Corporate Governance

Jurisdictional Comparisons **First Edition 2013**

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with a Foreword by
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Preface

Akira Kawamura **Anderson Mori & Tomotsune**

Global corporate governance

Good corporate governance is a necessary precondition for corporate culture to flourish. It ensures that companies comply with the law and the ethical rules of societies, and therefore be 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 marketplace. Unless they can prove themselves to be 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 the 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 prevailing in their own home jurisdiction. Therefore, the globally recognised rules can be considered to be an important business infrastructure of the recipient countries.

Another trend is that not only companies but also investors are increasingly becoming more global. Hence, the corporate governance rules must also be of a global standard. They influence each other and become 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 the global rule making. We may say that global corporate governance is emerging and is well accepted in many jurisdictions around the world.

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

Global financial crisis

Corporate governance became a critical agenda item for regulators and lawmakers worldwide in the years of 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 the many financial institutions, banks and investment banks in major jurisdictions in the USA, 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 and 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 that failed entity. It was observed that the peoples and their governments were not persuaded to help the collapsed entities unless they were able to prove 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.

Enron and the Sarbanes-Oxley Act

As early as 2002, the so-called 'Sarbanes-Oxley Act' (SOX Law or Act) was introduced in the USA to react 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 was not introduced by ways of the Act, into the management of corporate boards as well as into the accounting and audit systems and into the professional services rendered by accountants and lawyers.

The Round Table Discussion on the rule making to enforce the Act was held at the historical building of the United States Security Exchange Commission in Washington D.C. 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 are now introduced and enforced in most of the major jurisdictions including Japan, Germany and so on.

Common issues

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 to the independent committees may have to be introduced in many more jurisdictions.

Executive compensation is another hot issue. It is a problem of so-called 'say on pay'. A large number of litigations have been instituted in many jurisdictions, especially in the USA. 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.

General Editor's thanks

I am very much honoured to undertake the general editorship of this new book on present-day global corporate governance. This should be a unique and excellent source of legal information on this topic. The authors, who have kindly agreed to contribute their valuable time to making this book, are literally the best and most prominent lawyers on the topic in each of the jurisdictions and are very well known as such throughout the world.

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

The most important point I wish to note about this publication is the Foreword given by Marty Lipton of Wachtell, Lipton, Rosen & Katz. He is the legendary M&A lawyer of our time and a prominent advisor to the boards of major US and global entities. He kindly agreed to contribute to this book in his inspiring way. I thank him very much.

Akira Kawamura, Anderson Mori & Tomotsune
Immediate Past President of International Bar Association

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 buy-backs, 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, 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.

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Canada

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

1. GENERAL PRINCIPLES

1.1 What are the general principles of corporate governance in your jurisdiction? What are the main objectives of corporate governance principles in your jurisdiction? State also whether your legal system is based on common law or civil law.

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 contemplates 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 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 new 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. Corporations are also required to disclose if the corporation has a majority voting policy for its directors. A majority voting policy stipulates that if a nominee director does not receive a majority of votes in favour of his or her election, then the nominee will resign as director, regardless of the fact that he or she was validly elected under the applicable corporate statute. Recently, the Ontario Securities Commission, the largest securities regulator in Canada, issued a statement supporting the Toronto Stock Exchange's plan to introduce regulations to address majority voting. Lastly, the amendments impose a requirement that elections be held on an annual basis. This requirement prohibits 'staggered' boards which are still permissible under Canadian corporate statutes.

Notice and access

Recently, 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.

Advance notice by-laws

Another recent development in Canadian corporate governance is the implementation of advance notice by-laws for nominee directors proposed by shareholders. An advance notice by-law is a tool used by corporations to prevent surprises at the annual meeting of shareholders. An advance notice by-law 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 by-laws. For example, Institutional Shareholder Services supports advance notice by-laws 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 by-laws are common in the USA, they are a new development in Canada.

Emerging market issuers

Recently, Canadian corporations with operations in emerging markets have faced increased scrutiny by Canadian regulators. In late 2012, the Ontario Securities Commission published OSC Staff Notice 51-720 *Issuer Guide for Companies Operating in Emerging Markets*. Shortly thereafter, the Toronto Stock Exchange and TSX Venture Exchange published their own consultation papers on the subject. These publications reinforce the existing continuous disclosure obligations for Canadian companies operating in emerging markets and highlight potential risks associated with operating in an emerging market including: corporate governance practices, financial reporting and auditing issues, corporate structures and issues relating to risk management and internal controls.

The OSC Staff Notice recommends that appropriate modifications be made to a corporation's governance when it operates in an emerging market. For example, when the language and culture of the market in which a company conducts its operations is significantly different than Canada, it is recommended that the corporation have a director with knowledge of the culture and business environment. Similarly, corporations operating in an emerging market using complex or unusual structures (for example, structures involving many subsidiaries or special purpose entities) should ensure that internal controls are appropriate. Further, the impact of operating in an emerging market should be appropriately disclosed in a corporation's continuous disclosure documents.

Say on pay

A recent trend in Canadian corporate governance is the introduction of non-binding shareholder votes on executive compensation. These 'say on pay' votes are receiving a lot of attention in Canadian media as well as the business community. For further discussion of this issue, refer to paragraph 9.1.

Empty voting

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 recently 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.

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

Currently, the auditors of Livent Inc. (Livent), formerly a live theatre production company, are the subject of a C$450 million 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 C$500 million as a result of the scheme. Both co-founders were sentenced to four- and five-year jail sentences respectively. The current allegation is that the auditors ignored signs of fraud and were negligent in their review of Livent's financial statements. 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 also 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 10 years. The company also faces potentially crippling bans from participating in public works contracts in the province of Quebec. 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 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 by-laws 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 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. As a result, while there are still some efforts to create a national securities regulator, in the near term, it is likely that the status quo will continue.

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* specifies the ongoing disclosure requirements for public companies with respect to corporate governance.

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 also has five exchanges – the Toronto Stock Exchange (TSX), the Montreal Exchange, the TSX Venture Exchange (TSXV), the ICE Futures Canada and the Canadian National Stock Exchange. The TSX is the only stock exchange for senior issuers. The exchanges impose 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.

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 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 such changes?

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 per cent 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 materials circulated by management. Under Canadian corporate statutes, shareholders who hold at least 1 per cent of the total number of voting shares or whose shares have a fair market value of $2,000 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 in support of the proposal if it is supplied by the shareholder. 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 per cent 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 by-laws which may specify which officer of the corporation will act as the chairperson. Some corporate legislation specifies that if the corporation's by-laws 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 by-laws 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 per cent 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.

A recent development in securities law that will impact the strategy shareholder activists undertake involves changes to the early-warning regime. Currently, a shareholder is not required to disclose its ownership position in a public company until they acquire a 10 per cent ownership interest. The proposed amendments would bring this threshold down to 5 per cent which is in line with the equivalent US requirements. The proposed amendments are intended to provide greater transparency about significant holdings of a corporation's securities. These changes are not currently in effect but they have been generally viewed as positive by securities law practitioners.

Canadian securities regulators have also recently published new proposals regarding the regulation of shareholder rights plans or 'poison pills' under proposed National Instrument 62-105 *Security Holder Rights Plans*. These changes, if implemented, will change the tactics employed by parties involved in takeover bids and as a result, will likely impact shareholder activism. For further discussion of the proposed legislation, see paragraph 7.1.

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. As discussed above in paragraph 1.2, empty voting typically occurs when a shareholder's economic interest is not aligned with his or her voting rights. While a Canadian court determined that it could not intervene to prevent empty voting, recently, 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 by-laws 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 USA, 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 by-laws 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 per cent 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 a 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 care and loyalty 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 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, eg, 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.

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 the crisis. 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 each 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 Do you have 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 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: 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 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 per cent 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. A bid must remain open for acceptance for a minimum of 35 days.

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 per cent). 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 45–70 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.

Recently, the Canadian securities regulators published for comment a new regulatory framework involving the treatment of shareholder rights plans in Canada. As discussed above, 'poison pills' are currently permitted for up to 70 days to provide the directors of a target time to respond to a hostile bid. Under the new proposed framework, a shareholder rights plan becomes effective when it is adopted by the board of directors of the target, but it must be approved by a majority of shareholders within 90 days of its implementation. If shareholder approval is not obtained, the shareholder rights plan will automatically be removed after 90 days. Under this proposal, the shareholder rights plan must be approved annually by shareholders and can be terminated at any time by a majority vote of shareholders (excluding the shares of a bidder and any joint actors in a formal takeover bid). The proposed amendments would align Canada's regime more closely with the rules in the USA. The comment period for the proposed amendments was still open at the time of publication of this chapter.

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. The AMF proposal would limit securities regulatory intervention to situations where there is an abuse of shareholders' rights or the efficiency of capital markets. The reasonableness of a target board's recommendation would be reviewed by considering: the use of special committees of independent directors to review bids, the engagement of financial and legal advisors by the special committee and the disclosure to shareholders regarding the bid process and recommendation of directors. The AMF proposal would also require an irrevocable minimum tender condition of 50 per cent of the target's shares held by independent shareholders. If the 50 per cent threshold is satisfied, the bidder would then be required to extend its offer for an additional 10 days to give other shareholders the opportunity to deposit his or her shares.

At the present time, it is unclear which proposal, if any, will be adopted by Canadian regulators.

8. PROXY FIGHTING

8.1 Is proxy fighting customarily conducted for control of the company management or what other items? 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 half of the proxy contests. Proxy contests in Canada have affected issuers of all sizes in a wide variety of industries.

The methods of proxy solicitation have also been receiving increased attention in recent years. For example, in a recent case in British Columbia, *International Energy and Mineral Resources Invest (Hong Kong) Company Limited v Mosquito Consolidated Gold Mines Limited*, the British Columbia Supreme Court found that the 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.

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. Canadian securities regulators issued a consultation paper for comment in August 2012 and proposed a number of possible regulatory frameworks to address these issues. Recently, a number of industry groups have made recommendations for the regulation of proxy advisory firms. These recommendations include implementing proficiency standards for analysts making recommendations and a similar regulatory regime for proxy advisory firms to the current regulations in place for investment bankers regarding disclosure of potential conflicts of interest.

As discussed above in paragraph 1.2, the process for delivery of proxy materials in Canada was recently amended to allow for proxy materials to be posted on a company's website. These 'notice and access' amendments should improve the proxy solicitation process and may ultimately improve shareholder engagement.

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, many 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 who 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.

Recently, Barrick Gold Corp.'s shareholders voted against its executive compensation plan at the corporation's annual meeting by an overwhelming majority. However, while the vote clearly expresses its shareholders' dissatisfaction, it is not binding on the board of directors.

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 its executives' compensation as a part of its continuous disclosure obligations. Specifically, public corporations must disclose all compensation paid to its executive officers from any source. The 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. Under some corporate statutes, there is a requirement that the court find that the director was not at fault in order to be eligible for indemnification by the corporation.

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 as opposed to a derivative action. The oppression remedy is framed broadly and, unlike derivative actions, there is no requirement to obtain leave of the court before commencing an oppression remedy. 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.

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.

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 or the Corruption of Foreign Public Officials Act (CFPOA). Many Canadian companies implemented compliance programs after CFPOA was introduced in 1999. Recently, there has been a surge in Canadian investigations by the Royal Canadian Mounted Police which created an International Anti-Corruption Unit. As a result, there has been a renewed focus for Canadian corporations to have robust anti-corruption compliance programmes.

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