporate boards and in management suites continues to gain momentum, and has been the subject of legislative, regulatory and investor-driven developments.

The federal government of Canada has introduced amendments to the Canada Business Corporations Act (CBCA) that would, if passed, require directors of "prescribed corporations" to disclose to shareholders, at every annual shareholders' meeting, certain prescribed diversity information relating to the directors and members of senior management. Background information provided by the federal government suggests that the new diversity disclosure requirements will use a "comply or explain" framework, reflecting the requirements already in force for non-venture reporting issuers under amendments to National Instrument 58-101, Disclosure of Corporate Governance Practices (NI 58-101) that came into force in 2015. Those requirements include disclosure of the number of women on the board and in executive officer positions and of policies regarding the representation of women on the board. The amendments to NI 58-101 also required Toronto Stock Exchange (TSX) listed companies to disclose whether they impose term limits on directors, or otherwise employ mechanisms intended to promote board renewal. Securities regulators have followed up on to their commitment to promoting gender diversity with annual disclosure reviews, including in 2017.

In addition to the pressures on Canadian companies from securities regulators and governments to adopt diversity mandates for their corporate leadership positions, companies are also facing increasing pressure from outside stakeholder organisations, including major institutional investors and proxy advisors. Institutional Shareholders Services (ISS) and Glass Lewis & Co, influential proxy advisors, have introduced voting policies specifically targeting gender diversity.

Altogether, these various initiatives and developments make it clear that diversity on corporate boards will remain a prevalent issue in corporate governance reform, with pressure on companies increasing from legislators, regulators, investors and academics.

Takeover bids and defensive tactics

In 2016, the Canadian Securities Administrators (CSA) adopted changes to the rules that regulate takeover bids in Canada. While some commentators predicted a freeze of hostile bids in Canada, the actual number of hostile bids in 2017 only dipped slightly compared to the previous two years.

Not unexpectedly, the new takeover bid regime has engendered a development in defensive tactics that has played out in two recent dramatic contests for control. While the new regime effectively rendered the shareholder rights plan (or "poison pill") all but impotent, other than as a guard against so-called "creeping bids", target boards have seen some (although not universal) success through the implementation of defensive private placements.

Two issuers have recently succeeded in thwarting unsolicited takeover attempts through defensive private placements. Though challenged by the bidders, securities regulators held in both circumstances that the private placement was implemented to address legitimate financial needs and were therefore not "abusive" of the capital markets. However, a more recent attempt was overruled by the securities regulator, which held that in the circumstances the private placement was a manipulation of the voting process.

It appears that the use of defensive private placements will ultimately be decided on the unique facts of each transaction, and stock exchanges and securities regulators are expected to continue to play an important role in change of control transactions as targets develop this blunt and highly fact-dependent defence.

Proxy adviser initiatives

Proxy advisers are organisations that provide voting recommendations to investors on a broad variety of topics, including matters relating to corporate governance. Each year, the major proxy advisory firms, particularly ISS and Glass Lewis, issue updates to their proxy voting guidelines that alert issuers to the governance trends these advisers will focus on in the upcoming proxy season. As a result of the significant influence proxy adviser recommendations can have on the votes of major shareholders, many companies have become acutely attuned to their expectations and guidance.

For the 2018 proxy season, board gender diversity and "overboarding" are the dominant trends. On the gender diversity front, ISS will now issue "withhold" recommendations for the chair of the nominating committee of issuers included in the S&P/TSX Composite Index if the issuer has no disclosed gender diversity policy and no female directors serving on its board. This policy will apply to all TSX listed companies in 2019. Glass Lewis is also implementing a similar policy starting in 2019, but for S&P/TSX Composite Index companies will recommend a "withhold" vote if the issuer has no disclosed gender diversity policy or no female directors serving on its board. On the "overboarding" front, ISS and Glass Lewis have aligned their overboarding policies and, starting in 2019, will recommend a "withhold" vote for directors who serve on more than five public company boards (for non-CEO director nominees) or more than two outside boards (for active CEOs).

Risk management

Recent highly visible domestic and international risk management failures have thrust risk management into the spotlight. In November 2017, the Office of the Superintendent of Financial Institutions Canada released draft revised Corporate Governance Guidelines for federally regulated financial institutions. These guidelines identified risk management as a main theme and contemplate enterprise-wide risk identification and management.

In particular, securities regulators and many companies have increased their focus on cyber security risks. Recent guidance and disclosure reviews by regulators have emphasised that material risks relating to cyber security must be disclosed, and that the materiality of cyber security risks should be determined by an assessment of the probability of a breach and the anticipated magnitude of its effect. Cyber security risks are expected to expand as the reliance on information technology increases.

Environmental, social and governance (ESG) matters

The increased scrutiny of the corporate governance practices and policies of public companies by governments, regulators and the investor community includes an amplified focus on ESG matters. As a result of this scrutiny, and the Supreme Court of Canada's interpretation of the duty of loyalty, (*see Question 18*), the evolving role of corporate directors now includes consideration of a wide range of stakeholders and a broadening range of risks, as well as more robust disclosure in key areas, such as relating to gender diversity, cyber security and climate change. Notably, in addition to the increase in ESG proposals by shareholders and the regulatory focus on cyber security (*see above, Risk management*), the CSA have announced a review of the disclosure of risks relating to climate change. This review is expected to offer the first updated guidance on climate change and environment-related disclosure since 2010.

True majority voting

The federal government's proposed amendments to the CBCA would also adopt a mandatory majority voting regime for public companies incorporated under the CBCA. The proposed new regime would allow shareholders to vote against the election of a director (as opposed to merely "withholding" a vote). Effectively, the amendment would prevent directors of CBCA companies from being elected by a mere plurality, requiring instead a true majority. The proposed amendments would also eliminate slate voting at shareholder meetings of CBCA companies.

These proposed changes to the CBCA generally follow the changes adopted by the TSX to its Company Manual (TSX Manual) in 2014, which requires all TSX-listed companies, except listed companies that are majority controlled, to implement majority voting procedures or policies for director elections at uncontested meetings. However, the majority voting requirements of the TSX are different from the "true" majority voting that would be imposed by the proposed changes to the CBCA, in that they do not automatically result in the disqualification of a director if he or she does not receive a majority of the votes cast at a meeting. TSX-compliant majority voting policies require that:

- Where a director does not receive a majority of the votes cast (other than at a contested meeting), he or she must immediately tender his or her resignation.
- The board accept the resignation, absent "exceptional circumstances" (which are to be construed narrowly).

Enforcement of anti-bribery legislation

In 2013, the federal government enacted amendments to the Corruption of Foreign Public Officials Act (Canada) (CFPOA), implementing a variety of changes aimed at strengthening both the scope and application of the legislation. These changes included the introduction of several new offences targeting the falsifying of books and records for the purpose of bribing a foreign public official and an increase in the maximum prison sentence under the CFPOA from five years to 14 years. In 2017, an amendment to the CFPOA came into force removing an exemption for facilitation payments, or payments to low-level government officials to expedite or secure the performance of an act of a routine nature.

Influenced by these developments and increased scrutiny of multi-nationals under other countries' anti-corruption statutes, Canadian companies have begun to strengthen their own anti-corruption compliance programmes. These programmes are typically aimed at setting an unambiguous tone "at the top", preventing the commission of an offence from the outset and establishing procedures if breaches of the policy or applicable legislation occur.

Advance notice bye-laws and policies

With the rise in shareholder activism in recent years, an increasing number of listed companies have implemented advance notice bye-laws or policies, which generally require notice of director nominations and detailed information about nominees and dissident shareholders to be provided to management in advance of a shareholder meeting. The advance notice bye-law or policy is designed to protect companies from activist shareholders who may otherwise attempt to ambush a shareholders' meeting by bringing a surprise motion to nominate directors.

This mechanism has 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 only approve an advance notice policy if the policy imposes reasonable restrictions (generally 30 days) on nomination rights, and does not present excessive impediments on shareholders who wish to nominate directors under the policy. The TSX also issued guidance on advance notice bye-laws in 2017, indicating its support for the notice periods required by proxy advisors and requiring each listed issuer to post its advance notice bye-law or policy on its website.

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 corporations existing under corporate legislation, and does not address matters applicable to other entities, such as Canadian federal and provincial corporations that are created by specific statutes or financial institutions.

The main corporate entities used for business in Canada are:

- Federally or provincially incorporated corporations.
- In certain provinces, unlimited liability corporations, which are mainly used for tax reasons in more complex corporate structures.

The following answers focus on public companies, with the intention that private companies 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 come from:

- Corporate legislation and the common law.
- Securities legislation and rules and policies of provincial securities regulators.
- Stock exchange rules.

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 Shareholder Services (ISS), Glass Lewis and the Institute of Corporate Directors, are influential through shareholder engagement and their publications of policy statements and guidelines. These organisations' pronouncements have become reference points for corporate governance best practice, but do not always reflect positions universally adopted by companies or required by regulators, nor are these pronouncements necessarily consistent with each other, or applicable to all companies in all circumstances.

Corporate law and the common law

Generally, a company in Canada is incorporated through the filing of 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 company can carry on.
- Any rights attaching to each class of shares.

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

Additionally, in certain jurisdictions and under the Canada Business Corporations Act (CBCA), unanimous shareholder agreements or sole shareholder declarations can limit the powers of directors and transfer the responsibility (and liability) for certain matters to the shareholders.

Securities law and policy

National Policy 58-201, Corporate Governance Guidelines (NP 58-201) sets governance guidelines for most public companies in Canada, on the following:

- The composition, and mandate, of the board of directors.
- Directors' independence.
- The development of written position descriptions for directors and officers.
- Codes of conduct.
- The nomination and remuneration of directors.
- Performance assessment of the board and individual directors.

Companies must also disclose information about their corporate governance practices in accordance with National Instrument 58-101, Disclosure of Corporate Governance Practices (NI 58-101). Generally, securities regulators require companies to comply with the guidelines in NP 58-201 or explain their lack of compliance in their public disclosure. In addition, as noted, NI 58-101 now includes disclosure requirements relating to gender diversity on boards and in executive officer positions, as well as to board renewal mechanisms.

Stock exchange rules

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

- Comply with the provisions in the 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 both NI 58-101 and NP 58-201. Companies listed on the TSX Venture Exchange must comply with Policy 3.1,Directors, Officers, Other Insiders & Personnel and Corporate Governance of the TSX Venture Exchange's Corporate Finance Manual.

4. Has your jurisdiction adopted a corporate governance code?

No jurisdiction in Canada has adopted a corporate governance code in its corporate legislation. However, all companies are subject to the duties prescribed by statute, and public companies must comply with the rules and policies established under provincial securities legislation and with applicable stock exchange rules, which contain corporate governance guidelines and related disclosure requirements (*see Question 3*). Further, public companies are frequent targets of activist investors, and are increasingly engaged by passive investors in respect of their governance practices.

In addition, securities regulators in a number of key provinces have adopted Multilateral Instrument 61-101, Protection of Minority Security Holders in Special Transactions (MI 61–101) which prescribes a number of minority protections, such as enhanced disclosure, minority approval and formal valuations for certain transactions involving related parties.

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 public attention directed towards corporate social responsibility (CSR) practices by companies in Canada, Canadian corporate and securities laws do not explicitly regulate CSR issues.

However, a fundamental component of the directors' duty of loyalty under Canadian corporate law requires the consideration of all relevant stakeholders' interests, and the duty of care includes overseeing the identification and management of risk. In addition, many investors are focusing their attention on environmental and social matters. As a result, CSR in the broader sense, and in particular environmental sustainability and community relationships, are expected to draw more board attention.

Further, specific continuous disclosure obligations are triggered in certain circumstances where the company has undertaken particular initiatives:

- Public companies that have implemented any social or environmental sustainability policies that are fundamental to their operations (such as policies regarding the environment, or relating to communities in which they operate or human rights) must describe these policies and the steps taken to implement them in their annual information form.
- Companies must also 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 their periodic management discussion and analysis.
- Companies that violate federal environmental legislation can be ordered by a court to disclose these violations to their shareholders.

Through environmental, social and governance (ESG) proposals, shareholders have also begun actively demanding additional levels of CSR reporting from companies. In addition, the federal government has established the Office of the Extractive Sector Corporate Social Responsibility Counsellor to perform both an advisory and dispute resolution function in managing issues related to CSR in Canada's extractive sector. Further, the Extractive Sector Transparency Measures Act came into force in 2015 and requires mining, oil and gas, and other extractive companies to report all cumulative payments of CAN$100,000 or more under specific categories made to governments in Canada (including aboriginal governments) or abroad in a given year.

BOARD COMPOSITION AND RESTRICTIONS

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

Structure

Companies in Canada have a unitary board structure. The board of directors acts as a deliberative body to manage or supervise the management of the business and affairs of the corporation. Normally, the board delegates the day-to-day management function to officers, who are appointed by the board.

Management

The board of directors is required to manage, or supervise the management of, the company's business and affairs, subject to any unanimous shareholder agreement or transfer of such powers in the company's constating documents.

Generally, except possibly for early stage businesses, directors are not actively involved in the day-to-day business and activities of the company, but act as stewards, with responsibility for monitoring and oversight. Delegation to senior officers and other management and board committees for public companies and large private companies is common practice, although there are specific duties that cannot be delegated, including declaring dividends, approving financial statements and approving the issuance of shares. Regardless of any delegation, directors remain responsible for the supervision of the management of the company, except for any transfer of responsibility to shareholders by unanimous shareholder agreement or in the company'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 identified for nomination by a nominating committee of the board. Shareholders can also nominate directors if they follow the required procedures under the corporate law and the company's governing documents.

Employees' representation

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

Number of directors or members

A private company must have at least one director, while a public company must have at least three directors. The size and composition of a board will depend on the needs of each specific company, with consideration given to size, industry, breadth and depth of experience, expertise, diversity in all its forms and stakeholder interests, among other things.

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

General restrictions

Only individuals (as opposed to legal entities) qualify to serve as directors of Canada Business Corporations Act (CBCA) corporations. The CBCA bars any individual who has been found by a court in Canada or elsewhere to be of unsound mind or who has the status of bankrupt from being a director.

Age

In Canada, anyone who is under 18 cannot be a director.

Nationality

Under the CBCA and some of the provincial corporate statutes, at least 25% of the directors of a company must be "resident Canadians", meaning either Canadian citizens residing in Canada (with some exceptions for those residing elsewhere) or permanent residents who have not yet had a reasonable opportunity to apply for citizenship. The corporate statutes of British Columbia, among others, have no residency requirements for directors.

Gender

There are no gender quotas for board composition in Canada. However, the importance of diversity on corporate boards and in management suites continues to gain momentum, and has been the subject of legislative, regulatory and investment developments. See *Question 1, Diversity in corporate leadership positions and board renewal.*

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

Recognition

In Canada, independent directors are recognised and have the same standing on the board as non-independent directors.

Board composition

The Canada Business Corporations Act (CBCA) requires public companies to have at least three directors, at least two of whom cannot be officers or employees of the corporation or any of its affiliates. Under securities laws, publicly traded companies must disclose the identity of independent directors in their annual corporate governance disclosure, and must provide an explanation if a majority of the board is not composed of independent directors. National Policy 58-201, Corporate Governance Guidelines (NP 58-201) recommends that the chair and a majority of the board be independent. Audit committees must be composed entirely of independent directors, subject to some very limited exceptions, and public companies are also expected to have a compensation committee and a nominating committee each composed entirely of independent directors, and under provincial securities rules must disclose an explanation if that is not the case. Both the Toronto

Stock Exchange (TSX) and the TSX Venture Exchange require listed companies to have at least two independent directors.

Independence

Under securities laws, a director is "independent" if he or she has no direct or indirect "material relationship" with the company (*National Instrument 52-110, Audit Committees (NI 52-110)*). A "material relationship" means any relationship which could, in the view of the issuer's board of directors, be reasonably expected to interfere with the exercise of a member's independent judgement. In addition, certain relationships are explicitly deemed to be "material relationships", including being (or having been in the last three years) an employee or executive officer of the company, or being a partner of the company's auditing firm.

9. Are the roles of individual board members restricted?

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

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

Appointment of directors

Under Canadian corporate law, shareholders have the right to elect directors. While the law allows election by plurality, proposed amendments to the Canada Business Corporations Act (CBCA) and recent changes to the TSX Manual impose majority voting requirements (*see Question 1, True majority voting*). In addition, the governing corporate legislation or the charter documents of the company can permit the current directors to appoint additional directors between annual meetings up to a certain percentage of the current size of the board (typically one third) and to fill casual vacancies.

Removal of directors

Directors can be removed from office during their term by the company's shareholders by either an ordinary or special resolution, depending on the governing corporate law. A special meeting to remove a director can be called by the directors at any time, or by shareholders holding a minimum of 5% of the outstanding shares, subject to certain conditions.

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

As a matter of corporate law, the shareholders can elect directors for terms of up to three years, and staggered boards are permitted. However, the proposed changes to the Canada Business Corporations Act (CBCA) would eliminate this provision, and directors of public companies generally serve for a one-year term. The Toronto Stock Exchange (TSX) Manual requires annual elections for all directors. There has been some recent demand from some investors for limits on the number of terms a director can serve; however, there are currently no statutory limits on the number of terms that a director can serve.

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 company.

Shareholders' inspection

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

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

Directors can own shares in the company on whose board they serve. However, there are no legal obligations for directors to do so.

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

Determination of directors' remuneration

Generally, the directors of the company are responsible for determining directors' remuneration, and the Canada Business Corporations Act (CBCA) provides that it is not a conflict of interest for directors to vote on a resolution approving their own remuneration. In most public companies, remuneration is set by the compensation committee, in consultation with senior management and, if appropriate, specialised compensation advisors. The charter documents or any unanimous shareholder agreement can limit this power.

Disclosure

Public companies must disclose annually the amount of remuneration provided to their directors and certain senior executive officers, with a detailed discussion and analysis of that compensation in a prescribed form.

Shareholder approval

The remuneration of directors does not have to be approved by the shareholders of a company. However, public companies are increasingly incorporating advisory, non-binding "say-on-pay" shareholder resolutions into their corporate governance regime. The Toronto Stock Exchange (TSX) requires listed companies to receive shareholder approval for compensation plans (such as stock option and similar plans) that provide certain equity-based compensation arrangements to its directors, officers and others.

General issues and trends

While there are no legal restrictions on the quantum of directors' or executives' compensation, disclosure relating to executive and director remuneration has expanded in recent years, and proxy advisory firms such as Glass Lewis and Institutional Shareholder Services (ISS) are increasingly focusing on compensation as a key governance issue.

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 company's articles of incorporation and bye-laws, subject to any unanimous shareholder agreements and the applicable corporate statute.

A company has some flexibility when determining the process for its meetings, subject to any applicable corporate laws that require meetings to be held in Canada, or in a particular province. The

company typically sets out in its articles or bye-laws the location, notice and quorum requirements for the meeting. In jurisdictions with Canadian residency requirements for directors, similar residency requirements may also apply to attendance at meetings. Directors must attend meetings themselves; proxies or representatives are not permitted. However, attendance at meetings can be achieved by telephonic or other electronic means, provided that all participants can communicate adequately with each other.

Directors' resolutions can be passed by majority vote, subject to the company's constating documents. Any dissenting positions regarding a proposed directors' resolution must be acknowledged and recorded in the company's minutes. Resolutions can also be passed by a written consent resolution which, under the Canada Business Corporations Act (CBCA), must be signed by all of 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?

Directors' powers

While certain fundamental matters require shareholder approval (*see Question 6 and Question 34*), the board of directors has the duty to manage or supervise the management of the business and affairs of the corporation. The day-to-day operations can be delegated to management, but the directors have primary responsibility for the corporation's acts, and certain decisions cannot be delegated.

Restrictions

In some Canadian jurisdictions, shareholders can enter into a unanimous shareholder agreement that restricts or transfers the directors' usual powers of management and supervision to the shareholders. In other Canadian jurisdictions, the constating documents of the company 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, and will be subject to the same liabilities, as directors.

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, and are generally entitled to do so, subject to the limits on delegation (*see Question 6*). Boards of publicly traded companies must form audit committees and delegate to them the responsibility to:

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

Delegation does not relieve non-committee board members of their duties.

DIRECTOR'S DUTIES AND LIABILITIES

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

In supervising the management of the corporation, directors must abide by two overarching duties. Each director must:

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

In considering whether these duties have been discharged, Canadian courts will apply the business judgment rule, giving directors' decisions a high degree of deference, as long as the decision was made in good faith, without conflicts, and with an appropriate degree of prudence and diligence.

As a result of the oppression remedy under Canadian corporate law (which provides courts with a broad, flexible remedy for conduct that it determines is "oppressive" or "unfairly prejudicial" to, or that "unfairly disregards the interests of" a broad range of complainants), as well as the interpretation of the duty of loyalty by Canadian courts (which requires consideration of the interests of stakeholders affected by corporate acts), board decisions are also subject to a general standard of fairness.

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. A director of a company found in breach of the CFPOA can be personally liable and face fines and/or imprisonment. See *Question 1* for a further description of anti-bribery legislation.

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

Securities legislation is a provincial matter in Canada. However, while the exact offences and potential liabilities vary by jurisdiction, the provincial securities statutes are similar to one another, and include the following potential liabilities for directors:

- Directors can be liable for misrepresentations in publicly filed documents or public oral statements, or for failure to make timely disclosure, subject to certain defences.
- A director can be found liable for insider trading, "tipping" or "recommending".
- Directors can be found liable for market manipulation.

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

The content of directors' statutory duties does not change in the context of insolvency, though the interest of creditors in the duty of care may increase. Directors can be jointly and severally liable for

certain payments by the corporation if it is insolvent (or if those payments rendered it insolvent) or in the year prior to bankruptcy, including the payment of dividends, share redemptions or providing financial assistance. Directors can also be liable for authorising or participating in certain fraudulent actions that mislead or disadvantage creditors.

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 company they serve from contravening environmental laws. Reasonable care generally includes:

- Establishing an environmental policy.
- Implementing a proper system for preventing breaches of environmental laws.
- Establishing 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 company 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 requires directors to take reasonable care to ensure that the company they serve complies with the legislation and that the employees work in an environment that is safe and free of hazards and liabilities. A company's failure to comply with the applicable health and safety legislation can result in 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 company in relation to prohibited conduct can be found guilty of the offence, unless the director exercised proper due diligence. The possible penalties include a prison term of up to 14 years or fines of up to CAN$750,000 for first-time offences. In addition, the company could receive administrative monetary penalties of up to CAN$10 million.

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

There are numerous statutes that impose liability on directors, including in matters relating to tax, employment, labour, pensions, the environment, occupational health and safety, privacy and consumer protection.

Directors can be personally liable under the Income Tax Act (Canada) if the company fails to deduct or remit to the Canada Revenue Agency the prescribed amounts for certain payments by the company, 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 generally does.

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

Directors' liability is limited to the extent that directors' powers have been transferred to another person, whether by a unanimous shareholder agreement or through the company's charter documents, where permitted under applicable corporate laws.

Under the Canada Business Corporations Act (CBCA), a company 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 the best interests of the company. 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. If these conditions are satisfied and a director is found by a court to not be at fault, the company must indemnify the director against expenses reasonably incurred in connection with the defence of such proceeding.

Due to difficulties interpreting the corporate legislation regarding indemnification, it is common practice for directors to enter into indemnification agreements with companies.

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. Companies 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)?

Under the Canada Business Corporations Act, a person occupying the position of a director, whatever title that person has, is liable as a director. In addition, a unanimous shareholders' agreement may confer directors' powers and liabilities on shareholders.

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 the corporate statutes in Canada, directors are fiduciaries of the company. They are therefore required to act in the best interests of the company, which includes, among other things:

- Avoiding conflicts of interest.

- When unavoidable, disclosing a conflict of interest pursuant to the specific conflict of interest rules under 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-conflicted 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 company for any profits realised from such conflict. Directors are generally not liable for profits realised if sufficient disclosure was made to, and the transaction giving rise to the conflict was approved by a special resolution of, the shareholders.

Additionally, courts in Canada are less inclined to defer to board decisions in conflict situations, where the decision was not otherwise made on a reasonable basis.

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

Other than where a director has a disclosable conflict of interest, there are no formal restrictions on transactions between a director and the company. However, a director cannot be appointed as the auditor of a company.

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 the Canada Business Corporations Act and the provincial securities acts, such as the Securities Act(Ontario), as well as offences set out in the Criminal Code of Canada, generally restrict a director from purchasing or selling shares or other securities of the company he or she serves if, at the time of the sale or purchase, the director has knowledge of a material fact or material change that has not yet been generally disclosed. A material fact is a fact that would reasonably be expected to have a significant effect on the market price or value of the securities in question. A material change is a change in the business, operations or capital of the issuer (or a decision to implement such a change) that would reasonably be expected to have a significant effect on the market price or value of any of its securities. Information is considered generally disclosed if it has been disseminated in a manner calculated to effectively reach the marketplace and investors have been given sufficient time to analyse it.

DISCLOSURE OF INFORMATION

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

Under the Canada Business Corporations Act and similar provincial corporate legislation, directors are required to disclose a company's annual financial statements and the report of the auditor, if any.

Under the provincial securities acts and stock market rules, public companies must disclose all material facts and material changes. In addition to the continuous disclosure of material information at certain prescribed intervals and in prescribed forms, public companies must immediately disclose material changes.

The directors of a company are ultimately responsible for corporate disclosure and transparency. However, routine compliance with continuous disclosure obligations is typically overseen by a disclosure committee or the management team who is accountable to the board. Typically, the board will adopt a disclosure policy to guide the company on issues of disclosure.

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 Canada Business Corporations Act and similar provincial corporate legislation generally require annual meetings of shareholders, including for the election of directors and the appointment of auditors. Shareholders of public companies must appoint an auditor at each annual meeting. Directors can also call a special meeting at any time, and shareholders holding at least 5% of the outstanding shares can call a meeting (*see Question 35*).

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

Shareholders' meetings may be attended personally or by proxy. For public companies, shareholders typically tender proxies to either management or other representatives to vote on their behalf.

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 provide shareholders with a management proxy circular and related materials.

Certain shareholders can submit proposals that the corporation is then required to include in the proxy materials, and use of this entitlement appears to be on the rise in Canada. Given the rigidity of the notice requirements under corporate and securities laws, companies are limited in their ability to address matters put forward for consideration by shareholders that were not previously outlined in the notice of meeting.

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 two-thirds of the votes cast in favour by the shareholders present and entitled to vote at the meeting. These actions include, among others:

- Amending the company's constating documents.
- Approving an amalgamation, continuance, dissolution or other fundamental transaction.
- Approving the sale or lease of all or substantially all of the company's assets.
- Approving a plan of arrangement that implements a fundamental transaction.

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 company.

To submit a proposal for a matter to be raised at a shareholder meeting, a shareholder must have held 1% of the outstanding voting shares, or voting shares with a fair market value of at least CAN$2,000, for a period of at least six months. If a proposal includes a nomination of a director, the ownership threshold increases to 5% of the outstanding voting shares.

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 requisition a meeting (including to remove directors) or submit a proposal to a previously called meeting (including to nominate directors), provided that they have met the statutory requirements for, among other things, holding at least the required percentage of outstanding voting shares for the required period of time (*see Question 35*).

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 CEO 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 either private or public companies.

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 duty of care if they fail to ensure that the company 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 company. Directors also have a duty to inform the audit committee and the auditor of any error of which a director becomes aware in a financial statement and to prepare and issue revised financial statements when an auditor informs the directors of any such error.

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

In Canada, a company's annual financial statements must be audited unless the company's shareholders unanimously resolve to waive the requirement to appoint an auditor for that year. Shareholders of public companies cannot waive the auditor requirement. Subject to certain limited exceptions, there is no requirement for a company's interim financial statements to be audited.

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

A company's auditors are appointed at each annual general meeting of shareholders for a term ending at the next annual general meeting of shareholders. For public companies, potential candidates are generally identified by the company'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 Canada. In addition, auditors must be independent of the corporation that they audit. Under the Canada Business Corporations Act (CBCA), an auditor is not independent if he or she is a business partner, director, officer, employee or shareholder of a corporation or any of its affiliates.

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 company under corporate or securities laws. However, all non-audit services for a public company and its subsidiaries must be specifically pre-approved by the audit committee of the company. This pre-approval requirement can be satisfied by the adoption of specific policies and procedures for the engagement of non-audit services.

For public companies, there are specific disclosure requirements under National Instrument 52-110, Audit Committees (NI 52-110) regarding the use of external auditors and the type of work they perform. In general, these relate to disclosing the extent of fees paid for specific types of work performed. To ensure the independence of external auditors, Institutional Shareholder Services (ISS) recommends against voting for directors who are members of a company's audit committee if non-audit related fees paid to the company's auditors are greater than audit and related fees combined.

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?

An auditor can be liable for professional negligence to a company if its report is inaccurate. For publicly traded companies, an auditor, as an expert, can also be found liable for misrepresentations in portions of publicly filed documents that rely on his or her expertise and which he or she has consented to be included in the disclosed document.

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 company's corporate governance regime, which typically involves:

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

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

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ONLINE RESOURCES

Justice Laws Website

W *laws.justice.gc.ca/eng/*

Description. Justice Laws is the online source of federal statutes and regulations of Canada. The legislation is official and up-to-date and is available in both English and French translations.

Can-LII Connects

W *canliiconnects.org/en/*

Description. CanLII Connects provides access to case law and legal commentary on Canadian court decisions with respect to corporate governance. The information is unofficial but is up-to-date.

Canadian Coalition for Good Governance

W *www.ccgg.ca/*

Description. The Canadian Coalition for Good Governance represents Canadian institutional shareholders and promotes good governance practices in Canadian public companies and the regulatory environment. It issues unofficial publications in a variety of areas of corporate governance.

Practical Law **Contributor profiles**

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

Areas of practice. Corporate law, board advisory and governance; commercial law; mergers and acquisitions; pension governance and investment; private equity and venture capital.

Professional associations/memberships. Certified director, Institute of Corporate Directors (ICD), 2014.

Recent activities

- Holds or has held several director, committee chair (including audit committee) and corporate secretary roles for numerous entities and works with other advisers (such as auditors and compensation consultants).
- 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.
- External counsel for Crown and statutory entities.

Publications

- *Co-editor of Lawson Lundell's Business Law Blog.*
- *Published articles and participated in media interviews, including on matters of corporate law and governance practices, pension governance and investment, business ethics, natural resources, hospitality, travel and real estate law.*
- *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®.*
- *2016 YWCA Women of Distinction Awards: finalist in the Business & the Professions category.*
- *2011 Lexpert Zenith national award winner for corporate social responsibility and governance.*

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Areas of practice. Corporate law, board advisory and governance; commercial law; mergers and acquisitions; corporate finance and securities; private equity and venture capital.

Recent activities.

- Has a broad, transactional-based practice involving all aspects of corporate and securities law, with particular focus on public and private mergers and acquisitions, private equity, corporate governance and corporate finance.
- Advises clients on a wide range of domestic and international transactions, including public and private acquisitions and divestitures, raising capital, corporate reorganisations and private equity transactions, working closely with other experts within the firm to negotiate and implement optimal transaction structures.
- In addition to transactional work, also assists companies with their corporate governance and continuous disclosure obligations and advises on general corporate law.

Publications

- Co-editor of Lawson Lundell's Business Law Blog, with a series of articles on matters of corporate law and governance, and corporate finance and securities. Recent articles include:
  - *"A Sense of Purpose and the New Paradigm", Business Law Blog, 8 February 2018;*
  - *Gender Diversity and Overboarding Dominate ISS's 2018 Proxy Guideline Updates, Business Law Blog, 21 November 2017;*
  - *Potential Alteration of "Independence" in Canadian Corporate Governance, Business Law Blog, 31 October 2017;*
  - *CSA Publish Third Annual Review of Gender Diversity Disclosure, Business Law Blog, 12 October 2017;*
  - *Stakeholder Interests – A Canadian Perspective, Business Law Blog, 3 October 2017.*