This second edition is intended to put corporate governance into its global context, to show its significance for modern business society.

Written by the leading practitioners within the field, **from 32 jurisdictions**, this second edition will be a useful, first-hand reference material for practising lawyers and in-house attorneys who may counsel clients on their business in foreign countries.

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'Corporate governance rules cause acute concern for companies interested in investing or doing business in foreign countries, hence the need for their in-house and external legal counsel. They are keen to see that the business environment of the host jurisdiction is compliant with global standards. A corporate governance regime with global standards is now an essential element of international business.' – Akira Kawamura

ISBN 978-0-414-05030-3

SWEET & MAXWELL

CORPORATE GOVERNANCE *INTERNATIONAL SERIES*

2ND EDITION

THOMSON REUTERS

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INTERNATIONAL SERIES

General Editor: Akira Kawamura *Anderson Mori & Tomotsune*

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Akira Kawamura
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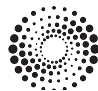

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Published in July 2015 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell
Friars House, 160 Blackfriars Road, London, SE1 8EZ
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
2nd floor, 1 Mark Square, Leonard Street, London EC2A 4EG)
A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414050303

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PREFACE

Akira Kawamura | Anderson Mori & Tomotsune

Following the great success of the first edition of this Book, it was agreed by the authors and the publisher, Thomson Reuters, to publish this updated second edition. The original edition was first published in 2013. It is an unusually short period of time in which to release a second edition – just about two years. I am deeply impressed by the amount of support and willingness expressed by all of the authors to participate in this work again. I also greatly appreciate the initiative taken for this by the publisher and its editors.

I am fully aware of the reason why we must update the first edition in such a short period of time: corporate governance rules and systems are changing rapidly and dramatically in many jurisdictions in the world. I am certain that this second edition may provide the readers with a good, current and quick understanding of the rules prevailing throughout the present time global markets.

1. GLOBAL CORPORATE GOVERNANCE

Good corporate governance is a necessary pre-condition for corporate culture to flourish. It ensures that companies comply with the law and the ethical rules of societies and as such are good corporate citizens.

Good corporate governance is also a key factor for companies to raise funds from the most suitable capital markets in the world or to trade their financial commodities in the market places. Unless they prove themselves as being highly and legitimately managed under the commonly accepted corporate governance rules, businesses may no longer be admitted to the major markets.

It is also a key consideration for the regulators of the recipient countries to introduce the rules according to global standards into their own jurisdictions because these are critical criteria looked at by foreign investors when deciding where to invest. They owe substantive responsibilities to commit themselves with their own corporate governance rules that prevail in their own home jurisdiction. Therefore, the globally recognised rules can be considered to be an important business infrastructure in the recipient countries.

Another trend is the globalisation of both companies and their investors. Hence, corporate governance rules must also be of a global standard. Such rules from different jurisdictions influence each other and are becoming very much the same in most of the world's leading markets, although, needless to say, the US law has been, among those, the most influential and has in many ways dominated global rule making. We can say that global corporate governance is emerging and is well accepted in many jurisdictions around the world.

Thus, I think, good corporate governance is essential for the sustainable growth of the world economy.

2. GLOBAL FINANCIAL CRISIS

Corporate governance became a critical item on the agendas of regulators and law makers everywhere in the world in the years since the global financial crisis (GFC), which took place following the collapse of Bear Stearns Co Inc and Lehman Brothers Holding Inc in 2008. It triggered, as is well known, the collapse of many financial institutions, banks and investment banks in major jurisdictions in the United States, Europe and then, in other parts of the globe. The serious aftermath of the GFC is still being felt in many jurisdictions such as Spain, Greece or Italy.

While there were many different reasons why rescue packages were or were not applied to the failed financial institutions, there was a common and important criterion, which was the ethical fairness of the corporate governance adopted by the board of such failed entity. It was observed that the people and their governments were not persuaded to help the collapsed entities unless they were successful in proving that they had been properly managed under a healthy corporate governance structure. If not, they were no longer admitted to play a role as corporate citizens.

3. ENRON AND THE SARBANES-OXLEY ACT

As early as 2002, the so-called Sarbanes-Oxley Act (SOX Law or Act) was introduced in the United States in reaction to a number of large corporate scandals revealed in that year. The largest one was the accounting fraud orchestrated by the board of Enron Corporation. It was said that it would have triggered a second Great Depression following the 1929 crisis, if a comprehensive reform of the management of corporate boards, as well as their accounting and audit systems and the professional services rendered by accountants and lawyers, was not introduced by way of the Act.

The Round Table Discussion on the rule-making to enforce the Act was held at the historic building that houses the United States Security Exchange Commission in Washington DC just before the Christmas holidays in 2002. I was invited to the Round Table as a panellist by the SEC. We discussed the scope of the cross-border reach that may be given to the Act and its subordinate rules. It was noted that the Act was intended to be a global rule and not just a national rule. As is seen in the following chapters of this book, the major principles of the Act have now been introduced and enforced in most of the major jurisdictions including Japan, Germany and so on.

4. COMMON ISSUES

As may be seen in the following chapters, there are many commonalities in the corporate governance rules of the jurisdictions covered in this book. The committees system of the board coupled with the independent directors, especially the independent audit committee, have been introduced in many jurisdictions after the introduction of the SOX Law and its subordinate rules. The power and functional support of independent committees may have to be introduced in many more jurisdictions.

Executive compensation is another hot issue: with the problem of so-called "say on pay". A large number of cases in this area have been instituted in many jurisdictions, especially in the United States. It is hoped that a sound standard for executive compensation will be established through those court cases.

Effective enforcement of the compliance programme developed under the SOX Law regime must be strengthened in many jurisdictions. In this regard, boards may have more practical powers to oversee the management of the companies.

Thus the topic of corporate governance is now an acute concern for the companies and their boards around the world. It is especially important for the companies that are active in multi-jurisdictional markets and hence, for their in-house counsels and outside legal counsels. They should keenly watch developments in corporate governance rules as an important part of the changing business environment.

5. LATEST DEVELOPMENTS AND THANKS

In the last few years, the corporate governance rules have been massively innovated in the most of the major markets. They

include, for example, the introductions in some part of a Corporate Governance Code and/or the Stewardship Code. In my own jurisdiction, Japan, both of them, being recently introduced, have brought about substantial changes to and reform of the Japanese corporate and investment culture.

I am very much honoured to again undertake the General Editorship of this Book, catching up with the changes in present day corporate governance around the world. This should continue to be a unique and excellent source of legal information on this topic. More importantly, this is one of the most current and comprehensive reference books on the topic.

The authors who have kindly agreed to contribute their valuable time to contributing to this book again are literally the best and most prominent lawyers on the topic in their respective jurisdictions and are very well known as such throughout the world.

This Book provides the best and most practical first hand reference material for the lawyers and in-house counsels who may have opportunities to counsel clients on their business in foreign jurisdictions. I would like to thank the authors for their valuable contributions to this Book.

I wish to note with thanks again the Foreword written by Marty Lipton of Wachtell Lipton Rosen & Katz. He is the legendary corporate governance lawyer of our age and a prominent advisor to the boards of major American and global entities.

Since 1 July 2013 the threshold for having to disclose substantial holdings of capitol or voting rights in listed companies was reduced from 5% to 3% and gross short positions have to be disclosed. The threshold to put items on the agenda was raised from 1% to 3%. Finally, the relevant Act contains a mechanism enabling a listed company to identify its "ultimate shareholder". Furthermore the NCGC obliges a shareholder to consult with management 180 days prior to putting an item on the agenda, which gives management time to settle a discussion with the shareholder or to build up a defence.

FOREWORD

Martin Lipton | Wachtell, Lipton, Rosen & Katz

The core purpose of corporate governance is to build long-term sustainable growth in corporate and shareholder value for the benefit of all stakeholders. The vitality of the global economy depends upon our fostering a long-term orientation and resisting the pressure to measure success on the basis of myopic benchmarks. Corporate governance practices can, and should, vary across jurisdictions, and the treatment of the following key issues by boards, management, stakeholders and regulators has global relevance in determining a corporate governance profile that facilitates the creation of sustainable value and is fine-tuned to specific country and company circumstances:

- Establishing an appropriate ''tone at the top'' to actively cultivate a corporate culture that gives high priority to ethical standards, principles of fair dealing, professionalism, integrity, full compliance with legal requirements and ethically sound strategic goals.
- Partnering with management and advisors to review the company's business and strategy and identifying and developing talent as part of robust succession planning.
- Organising the business, and maintaining the collegiality, of the board and its committees so that each of the increasingly time-consuming matters that the board and board committees are expected to oversee receives the appropriate attention of the directors.
- Understanding, and effectively evaluating, the ever-evolving legal rules, stock exchange requirements and aspirational 'best practices' that have come to have almost as much influence on board and company behaviour.
- Developing an understanding of shareholder and stakeholder perspectives on the company and fostering long-term relationships with shareholders and other stakeholders, as well as coping with escalating requests for meetings to discuss governance and business proposals, including employee lay-offs, stock buybacks, special dividends, spin-offs and other corporate transactions.
- Objective evaluation of activist agendas, notwithstanding the threat of proxy contests, with-hold-the-vote campaigns and other pressure tactics, to determine what will in fact further the best interests of the company and all of its constituents.
- Developing an understanding of how the company and the board will function optimally in the event of a crisis and proactively planning for a crisis.
- Ensuring appropriate procedures for review of transactions involving related persons or that could otherwise involve a conflict.
- Retaining and recruiting directors who meet the requirements for experience, expertise, diversity, independence, leadership ability and character, and providing compensation for directors that fairly reflects the significantly increased time and energy that they must now spend in serving as board and board committee members.
- Coping with the proliferation of new regulations and changes in the general perception of business that have followed the financial crisis.
- Addressing conflicts of proxy advisory firms and the shortcomings of one-size-fits-all governance checklists and

resisting unsound demands of corporate governance activists that are not linked to true value creation.

- Achieving the delicate balance of enabling the company to recruit, retain and incentivise the most talented executives while avoiding media and populist criticism for inappropriate compensation.
- Dealing with populist demands, such as criticism of risk management, and the demands of the public with respect to health, safety, environmental and other socio-political issues in a manner that will pre- empt increased regulation and avoid escalation of unsound demands, while at the same time furthering the best interests of the company.

Considerable attention has been devoted to searching for lessons learned from the global financial crisis and ways to improve board functioning. Perhaps one of the most valuable "lessons learned" is that boards and regulators need to focus on what works, without the undue distraction of reform for reform's sake and standardised mandates that pay lip service

to "best practices" but add little if any real value. Some of the other "lessons learned" include a renewed focus on risk management (including overseeing cybersecurity), a better understanding of the challenges faced by highly complex, global businesses and a rethinking of the experience and skill sets needed for an effective board.

In order to promote effective governance, the institutional, regulatory and governance environment must facilitate an adequate supply of quality directors who: (i) have sufficient knowledge of, and experience with, the company's businesses, even if this requires a re-examination of whether the trend towards boards with only one non-independent director makes sense and results in boards with a greater percentage of directors who are not "independent", (ii) are in sufficient number to staff the requisite standing and special board committees that handle much of the board's work, (iii) are able to devote sufficient time to board and committee meetings, and the preparation for them, (iv) receive regular tutorials by internal and external experts as part of expanded director education and (v) are encouraged to maintain a true collegial relationship among and between the company's senior executives and the members of the board.

CANADA

Jay M. Hoffman & James M. Klotz* **| Miller Thomson LLP**

1. GENERAL PRINCIPLES

1.1 What are the general principles of corporate governance in your jurisdiction? What are the main objectives of the corporate governance principles? Is your legal system based on common law, civil law, Islamic law or something else?

The board of directors of a Canadian corporation manage or oversee the management of a corporation, appoint the corporation's officers and delegate tasks to the corporation's officers, where appropriate.

A director of a corporation has two fundamental duties imposed by Canadian corporate statutes. The first is a fiduciary duty to act in good faith with a view to the best interests of the corporation. This duty requires a director to act in the interest of the corporation and not in his or her own interest or the interest of any one particular stakeholder group. The fiduciary duty also includes a duty to treat individual stakeholders fairly and equitably.

A director's second fundamental duty is to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This duty imposes an objective standard on directors and requires a director to make fully informed judgements on behalf of the corporation. Directors should only rely on the expertise of management or other advisors where reasonable.

Directors who discharge these statutory duties properly may benefit from the "business judgment rule". Canadian courts have stated that they will not intervene when a director has made a decision that is independent of any conflict of interest, made in good faith and that is within the range of reasonable possibilities given the information available to the director at the relevant time. Further, courts have confirmed that directors will not be held to a standard of perfection but rather a standard of reasonableness. However, if a court determines that a director did not act in accordance with his or her statutory duties to the corporation, the onus shifts to the director to prove that a decision was not only reasonable but also the best possible alternative. Therefore, directors should carefully consider the possible application of the business judgment rule and should ensure that processes are implemented to document a director's actions in reaching a decision and discharging his or her duties. Canada's legal system is based on common law with civil law applying in the province of Quebec. Canadian corporations are formed as limited liability companies or unlimited liability companies.

1.2 Have there been any recent developments in the law, codes and rules of corporate governance?

Election of directors

Canada's corporate governance regime is constantly evolving. For public companies listed on the Toronto Stock Exchange, a requirement was implemented in December 2012 which requires all directors to be elected individually instead of by slate and for the corporation to disclose the voting results for each director individually. In June 2014, the Toronto Stock Exchange implemented a requirement for all listed issuers to maintain a majority voting policy. A majority voting policy stipulates that if a nominee director does not receive a majority of votes cast in favour of his or her election, then the nominee will immediately tender his or her resignation, regardless of the fact that he

**The authors gratefully acknowledge the assistance provided by their associate Mara Banack in the preparation of this chapter.*

or she was validly elected under the applicable corporate statute. Absent "exceptional circumstances" a board must accept the resignation. The Toronto Stock Exchange has indicated that a board of directors should determine for itself whether or not it is appropriate to consider a situation to be an "exceptional circumstance."

Advance notice byelaws

Another recent development in Canadian corporate governance is the implementation of advance notice byelaws or policies for nominee directors proposed by shareholders. An advance notice byelaw or policy is a tool used by corporations to prevent surprises at the annual meeting of shareholders. An advance notice byelaw or policy will impose a deadline by which a shareholder must submit a director's nomination to the corporation's management prior to the annual shareholders' meeting of the corporation. A number of stakeholder groups have supported advance notice byelaws. For example, Institutional Shareholder Services supports advance notice byelaws when the nomination period for shareholder nominees is no less than 30 days and no more than 65 days prior to the meeting date. While advance notice byelaws are common in the USA, they are a relatively new development in Canada. Over 600 Canadian public companies have adopted an advance notice byelaw.

A Canadian court recently provided guidance on the use of advance notice byelaws or policies in Canada in a case called *Orange Capital, LLC v Partners Real Estate Investment Trust*. Partners Real Estate Investment Trust (Partners) introduced an advance notice policy and announced the date for its annual meeting of unitholders. Pursuant to Partners' advance notice policy, unitholders were required to nominate a trustee not less than 30 days before the annual meeting. Orange Capital LLC (Orange) announced its nominee after the expiry of the deadline set out in Partners' advance notice policy. For unrelated reasons, the annual meeting of Partners' unitholders was postponed. Despite the postponement, Partners took the position that Orange's nomination was invalid. The Court found that due to the ambiguous language in Partners' policy, Orange's nomination was valid. The ambiguity arose due to the rescheduled meeting date. Partners' position was that the appropriate nomination period should be calculated based on the originally scheduled meeting date while Orange's view was that the actual rescheduled meeting date should be the trigger for calculating the delivery of a timely nomination. The Court found that Orange's interpretation of Partners' policy more accurately reflected the plain meaning of the advance notice policy. The Court concluded that an advance notice policy should be used by management as a shield from potential ambush and should not be used as a sword to limit shareholders' rights. In addition, the Court confirmed that ambiguity in a corporate byelaw should be resolved in favour of a shareholder.

Updates to proxy voting infrastructure

Canadian securities regulatory authorities have been reviewing proxy voting infrastructure since August 2013. Proxy voting is considered to be one of the most important avenues by which shareholders can affect the governance of a corporation. In January 2015, CSA Staff Notice 54-303 *Progress Report on Review of the Proxy Voting Infrastructure* was published. It identified key areas of focus by securities regulators including, modernising how meeting tabulators receive omnibus proxies, ensuring the accuracy and completeness of vote entitlement information in omnibus proxies, increasing consistency in how tabulators reconcile proxy votes to official vote entitlements and opening lines of communication between meeting tabulators and intermediaries about whether proxy votes are accepted. In time for the 2016 proxy season, the Canadian regulators have indicated that they will require industry participants to

introduce protocols for vote reconciliation that will increase accuracy and reliability of vote reconciliation practices and accountability of the various parties involved in the proxy voting infrastructure.

Changes to proxy solicitation practices

In an important recent decision, *Smoothwater Capital LP I v Equity Financial Holdings Inc*, the Ontario Superior Court of Justice determined that management was entitled to make public statements in response to dissident press releases without delivering a management proxy circular as long as the statements made do not constitute proxy solicitation. For more information, refer to paragraph 8.1 below.

Women on boards

As of December 2014, most Canadian jurisdictions require that listed issuers disclose the number and percentage of directors and senior officers who are women. In addition, issuers are expected to disclose any targets being implemented to increase the number of women in senior roles and to outline any policies introduced regarding the advancement of women.

Changes to Canada's early warning regime

Canadian securities regulators have been considering the appropriate threshold for disclosure of an ownership position by a shareholder in a public company. Currently a shareholder is not required to disclose its ownership position in a company until it acquires a 10% ownership interest. Canadian securities regulators have considered amendments that would reduce the threshold to 5% and determined recently that such amendments will not be introduced. It is expected that maintaining the status quo with respect to the early warning reporting threshold will maintain Canada's reputation as a "bidder friendly" jurisdiction. For further information, refer to paragraph 3.4 below.

The introduction of golden leashes

For the first time in Canada, an activist shareholder proposed a slate of independent directors and offered to pay its nominees a percentage of any profits earned on its position. These "golden leashes" raise serious corporate governance concerns as the nominee directors could be faced with a conflict between their personal gain and the corporation's best interest. For further information, refer to paragraph 4.5 below.

Amendments to money laundering legislation

Canada's *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* was amended to address a number of deficiencies identified by a task force reviewing the legislation. The amendments impose additional requirements on reporting entities (including but not limited to, securities dealers, financial institutions, life insurance companies, brokers, agents and legal counsel) to conduct ongoing monitoring of business relationships with clients and to keep a record of the information obtained. It also mandates that reporting entities should have policies and procedures in place to ascertain the identity of a client and where the risk is considered high, to engage enhanced measures to mitigate the risk.

1.3 Outline recent court cases and incidents involving corporate governance issues. Were there any significant corporate scandals or large unlawful corporate cases?

Deloitte & Touche LLP (Deloitte), the auditors of Livent Inc (Livent), formerly a live theatre production company, were found liable for damages of CAD85 million in a lawsuit filed on behalf of Livent's creditors and shareholders. In 2009, the co-founders of Livent were found guilty of fraud and forgery for artificially inflating Livent's profits and understating its costs to improve the company's financial position for every quarter between 1993 and 1998. Investors lost approximately CAD500 million as a result of the scheme. Both co-founders were sentenced to four- and five-year jail sentences respectively. The Court found that Deloitte did not meet the standard of care in the circumstances because they ignored signs of fraud, did not employ an appropriate level of professional scepticism and were negligent in their review of Livent's financial statements. Deloitte has appealed the decision. The case is being closely watched in Canada because it has the potential to be a precedent-setting decision regarding the potential liability for an auditor's failure to detect fraudulent accounting.

Another scandal that has received much attention involves Canadian engineering firm, SNC-Lavalin Group Inc (SNC-Lavalin). It is alleged that SNC-Lavalin made improper payments to secure construction contracts in a number of countries including Libya, Tunisia, Mexico, Switzerland, Algeria, Cambodia and Bangladesh. SNC-Lavalin's former CEO and a number of other former executives of the company have been arrested and charged with fraud in connection with other construction projects. It is also alleged that SNC-Lavalin was involved in corrupt political donations domestically. The company has already settled a complaint from the World Bank that bars one subsidiary of the company from bidding on any projects funded by the World Bank for at least ten years and one of SNC Lavalin's executives was convicted in Switzerland of arranging improper payments to obtain construction contracts in Libya. In February 2015, SNC Lavalin and two of its subsidiaries were charged with corruption and fraud charges for bribing Libyan officials. The company also faces potentially crippling bans from participating in public works contracts in Canada. While the full extent of SNC-Lavalin's alleged impropriety is still unknown, it highlights the need for increased enforcement of Canada's anti-bribery laws.

The Supreme Court of Canada's landmark decision in *BCE Inc v 1976 Debentureholders* continues to be an important case in Canadian corporate governance. The *BCE* decision states that the duty of a board of directors is owed to the corporation and not any particular constituency. While a board is not required to consider the interests of any particular stakeholder groups, boards may and, as a practical matter, should assess the reasonable expectations of various stakeholders including shareholders, employees, suppliers and creditors. The decision also provides that while a corporation is entitled to act in a manner that will maximise profit and shareholder value, a corporation is not entitled to treat any particular stakeholder unfairly. The decision is considered to be positive for Canadian boards of directors because it recognises the inherent difficulty of balancing the interests of various stakeholder groups while acknowledging the important role played by shareholders in approving proposed transactions. The decision affirms that Canadian courts will not intervene where directors have weighed the various competing interests and exercised sound business judgement.

1.4 Which law enforcement agency is in charge of enforcing corporate governance? May a criminal sanction be levied upon infringement of the corporate governance rules?

The enforcement of corporate governance falls within a number of different areas. Criminal laws are enforced

by local, provincial and federal police agencies. Securities laws are enforced by provincial securities regulators. Other governmental authorities may also impose sanctions or fines for infringement of environmental, labour and competition laws. Liability for directors and officers may arise under corporate statute. Corporate law regulators are empowered under corporate statutes to enforce breaches of corporate law. For example, Canadian corporate law statutes provide that any person who makes or assists in making a report, return, notice or other document required by the statute that contains an untrue statement or omits a material fact is guilty of an offence and liable for a fine or imprisonment. However, the statute also provides a due diligence defence that states that there is no liability for a misstatement or omission when the person exercised reasonable diligence. As a result, it is very rare for liability to arise under these statutes in Canada. It is much more common for private parties to enforce corporate law statutes among themselves by seeking judicial intervention to settle disputes; for example, see the discussion of the oppression remedy in paragraph 3.1.

2. SOURCES OF LAW

2.1 Which laws, codes or statutes govern company structures and organisations? Are there statutes like the Companies Act or other forms of law? Is there much relevant case law?

Corporations in Canada are governed by either federal or provincial corporate statutes, provincial securities laws, applicable stock exchange rules and common law. These sources of law are supplemented by recommendations and best practices from various industry groups, institutional shareholder groups and professional associations. Corporate statutes provide the general framework in which a corporation operates. Most Canadian corporations are formed by articles of incorporation which serve as the primary rules governing the corporation. The articles of incorporation set out the legal name of the corporation, the location of its registered office, any restrictions on the business of the corporation, the number of directors and rights and restrictions attaching to the corporation's shares. Most corporations will also enact byelaws that specify many of the mechanics associated with governing the corporation including the appointment of corporate officers, the authority of corporate officers and the procedure for meetings of directors.

Canadian common law provides further guidance on many corporate governance issues. For example, the common law has interpreted the duty and scope of directors' duties and affirmed the use of the business judgment rule by directors. The business judgment rule provides that a Canadian court will not interfere with a reasonable business decision made by a corporation's directors as long as the directors exercised reasonable care and diligence and acted honestly and in good faith when making the decision. Similarly, Canadian courts have clarified that directors of a corporation owe their duty to the corporation and not to any stakeholder group in particular.

Canadian public companies are also subject to regulation by provincial securities laws and regulations and stock exchange rules. For further discussion of regulation in the public company context, see paragraph 2.2 below.

2.2 Which laws, codes or statutes regulate capital markets in your jurisdiction?

Canadian capital markets are regulated by provincial securities regulators. Each province and territory of Canada has its own securities legislation. There are national rules that have been adopted to harmonise and streamline the regulatory system. The provincial system has faced significant criticism. However, there is no national securities regulator in Canada. In December 2011, the Supreme Court of Canada ruled that the federal government's proposal

to create a national securities regulator was unconstitutional. Following the Supreme Court of Canada's decision, six Canadian provinces entered into a memorandum of agreement that outlines the framework under which a cooperative capital markets regulatory system could operate. It requires all participating jurisdictions to enact uniform legislation that addresses all securities regulatory matters with accompanying federal legislation that will address systemic risk in national capital markets, data collection and criminal matters. This cooperative capital market regime is a major development in achieving national securities regulation in Canada. However, without full participation of all provinces, this regime will still have its shortcomings.

With respect to corporate governance, all public companies in Canada are subject to National Policy 58-201 *Corporate Governance Guidelines* (NP 58-201), which addresses issues relating to the composition, mandate and conduct of a corporation's board of directors, nomination of board members and compensation of officers. While NP 58-201 is called a guideline, corporations are required to comply or explain any non-compliance in the corporation's annual disclosure documents. Failure to disclose is considered a breach of securities law. National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101) specifies the ongoing disclosure requirements for public companies with respect to corporate governance. Most Canadian provinces have introduced changes to NI 58-101 which require public issuers to advise whether it has adopted director term limits, whether it has adopted a policy regarding the representation of women on its board of directors, how the board of directors or nominating committee is considering the representation of women in the director identification and selection process, how it considers the representation of women in executive positions, whether it has adopted targets regarding the representation of women on the board and the number of women on the board and in executive officer positions of the issuer and all major subsidiaries.

In addition to provincial regulators, the Canadian securities industry is regulated by two self-regulatory organisations: the Investment Industry Regulatory Organisation of Canada and the Mutual Fund Dealers Association of Canada. These two bodies regulate the standards of practice and conduct of its members in order to protect investors and the public interest.

Canada currently has five securities exchanges – the Toronto Stock Exchange (TSX), the TSX Venture Exchange (TSXV), the Montreal Exchange, the ICE Futures Canada and the Canadian National Stock Exchange. Recently, a new stock exchange, the Aequitas Neo Exchange (ANE), received regulatory approval to begin operations as of 1 March 2015. Previously, the TSX was the only stock exchange for senior issuers. The ANE is expected to open its trading platform in the first half of 2015.

Each of the exchanges imposes additional requirements on listed issuers. For example, the TSX requires corporations to seek shareholder approval for certain transactions. The TSXV also has its own policy manual for issuers. Refer to paragraph 3.1 below for further details on requirements imposed on issuers by the TSX.

2.3 Are there any public interest laws which apply to or influence corporate governance?

Corporations in Canada are required to comply with a variety of public interest laws that indirectly influence corporate governance. For example, the Canadian Charter of Rights and Freedoms, human rights legislation, environmental laws and anti-corruption laws are all applicable to corporations.

2.4 Have there been any recent developments in any of the above laws? What are the recent changes to the above laws or rules and the reasons for them?

Public interest legislation in Canada is well established and has not undergone any recent significant changes that would affect the governance of corporations in a material way.

3. SHAREHOLDERS AND THE SHAREHOLDERS' MEETING

3.1 How are shareholders' interests represented in the company? How are the shareholders assured exercise of their rights? What is the highest governing body within the company structure if it is not the shareholders' meeting?

Shareholders elect the directors who manage or supervise the management of the business and affairs of the corporation. Typically, the management of a public company will nominate director candidates for election by the shareholders with recommendations from the board of directors or a nominating committee. Under Canadian corporate statutes, certain fundamental changes require shareholder approval, including: changes to the corporation's constating documents, amalgamations, sale of all or substantially all of the corporation's assets and the continuance of the corporation into another jurisdiction. For public corporations, the rules of the stock exchange may require shareholder approval in additional circumstances. The TSX Company Manual states that securityholder approval may be required for transactions that materially affect the control of the corporation. For example, securityholder approval is required by the TSX in an acquisition transaction where the acquirer issues more than 25% of the number of its own issued and outstanding shares as consideration for an acquisition.

A shareholder may submit a proposal to raise a matter at a shareholders' meeting. In some circumstances, a corporation is required to include a proposal submitted with shareholder meeting materials circulated by management. Under Canadian corporate statutes, shareholders who hold at least 1% of the total number of voting shares or whose shares have a fair market value of CAD2,000 and have held the shares for at least six months are entitled to have a proposal presented to other shareholders at a corporation's annual meeting. The main advantage of this approach is that it is very cost efficient. Management is obliged to give notice of these proposals in its proxy solicitation materials and to include a brief statement of the shareholder in support of the proposal. Management does not have to include materials that are not submitted in a timely manner or do not constitute business that relates to other shareholders.

A shareholder holding 5% or more of the issued voting shares of a corporation is entitled to requisition a shareholders' meeting as long as the shareholder provides notice of the meeting to all directors and the registered office of the corporation indicating the business to be transacted at the meeting.

In Canada, there are many different avenues for a shareholder to pursue to protect his or her rights. A shareholder can undertake a derivative action, which involves the shareholder applying to a court to compel the corporation to take action against a director. Alternatively, a shareholder may rely on the oppression remedy. It is available to a complainant (as defined in corporate legislation) who can establish that the corporation or its affiliates have acted in a way that is oppressive or unfairly prejudicial to or unfairly disregards the interests of the complainant. The oppression remedy gives a court broad discretion to enforce fairness and rectify the complaint. A third option

available to a shareholder is to apply to a court to compel a director, officer or employee of a corporation to comply with corporate statutes, the corporation's constating documents or a shareholders' agreement.

3.2 How is the shareholders' meeting conducted? Who may chair the meeting? May attendance (not voting) at the meeting be restricted only to the shareholders? Are the shareholders allowed to be accompanied by legal or other counsel?

In Canada, regular shareholders' meetings must be held on an annual basis. Corporate statutes require a meeting of shareholders to be held not later than 15 months after the last preceding annual meeting of shareholders. Generally, shareholders' meetings are called by the directors of the corporation, but may be requisitioned by shareholders who meet minimum ownership thresholds. Canadian corporate statutes prescribe the amount of notice required to be provided to shareholders of an upcoming meeting. For public companies, these notice requirements may be more stringent because of applicable securities regulation.

The chairperson of an annual meeting of shareholders is commonly determined by the corporation's byelaws which may specify which officer of the corporation will act as the chairperson. Some corporate legislation specifies that if the corporation's byelaws do not specify who will chair the meeting, the president, or in his or her absence, a vice-president who is a director shall preside as chair. If there is no person who meets the criteria provided by applicable corporate legislation, the shareholders present are entitled to choose a person to act as chair. The chairperson of the meeting of shareholders is under a general duty to assist the meeting in achieving its objectives by preserving order, ensure that the proceedings are being conducted in an orderly manner and to determine any incidental matters that arise during the course of the meeting. The chairperson is required to act in good faith and to be impartial throughout the meeting.

The agenda of an annual meeting of shareholders must include the election of the board of directors, the appointment of auditors and a review of the corporation's financial statements. After these matters have been completed, directors or management may put forward issues for shareholder consideration or shareholders may raise other issues of concern to them.

Generally, in order to attend a shareholders' meeting one must have the right to vote at the meeting. In addition to shareholders, proxyholders, directors and auditors of the corporation are entitled to attend a meeting. Others may attend by invitation of the chairperson or with consent of the shareholders. Alternatively, the corporation's byelaws may specifically entitle a "stranger" to attend. Shareholders are not regularly permitted to attend with legal counsel; however, this requirement is easily circumvented by appointing legal counsel as a proxyholder.

In addition to annual meetings, a corporation may hold special meetings of shareholders. These meetings are usually called to address a specific issue that requires shareholder approval. For example, a special meeting of shareholders may be held to approve a fundamental change to the corporation or to approve a change of control transaction. Practically, special meetings are frequently held in conjunction with the annual meeting of shareholders. In order to call a special meeting of shareholders, notice must be provided that states the location and time of the meeting and provides shareholders with information about the specific topic that they will be asked to consider and vote on at the special meeting of shareholders.

3.3 How are minority shareholders' rights protected?

Minority shareholders are protected by the requirement for either a simple majority or two-thirds of shareholders voting at a shareholders' meeting to approve certain transactions which would constitute a fundamental change to the corporation under corporate and securities statutes and the rules of the TSX.

Additionally, in Ontario and Quebec, Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* will apply to protect the interests of minority shareholders by requiring minority approval and independent valuations in the context of certain business combinations and related party transactions and takeover bids made by insiders or issuers.

3.4 Is shareholder activism encouraged or discouraged? If not encouraged, how is it regulated?

In Canada, shareholder activism is on the rise and the increased participation of shareholders in the governance of the corporation is generally viewed as a positive. This trend can be attributed to a number of activist friendly attributes of the regulatory regime for Canadian corporations. For example, there are generally no staggered boards of directors in Canada and an entire board of directors can be removed by a simple majority vote of shareholders. Similarly, shareholders with a 5% ownership interest are entitled to requisition a shareholders' meeting. There are also fewer defences available to fend off potential takeover bids in Canada compared with the US system.

Recently, Canadian securities regulators have been considering the early warning regime and the appropriate threshold for requiring disclosure of an ownership position. Currently, a shareholder is not required to disclose its ownership position in a public company until it acquires a 10% ownership interest. In March 2013, the Canadian securities regulators proposed amendments which would bring this threshold down to 5% which is in line with the equivalent US requirements. Interestingly, after much discussion, in October 2014, the Canadian securities regulators confirmed that they would not proceed with the proposed amendment. In making that determination, the regulators cited the unique features of the Canadian market in comparison to the United States, the potential for hindering an investor's ability to take strategic positions by requiring disclosure at an early stage and the increased administrative costs associated with additional reporting and compliance. It is still expected that the regulators will publish final amendments to Canada's early warning regime which will expressly require that shareholders disclose any decrease of any ownership interest that is 2% or more and disclose when their ownership interest falls below the reporting threshold. These amendments are expected in the second quarter of 2015. It is expected that maintaining the status quo with respect to the early warning reporting threshold will maintain Canada's reputation as a "bidder friendly" jurisdiction.

Canadian securities regulators have been reviewing regulations regarding shareholder rights plans or "poison pills" since September 2013. In March 2015, Canadian securities regulators published proposed amendments to Canada's takeover bid regime. While these amendments do not specifically change the current approach to shareholder rights plans, they will likely have an impact on the usage of shareholder rights plans going forward. For further discussion of the proposed legislation, see paragraph 7.1.

A recent trend in Canada is the resurgence of "voting pills" which provide that a shareholder rights plan or poison pill will be activated by an agreement among shareholders to vote together even where shares are not being acquired. The rationale behind a voting pill is that it provides boards of directors and shareholders a tool to proactively address

concerns before an activist investor becomes involved. These voting pills are already used in other jurisdictions, like the United States.

Canada's securities regulator recently intervened in a proxy contest of an issuer, Tuckamore Capital Management (Tuckamore), where a shareholder argued that a voting pill was inhibiting its ability to solicit proxies from other shareholders in opposition to a proposed going private transaction. Access Holdings (Access) complained that if it merely entered into voting agreements with other shareholders without acquiring any additional shares, it could trigger the issuance of rights under Tuckamore's rights plan. Ultimately, at the urging of securities regulators, Tuckamore amended its shareholder rights' plan to expressly allow Access to enter into voting agreements with other shareholders.

3.5 How are professional shareholders (those minority shareholders who seek some extra benefit from companies by unduly and habitually influencing management by using their shareholding) treated by the law? Are they excluded from attending the shareholders' meeting? Are they criminally or otherwise publicly sanctioned?

In Canada, there is no legislation regulating professional shareholders. However, as shareholder activism continues to rise, this issue may garner more attention. As regulators consider the issue, it will be essential to balance the legitimate right of shareholders to actively participate in the governance of a corporation and the desire to prevent professional shareholders from employing abusive tactics that hinder the proper management of the corporation.

Empty voting continues to be an issue for corporations in Canada. Empty voting is the term used to describe a number of circumstances that, whether intentionally or not, decouple the economic interest in a share from the voting rights attached to it. Empty voting can occur in various ways, including when an investor sells shares between the record date and the meeting date so that he or she no longer has an economic interest in the outcome of the shareholder vote but retains the ability to affect the outcome of the meeting. The type of empty voting that triggers the most policy concerns arises when an investor employs hedging techniques that insulate against the economic risk of holding shares or that result in the investor having a large voting interest with a relatively small economic interest. Empty voting, especially empty voting that is intentionally employed to affect the outcome of a proxy battle, causes concern because of the misalignment created between voting rights and the investor's economic interest. A Canadian Court considered the issue of empty voting and while it expressed concern about the misalignment of economic interests of the hedge fund that had engaged in empty voting and other shareholders, it concluded that the practice does not violate any law and there was no legal basis for judicial intervention. Canadian securities regulators have attempted to address the issue by proposing requirements for security holders to aggregate holdings and disclose any use of derivatives or security lending arrangements that could lead to empty voting. However, these amendments are not currently in effect and it remains to be seen if the proposed amendments will effectively address the issue.

3.6 Are shareholders' benefits given to some of the shareholders by the company without resolution by the shareholders' meeting prohibited or regulated by the law or other rules?

The rights of shareholders are dictated by the type of shares held. The starting point in Canadian corporate law is that all holders of a class of shares shall be treated equally. The terms, conditions, rights, privileges and restrictions that attach to a corporation's shares are set out in the share terms which form part of the constating documents

of a corporation. Directors or officers of the corporation only have authority to vary the terms conditions, rights, privileges and restrictions outlined in the corporation's constating documents in limited circumstances. For example, the byelaws of a corporation can be amended by the board of directors and become effective pending shareholder approval. However, most other changes to a corporation's constating documents would be considered fundamental changes, and as a result, require shareholder approval under Canadian corporate law.

4. DIRECTORS AND BOARD OF DIRECTORS

4.1 What are the functions and responsibilities of the directors and the board of directors? Do you have a one- or two-tier board system? What are the outside directors called?

A corporation's board of directors is tasked with providing stewardship and oversight to the corporation's management team. Board members are not expected to devote their full time or attention to the daily business of the corporation. Daily responsibilities are typically delegated to the corporation's management but must still be supervised by the board of directors. Appointing and evaluating the performance of the corporation's management is considered an important function of the board of directors. Unlike in the United States, the role of chair of the board of directors and chief executive officer of the corporation are usually separated and held by different individuals in Canada.

While delegation of daily responsibilities to management is common, there are certain functions that a board is not permitted to delegate under the governing corporate statute. These functions include: issuing securities, purchasing or redeeming shares, declaring dividends, approving financial statements and certain disclosure documents, making changes to the corporation's byelaws and filling vacancies on the board of directors. Ultimately, the board must always retain ultimate control over the corporation and be able to intervene in any material issue facing the corporation.

Canada has a one-tier board system. Under corporate law applicable in most Canadian provinces, in order to act as a director in Canada, a director must be a natural person, over the age of 18, of sound mind and not bankrupt. Some Canadian corporate legislation imposes a requirement that the board of directors include at least 25% resident Canadians. Several Canadian jurisdictions do not impose a residency requirement. Therefore, this requirement frequently becomes an important consideration when determining where to incorporate in Canada.

Outside directors are known as outside directors, independent directors or non-executive directors. Generally, Canadian corporate statutes require public corporations to have at least two directors who are "outside", meaning that they are not employees, partners, family members of executive officers or in receipt of remuneration from the company in excess of specified amounts from the corporation or its affiliates. NP 58-201 recommends that a majority of directors be independent. However, it has become common in Canada for boards to have two-thirds independent directors. For further discussion of independent directors, see paragraph 4.4 below.

NP 58-201 provides additional guidelines that impact the functions and responsibilities of a board of directors of a public company. For example, NP 58-201 provides that a board should adopt a written mandate that acknowledges the directors' responsibilities, implements internal controls and adopts processes for receiving feedback from stakeholders. While audit committees are required by securities law, NP 58-201 also recommends

that directors form other committees including a nominating committee, compensation committee and corporate governance committee.

In addition, a board of directors may determine that it is appropriate for an independent special committee to be formed in specific circumstances. Special committees are commonly formed to consider potential change of control transactions, corporate crises and insolvency proceedings. A special committee is required by law in limited circumstances, for example, an insider bid. In that context, a bidder will be required to obtain a formal valuation which will be supervised by the special committee. In a related party transaction, it is considered best practice to form a special committee of independent directors.

4.2 What are the rules that may give rise to civil and criminal liability of the director(s)? How are those liabilities sought?

Directors must be aware of potential exposure to personal liability in the civil and criminal context. As discussed above, directors owe the corporation a duty of loyalty and duty of care and can be held personally liable for breaches of these duties if it can be proven that the directors acted unreasonably, dishonestly or adversely to the best interests of the corporation. A breach of these duties is usually enforced in the civil context by a derivative action brought by the corporation's shareholders. For further discussion of derivative actions, see paragraph 11.1 below. Directors may also face civil liability if they are found to have acted negligently in the performance of their duties.

In 2014, the Ontario Court of Appeal in *Unique Broadband Systems, Inc*, found that a director and chief executive officer breached his fiduciary duty as a director of the corporation by approving excessive and unreasonable compensation to senior management. The Court found that the director could not rely on the business judgment rule because the director had not acted honestly and in the best interest of the corporation and was, therefore, not entitled to indemnification. The decision is instructive because it highlights the need for directors to seek expert advice to ensure the reasonableness of a decision. In addition, the decision confirms that the disclosure of a conflict of interest does not relieve a director from his or her obligation to act honestly and in the best interest of the corporation.

In the criminal context, directors can be found guilty of theft or fraud under Canada's Criminal Code. For an example, see discussion of Livent Inc's founders above in paragraph 1.3.

Statutorily, directors may be held liable for unpaid employee wages and benefits and, in some jurisdictions, accrued vacation pay and other benefits. Directors may also be liable for funds that are not remitted to the appropriate governmental authority for income taxes, pensions, unemployment insurance, registered retired savings plans and withholding taxes. Other potential sources of personal liability for directors arise from non-compliance with health and safety requirements, environmental laws, competition laws and anti-spam legislation.

Directors of public companies must also be aware of potential liability (including fines or imprisonment) that arises from breaches of securities law. Directors may face liability in connection with continuous disclosure documents, takeover bid circulars and prospectuses if these documents contain fraudulent information or material misrepresentations. Directors may face additional penalties related to insider trading or other offences under securities law.

For a director, the best defence against the risk of personal liability is ensuring that the corporation has appropriate corporate governance policies and procedures in place and he or she is aware of a director's obligations and is diligent in ensuring that they are discharged and maintained.

4.3 Does the board of directors have a committee system, for example nomination committee, compensation committee, audit committee? If not required, is it common practice for companies? How does it function?

Public companies are required to have an audit committee. The audit committee must consist of a minimum of three financially literate independent directors. Other committees that are common for Canadian public companies include: governance committees, compensation committees, health and safety committees, pension committees and nominating committees. While there is no requirement at law to have these committees, it is generally recommended by the Canadian Securities Administrators and considered a best practice in corporate governance. If a public company forms a nominating or compensation committee, NP 58-201 recommends that all members of the committee be independent. For corporate governance committees, NP 58-201 recommends that it be formed by a majority of independent directors and all other members be non- management directors.

The board of directors of private companies are not required to have any committees; however, committees are a practical method of dividing responsibilities and expertise among directors and, as a result, are commonly formed.

4.4 Is it a legal requirement to have an independent director or a third-party director? If so, how are they appointed? Is it required for listed companies?

Generally, corporate statutes impose a requirement on public companies to have at least two independent directors. Independent means that the director is not an employee of the corporation and the director has no material relationship with the corporation. The Canadian Securities Administrators recommend that a board of directors should be composed of a majority of independent directors. Under the federal corporate statute, a corporation that offers securities to the public must have at least three directors and at least two of those directors must be independent.

4.5 How is the compensation for directors or officers determined? Can it be contested by the shareholders or the regulatory authorities? What are the common rules or practices for the compensation of officers?

The compensation of directors is determined by the board of directors. There is no requirement to obtain shareholder approval for the remuneration of directors. However, for public companies, the remuneration of directors will be subject to disclosure requirements. Generally, directors' compensation in Canada is relatively modest.

Recently, director compensation has garnered increased attention in Canada. Agrium Inc (Agrium), a Canadian corporation, faced criticism by Jana Partners LLC (Jana), its largest shareholder. Jana proposed its own slate of independent directors to serve on the board of directors of Agrium. Controversially, and for the first time in Canada, Jana offered to pay its nominees a percentage of any profits earned on its stake in Agrium over a three-year period. These payments are known as golden leashes and they raise serious corporate governance issues because a payment to a nominee director can create a conflict for directors between their own personal gain and the best interests of the corporation. Ultimately, Jana's nominees were not elected. However, the use of golden leashes will undoubtedly be an issue in Canadian corporate governance going forward.

The compensation of officers is also determined by the board. The CEO of the corporation will frequently provide a recommendation for remuneration of other officers. Many Canadian corporations have adopted non-binding

shareholder "say on pay" votes which allow shareholders to participate in the process of determining officers' compensation. See paragraph 9.1 below for a full description of officers' remuneration.

4.6 How will the board handle a corporate crisis like an internal criminal case, violence, social media exposure or dawn raid by the authorities?

When a corporate crisis arises, the most common response of a prudent board of directors is to form a special committee of independent directors to handle it. The mandate of the special committee should be clear and tailored to address the specific crisis in order to ensure that the special committee has the requisite authority to address the issue. The formation of a special committee generally is viewed favourably by courts and tribunals as it supports the presumption that the corporation's directors are discharging their obligations by ensuring that the corporation's interests are being protected. Depending on the nature of the crisis, it may be prudent to grant the special committee authority to obtain its own legal counsel and financial advisors or other experts. For directors serving on the special committee, it may also be prudent to obtain an additional indemnity from the corporation and additional directors' insurance because frequently the decisions of a special committee are scrutinised by the public and reviewed by courts or regulatory bodies.

5. BOARD OF AUDITORS, AUDIT COMMITTEE, ACCOUNTING AUDITORS

5.1 How is the internal accounting and legal audit structured and conducted? Is an outside accounting audit required and, if so, how is it structured? Are there requirements to change the auditor every five years?

For public companies, the corporation is required to appoint an auditor. The shareholders of a private corporation are entitled to dispense with the audit requirement. In order to be appointed as auditor, the auditor must be registered with the applicable regulatory bodies. Auditors are appointed by the shareholders for annual terms which expire at the next annual meeting of shareholders.

It is a statutory requirement for a public corporation to appoint an audit committee. The audit committee is comprised of at least three independent directors of the corporation who possess special duties to review the corporation's financial statements and act as a liaison between the board of directors and the corporation's auditors.

There is no requirement in Canada to change auditors after a specific period of time. This issue was recently considered as part of an industry consultation regarding audit standards. The Enhancing Audit Quality (EAQ) steering group recommended that it is more appropriate to require audit committees to review their audit firm every five years and leave it to the discretion of the committee to either keep or replace their current auditors. The EAQ steering group also recommended public disclosure of the results of the audit committee's review.

5.2 Are there supervisory auditors? What is the function of the supervisory auditors' board?

Not applicable.

6. MARKET DISCLOSURE/TRANSPARENCY TO THE SHAREHOLDERS AND THE PUBLIC

6.1 What are the disclosure requirements for companies in your jurisdiction under company law, capital markets law or any other rules?

Private corporations in Canada have limited disclosure obligations consisting of delivery to its shareholders of annual financial statements and a notice of an annual shareholders' meeting.

Public companies in Canada have ongoing disclosure requirements for shareholders and the public under Canadian securities law. Public companies are required to file with Canadian securities regulatory authorities: financial statements (annually and quarterly) with management's discussion and analysis, an annual information form outlining the corporation's business and information circulars for shareholders' meetings.

In addition to the regular disclosure requirements outlined above, public companies in Canada are required to disclose any material changes in the business of the corporation that would reasonably be expected to have a significant effect on the market price or value of any of the corporation's securities by filing a material change report and press release. For public companies listed on the TSX, there is an additional requirement to promptly disclose by press release any fact that would be reasonably expected to have a significant effect on the market price or value of any of the corporation's securities.

In addition to the corporation's disclosure obligations, directors and some officers are required to file insider reports outlining their holdings of the corporation's securities including any compensation based holdings or indirect holdings of the corporation's securities or related financial instrument.

6.2 What is the liability or responsibility of the board in relation to the company's disclosure requirements?

If a public company does not comply with its ongoing and timely disclosure obligations outlined in paragraph 6.1 above, the corporation may be subject to enforcement proceedings by the applicable securities regulator. In addition, directors and officers may be held liable for damages to investors if the corporation makes misleading or untimely disclosure. Class-action proceedings in Canada against public companies, directors and officers are becoming much more common.

7. M&A AND CORPORATE GOVERNANCE

7.1 Upon an M&A offer, how are the transparency and fairness rules of the company provided under the company and stock market laws and rules?

In Canada, there are several ways to acquire a target company including plans of arrangement, amalgamations and takeover bids. We will focus here on takeover bids. Canadian takeover bid rules are engaged when the securities subject to a potential bid together with the current holdings of an acquirer (together with any joint actors), constitute 20% or more of the outstanding voting or equity securities of a particular class.

If the takeover bid rules apply, the acquirer must offer to all shareholders of the target corporation to acquire shares on the same terms, unless an exception is available to and relied on by, the acquirer. The policy rationale for Canada's

takeover bid rules is to ensure that the interests of the target company's shareholders are protected while ensuring that any takeover bid is conducted in an open and transparent manner. Takeover bid legislation is intended to enhance a shareholder's ability to make a fully informed decision based on the merits of a potential offer and ensure the equal treatment of all shareholders. Canadian takeover bid rules have been criticised for favouring bidders and, in some cases, conflicting with the fiduciary duties of the board of directors by limiting the defensive measures it may employ in an unsolicited bid.

Under Canadian securities law, a takeover bid can be commenced by either publishing an advertisement or, more commonly, by mailing an offer to purchase to the target's shareholders. In the offer to purchase, the acquirer is required to disclose relevant background information about the negotiations of the offer, future plans for the target and any other material information for shareholders. All shareholders of a particular class of shares must be offered identical consideration. The directors of the target will then deliver a director's circular either recommending that shareholders accept the offer or request that shareholders take no action while the bid is considered by the board of the target corporation. The director's circular must be mailed within 15 days of the acquirer's commencement of the bid and it must disclose any information that would reasonably be expected to affect the shareholder's decision to accept or reject the offer. Currently, a bid must remain open for acceptance for a minimum of 35 days but proposed amendments discussed below may extend this minimum period to 120 days, except in certain circumstances.

National Policy 62-202 *Defensive Tactics* outlines the securities regulators views on defensive tactics taken by a potential target's board of directors. A shareholder rights plan (or poison pill) is a defensive tactic that is triggered when a person acquires more than a specified percentage of outstanding shares (typically 20%). When triggered, the shareholder rights plan allows existing shareholders to acquire additional shares of the target at a deep discount to their market price, which effectively prevents a bidder from acquiring a control position in a target corporation unless the target board agrees to waive the shareholder rights plan or the Canadian securities regulator terminates it. Historically, the position of Canadian securities regulators has been that a shareholder rights plan should be used as a tool to allow a target's board of directors time to seek out alternatives to a hostile bid, including a white knight or other alternative. However, these plans are generally terminated by securities regulators within 45 to 70 days of the commencement of a bid based on the rationale that shareholders should be given the opportunity to decide if they wish to tender to a hostile bid. The defensive tactics available under Canadian securities law are relatively limited compared with US laws.

In March 2013, the Canadian securities regulators published for comment a new regulatory framework involving the treatment of shareholder rights plans in Canada. The Quebec securities regulator, the *Autorité des Marchés Financiers* in Quebec (AMF), published its own consultation paper proposing an alternative policy that would reduce securities regulators' intervention in defensive tactics by increasing reliance on a target's board of directors. After a comment period, with input from many stakeholders, the regulators elected not to proceed with either proposal.

Instead, securities regulators announced in September 2014 their intention to introduce amendments to address the significant issues identified in both previous proposals. In March 2015, the Canadian securities regulators published proposed amendments to Canada's takeover bid regime. The stated goal of the new amendments is to rebalance the current dynamics between hostile bidders and target boards and to harmonise the approach across all Canadian jurisdictions. The new proposal would require that all takeover bids (i) include a minimum tender condition requiring

that more than 50% of all of the outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered and not withdrawn before the bidder can take up any securities under the bid, (ii) that the bid must be extended for 10 additional days after the bidder achieves the minimum tender condition and all other conditions have been satisfied or waived and announces its intention to take-up and pay for securities deposited under the bid and (iii) the bid must remain open for at least 120 days (except issuer bids, which must remain open for not less than 35 days), unless (a) the target board waives the requirement and issues a press release announcing a shorter deposit period of no less than 35 days provided that where there are multiple bids the waiver is granted in a non-discriminatory manner or (b) the target board issues a press release that it has agreed to enter into a specified alternative transaction with another party (for example, a plan of arrangement or other similar change of control transaction to be approved by shareholders of the issuer), in which case all then outstanding takeover bids, and any subsequent takeover bids commenced before completion or abandonment of the alternative transaction and expiry of any takeover bid made prior to the announcement of the alternative transaction, must remain open for an initial deposit period of at least 35 days from the date of the bid. While these proposed amendments indicate where the Canadian regulatory regime is moving, they remain open for comment until 30 June 2015, and it remains to be seen when these changes will take effect, if ever.

8. PROXY FIGHTING

8.1 Is proxy fighting customarily conducted for control of the company management or anything else? How is it regulated under the company law or market regulations?

Shareholder activism is on the rise in Canada. In the last five years, proxy contests have become increasingly more common and dissidents have been successful in more than two-thirds of the proxy contests. Proxy contests in Canada have affected issuers of all sizes in a wide variety of industries.

Despite the success of many activists in proxy contests, Canadian courts are still willing to intervene to ensure that proxy contests are conducted fairly. In *Hastman v St Elias Mines Ltd*, the British Columbia Supreme Court upheld the decision of a chair presiding over an annual general meeting to disqualify certain nominees to the company's board of directors nominated by activist shareholders because the dissident proxy materials contained material misrepresentations. Management of the company contacted the activist shareholders and advised of the errors in the dissident proxy materials. Despite warnings from management, no revisions were made to them. Ultimately, the activist shareholders brought an unsuccessful oppression remedy. This case illustrates the importance that Canadian courts place on accurate disclosure in proxy materials.

The methods of proxy solicitation have also been receiving increased attention in recent years. For example, in a case in British Columbia, *International Energy and Mineral Resources Invest (Hong Kong) Company Ltd v Mosquito Consolidated Gold Mines Ltd*, the British Columbia Supreme Court found that management's use of a telephone-based proxy system for a contested directors election was oppressive and unfairly prejudicial to the dissident shareholders because it was not a reliable method for identifying the shareholder giving instructions and ensuring that the shareholder's vote was private and fully informed. In an important recent decision, *Smoothwater Capital LP I v Equity Financial Holdings Inc,* the Ontario Superior Court of Justice determined that management was entitled to make public statements in response to dissident press releases without delivering a management proxy circular. In this case, management issued a press release defending the prior decisions of the board and criticising the board

nominees of the dissidents. The press release did not expressly solicit proxies but it did indicate that a proxy circular would be filed. Under Canadian proxy solicitation rules, dissidents are entitled to make a public broadcast or solicit proxies from 15 shareholders or less without delivering a proxy circular. This exception is only available to dissidents which often puts issuers at a significant disadvantage as any response prior to filing a management proxy circular may be considered an improper solicitation of proxies. Now, in light of the recent decision in *Smoothwater,* the Court has confirmed that management is entitled to respond to public criticism from a dissident shareholder without delivering its proxy circular as long as the statements made do not constitute proxy solicitation.

The increased use of proxy advisory firms by mainly institutional investors has also raised corporate governance concerns related to potential conflicts of interest, lack of transparency and incomplete disclosure. In April 2014, the Canadian securities regulators proposed National Policy 25-201 *Guidance for Proxy Advisory Firms*. The recommendations contained in the policy are designed to promote transparency and foster public awareness of the role of proxy advisory firms. The policy focuses on (i) identification, disclosure and mitigation of conflicts of interest, (ii) greater transparency in the methods used in developing vote recommendations, (iii) publication of proxy voting guidelines and (iv) greater communication of information with clients, market participants, the media and the public. The public comment period on the proposed policy closed in June 2014. At the time of publication of this chapter, the final policy had not been published.

In an attempt to modernise the proxy solicitation process, Canadian securities regulators amended National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer* to modernise the method for delivery of proxy materials. Canadian public corporations are now permitted to post proxy materials on the corporation's website (as opposed to sending it by regular mail). These "notice and access" amendments became available to public corporations holding shareholders' meetings after 1 March 2013.

9. OFFICERS' REMUNERATION RULES

9.1 How is remuneration of officers determined? By whom? Is there a role for the shareholders' meeting? Is there any mechanism for an independent body to review and evaluate them?

The board of directors is responsible for determining the remuneration of the corporation's officers. However, in the last five years, a majority of large Canadian corporations have adopted a policy whereby shareholders are entitled to a non-binding "say on pay" vote. Shareholder participation in executive compensation decisions continues to be controversial in Canada.

Those in favour of say on pay voting argue that it is a means of increasing dialogue and engagement with shareholders. Many consider it to be a best practice that should be voluntarily adopted as part of a corporation's governance regime. Those opposed to say on pay voting argue that it is inappropriate for shareholders to usurp the responsibilities of the board of directors. Further, for those corporations that have already adopted say on pay voting in Canada, shareholders have supported the board of director's recommendation in almost all cases and so many argue that these votes are largely rubber stamps and are not effective.

In 2013, Barrick Gold Corp's (Barrick) shareholders voted against its executive compensation plan at the corporation's annual meeting by an overwhelming majority. In 2014, after Barrick revised its policies to better align its executive compensation with overall shareholder returns, its executive compensation plan was overwhelmingly approved. This

change from 2013 to 2014 demonstrates that while shareholder say on pay votes are non-binding, they still provide a powerful incentive for companies to consider shareholders' views in determining executive compensation.

9.2 Is the mechanism of officers' remuneration publicly debated?

The mechanism for determining the remuneration of a corporation's officers is publicly debated and frequently discussed in the Canadian press. Canadian public corporations are required to disclose their executives' compensation as a part of their continuous disclosure obligations. Specifically, public corporations must disclose all compensation paid to their executive officers from any source. A corporation is also required to disclose the objectives and rationale of its compensation strategy and the methodology used for determining compensation.

10. DIRECTORS' LIABILITIES, LIABILITY INSURANCE, INDEMNIFICATION

10.1 What are the directors' responsibilities and liabilities under the law? Can those liabilities be covered by insurance? Can it be indemnified by the company or other related parties?

As discussed above in paragraph 4.2, directors are at risk for personal liability from a number of sources. Therefore, it is common for corporations to obtain insurance against personal liability which may be incurred by current or former directors. Frequently, the corporation will pay the premium on these insurance policies.

Under corporate statutes, a corporation may indemnify its current and past directors for most liabilities for which they may be responsible by virtue of acting as a director of the corporation. The indemnification is usually qualified by the condition that the director acted in good faith with a view to the best interest of the corporation. A corporation cannot indemnify a director for a breach of his or her fiduciary duty or criminal or administrative penalties unless the director reasonably believed that the conduct was lawful. Corporations indemnify directors for litigation costs related to actions in which the director acted in good faith in accordance with his or her duties.

11. SHAREHOLDERS' DERIVATIVE SUITS

11.1 Is a shareholder's derivative suit provided for by law in your jurisdiction? How is it enforced by the shareholders?

Canadian corporate law statutes allow certain stakeholders to bring a derivative action on behalf of the corporation or its affiliates to enforce the corporation's rights when the corporation does not take action on its own behalf. Shareholders, directors of the corporation, former shareholders (in specific circumstances) or any other person whom a court determines is a "proper person" is entitled to bring a derivative action. These actions are viewed as a mechanism for protecting the corporation and ensuring corporate accountability.

In order to commence a derivative action, a complainant must seek leave of a court and provide notice of the action to the corporation's directors not less than 14 days prior to commencing the action. If the court is satisfied that the complainant is acting in good faith and that the action appears to be in the best interest of the corporation, leave will be granted.

While derivative actions are available, in Canada it is more common to bring an action under the oppression remedy. The oppression remedy is framed broadly and, unlike derivative actions, there is no requirement to obtain leave

of the court before commencing an oppression claim. Further, the oppression remedy is a broad equitable remedy that affords the court the power not only to enforce legal rights but also to determine a fair outcome for the parties involved.

Interestingly, there have been situations where Canadian courts have found it appropriate to bring both a derivative action and an oppression remedy when the corporation and a particular shareholder have been directly harmed.

11.2 Have there been any recent relevant court cases on the subject?

In recent examples of derivative actions, Canadian courts have reaffirmed the principles outlined above and have allowed actions to proceed as long as the complainant has standing to bring the action and is acting in the best interest of the corporation.

In *Briere Sound Ltd v Briere*, the British Columbia Supreme Court determined that a creditor of the corporation was a proper person to bring a derivative action pursuant to the province's corporate legislation. This ruling is considered to be the first in Canada to extend the definition of proper person to include creditors. In making the decision, the Court specifically noted that a creditor will only be considered to be a proper person in specific circumstances. In *Briere*, the creditor was a former director of the corporation, the corporation was insolvent, the creditor was a major creditor and the creditor alleged that the creditor's interests were directly and negatively affected by the actions of the corporation. While this decision likely does broaden the scope of the definition of proper person the ability to bring a successful derivative action is still fact specific.

12. SOCIAL INTEREST IN CORPORATE BEHAVIOUR

12.1 How is a company in your country expected to deal with the following issues: corporate social responsibility; gender, racial and social diversification; environmental issues; ecology and corruption?

A public corporation in Canada must annually report to its shareholders on social and environmental policies that have been implemented that are fundamental to operations. A large number of both public and private Canadian corporations have adopted codes of ethics, conduct and best practices for their employees to achieve greater diversity and equality within corporations.

Recently, there has been a renewed focus on achieving gender diversity in corporate Canada, and Canadian securities regulators have mandated that senior listed issuers disclose the number of women on their board of directors and in senior management positions as well as the policies and procedures implemented to ensure that women are considered in the nomination process for vacant positions.

Canadian anti-corruption laws have recently been receiving increased attention by corporations and the Canadian media. Anti-corruption legislation in Canada falls under the Criminal Code. For further discussion, refer to section 1.2 above.

13. REGULATORY FRAMEWORKS FOR PROFESSIONAL INVESTORS

13.1 How are professional investors (like pension funds or investment funds) required or encouraged to exercise their power for good corporate governance of the company? Are they required to comply with rules like the Stewardship code?

The UK Stewardship Code sets out best practices for effective corporate governance by institutional investors. It employs a "comply or explain" model. Canadian institutional investors are not required to comply with the UK Stewardship Code. However, many institutional investors in Canada have chosen to implement policies or procedures that share the same values as the Stewardship Code.

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