CANADA

Law and Practice

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Fasken

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1. Introductory

1.1 Forms of Corporate/Business Organisations

The principal form of business organisation in Canada is the business corporation which affords shareholders limited liability protection, and Canada has 14 different business corporations statutes under which these can be incorporated. The Canada Business Corporations Act or "CBCA" is Canada's federal business corporations statute. Each of Canada's 13 provinces and three territories also has its own business corporations statute. However, these are generally modelled on the CBCA such that, in most cases and subject to limited exceptions (such as director residency requirements), there is generally little substantive difference among them practically speaking. Several provincial business corporations statutes in Canada provide for unlimited liability corporations, which may be advantageous as part of cross-border tax planning (but which do not necessarily provide shareholders the extent of limited liability protections that business corporations do).

1.2 Sources of Corporate Governance Requirements

The principal sources of corporate governance requirements in Canada are the business corporations statute under which the company is incorporated and, if the company is publicly listed in Canada, Canadian securities laws. Also, while not technically binding or obligatory, corporate governance practices in Canada can be significantly impacted by various non-legal sources such as proxy advisory firm recommendations and contemporary industry best practices.

A particularly notable non-legal source of corporate governance practice in Canada is the potential influence of Canadian institutional investors such as pension funds. Many of these investors have distinct expectations regarding various corporate governance matters, including as relates to such issues as diversity, equity and inclusion (DEI) and sustainability, and they often proactively exert pressure on their portfolio companies towards these ends. Moreover, this pressure can at times be significant, including where institutional investors together hold a sizeable shareholding and because many Canadian public companies are not as widely-held as more often occurs in certain other jurisdictions.

Overall, corporate governance in Canada continues to evolve and is an area of acute interest among companies, investors, regulators, and other market participants.

1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares

Publicly traded companies in Canada are subject to various corporate governance rules and guidelines of both mandatory and voluntary application. Mandatory requirements are imposed principally by the company's governing corporate statute (see **1.1 Forms of Corporate/Business Organisations**) or by applicable securities laws. Voluntary requirements result principally from non-legal sources such as the expectations of institutional investors (eg, pension funds; see **1.2 Sources of Corporate Governance Requirements**), proxy advisory firm recommendations, and contemporary industry best practices.

Notwithstanding the 14 different corporations statutes (federal, provincial and territorial; see **1.1 Forms of Corporate/Business Organisations**) available in Canada, the majority of Canadian public companies are incorporated

under the CBCA. This makes the CBCA the most relevant Canadian corporations statute when discussing the corporate governance of Canadian public companies. Regarding securities laws, Canada does not have a national securities regulator similar to the Securities and Exchange Commission (SEC) in the United States. Instead, each province and territory generally has its own securities statutes and securities regulators. That said, there is significant harmonisation among these various securities laws, including further to the work of the Canadian Securities Administrators (CSA), which is an umbrella organisation of Canada's provincial and territorial securities regulators whose mandate is to improve, co-ordinate and synchronise the regulation of Canadian capital markets.

The two principal Canadian stock exchanges are the Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSXV) and each of these have listing rules. However, these rules do not factor prominently as relates to corporate governance matters, which are generally left to Canadian corporate law and securities law.

2. Corporate Governance Context

2.1 Hot Topics in Corporate Governance

There are several current "hot topics" in corporate governance in Canada. These include (i) climate change disclosure, (ii) diversity, equity and inclusion (DEI) matters, (iii) new legislation addressing forced labour and child labour in supply chains, and (iv) new legislation imposing corporate transparency and disclosure obligations.

While climate change disclosure is not yet mandated in Canada, the majority of TSX and TSXV companies have been proactively reporting climate-related information for several years. The CSA (see **1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares**) is (as of mid-2024) preparing Canada's first mandatory climate-related disclosure rules. These are being modelled on the sustainability disclosure standards of the ISSB (International Sustainability Standards Board) but will also feature such amendments deemed appropriate for Canadian capital markets. However, the finalisation of the CSA's rules is expected to be contingent on developments in the United States. Delays related to the SEC's rules could therefore result in similar delays in Canada. In the meantime, "say-on-climate" shareholder proposals are increasingly common Canadian public company AGMs.

DEI is another area of current focus for the CSA (see **1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares**). In early 2023, it published for comment a proposed rule that would require enhanced disclosure from non-venture issuers regarding how the issuers identify and evaluate new candidates for nomination to a company's board and how diversity is incorporated into those considerations. In particular, the CSA sought input on whether the enhanced regime should require specific disclosure with respect to Indigenous peoples, LGBTQ2SI+ persons, racialised persons, persons with disabilities, or women, or whether the specific disclosure should be limited to women on a company's board and allow for voluntary disclosure with respect to other under-represented groups. The comment period for the proposed rule ended in September 2023 but (as of mid-2024) the CSA has yet to issue any decision.

Regarding forced or child labour in supply chains, Canada's new Fighting Against Forced

Labour and Child Labour in Supply Chains Act (FCLA) entered force in January 2024. The FCLA requires covered entities to file annual reports addressing the risk of forced or child labour in their supply chains, both in Canada and internationally. The reports must also address the company's related due diligence processes and employee training, if any. Covered entities include companies listed on a Canadian stock exchange or doing business in Canada that meet at least two of the following three thresholds for at least one of the last two financial years: at least (i) CAD20 million in assets, (ii) CAD40 million in revenue, and/or (iii) 250 employees.

Regarding corporate transparency, several Canadian corporate statutes (see **1.1 Forms of Corporate/Business Organisations**) now require the disclosure of information regarding individuals with significant control over privately owned companies. For example, the CBCA requires the identification of any person owning or controlling 25% or more of the company's shares, whether individually or together with related persons. This has been the case since 2019. However, in 2024 the CBCA was amended to add a federal register of individuals with such significant control, parts of which register will be publicly available. The aim of the disclosure is to assist authorities in fighting money laundering, tax evasion and similar illegal activities, and the legislation includes whistle-blower protections. Penalties for non-compliance include a maximum fine of CAD1 million.

For further discussion, including recent developments in "ESG" or "sustainability" reporting, see **2.2 Environmental, Social and Governance (ESG) Considerations**.

2.2 Environmental, Social and Governance (ESG) Considerations

ESG reporting in Canada remains fluid as public companies continue to consider how best to approach ESG disclosure and build reliable internal systems to address evolving stakeholders' demands.

Key issues in ESG reporting in Canada currently include:

- board oversight, where boards are taking a more active role in ESG oversight, with increasing involvement from audit committees;
- executive compensation, where more companies are incorporating ESG metrics into their short-term executive compensation decisions;
- reporting frameworks, where sustainability reports are becoming a key tool for ESG disclosure and with companies referencing one or more frameworks in their reporting;
- assurance, where companies are increasingly obtaining third-party assurance (typically limited assurance) for specific ESG disclosures;
- greenhouse gas (GHG) reporting, where more companies are disclosing an absolute GHG emissions reduction target;
- indigenous engagement, where an increasing number of Canadian public companies are disclosing policies focused on engagement and reconciliation, particularly companies in Canada's resources and finance sectors (see also **2.1 Hot Topics in Corporate Governance**);
- forced labour and child labour, where Canada's new Fighting Against Forced Labour and Child Labour in Supply Chains Act has recently entered force; and

- shareholder proposals, where Canada's financial services industry receives the most ESG-related shareholder proposals.

Relatedly, the authors have begun witnessing the ESG disclosure of Canadian public companies shift from employing "ESG" terminology to broader "sustainability" terminology.

3. Management of the Company

3.1 Bodies or Functions Involved in Governance and Management

The management of Canadian companies is principally conducted by the CEO, CFO and the other members of the executive management team. The authority of management is as delegated to management by the board of directors. Best practice in Canada is for the board to devise a formal mandate for itself together with an associated delegation of authority to management.

3.2 Decisions Made by Particular Bodies

Best practice in Canadian corporate governance is for shorter term and general operational decision-making to be delegated by the board to management and for the board to retain authority over longer term and "bigger picture" issues. Matters over which the board retains authority are often allocated to board committees.

Audit committees are required at Canadian public companies. The committee must be composed of a minimum of three members and, subject to limited exceptions, each member must be independent.

Other common committees include a compensation committee, a corporate governance committee, an environmental or ESG committee, a nominating committee, a disclosure committee, a pension committee, a risk committee, a safety committee, and/or a finance committee. The number and nature of committees formed by the board is generally a function of the size of the company and the nature of its business. Best practice is for a committee to be comprised of board members who have expertise in the particular area of the committee's mandate.

Special board committees are typically formed in certain circumstances, such as in connection with a possible change of control transaction (eg, an unsolicited takeover bid), in relation to an internal investigation (eg, regulatory non-compliance), or in response to an emergency or crisis situation (eg, a data breach).

3.3 Decision-Making Processes

Canadian corporate law limits the board's ability to delegate its authority in that certain decisions are within the sole authority of the directors. For example, under the CBCA, only the board may (i) submit to shareholders matters requiring their approval, (ii) declare dividends, (iii) approve financial statements for distribution to shareholders, (iv) approve a management proxy circular, takeover bid circular, or other circular, or (v) amend or repeal the company's by-laws. However, committees can (and often do) advise on these matters before the full board makes a final decision.

Even where it is legally permissible to delegate decision-making to a board committee or management, best practice in Canada is for the board to carefully consider whether to do so. Typically, matters of strategic importance or material policy, while sometimes at first instance the responsibility of a committee, are reserved for final determination by the board (eg, after the committee has made its recommendations). For

example, while risk committees have become common at large Canadian public companies, ultimate authority over the "risk-reward" balance to be assumed at the enterprise level is often reserved for the full board.

4. Directors and Officers

4.1 Board Structure

Canada's business corporations statutes prescribe basic requirements regarding board structure. Private companies are generally required to only have a single director. Public companies are generally required to have a minimum of three directors, at least two of which are not officers or employees of the company or its affiliates. Typically, a public company's articles will allow for a range in the number of directors so that the board can be expanded or reduced as circumstances warrant and without having to amend the company's articles. In order to fulfil its duties, a board should have sufficient directors for its own direct needs and to serve on the board's committees.

4.2 Roles of Board Members

The allocation of roles and responsibilities among board members is generally approached on a case-by-case (ie, company-specific) basis in Canada. Best practice is to develop and implement a formal mandate for the board, which includes a considered delegation of authority to management. Best practice in Canada is also for the board to continually evaluate which specific skill sets are most relevant to its needs and which of those might be absent and thus should be added.

4.3 Board Composition Requirements/Recommendations

Several of Canada's business corporations statutes impose residency requirements. For example, under the CBCA, a minimum of 25% of the company's directors must be resident Canadians. For requirements relating to board size, see **4.1 Board Structure**. For requirements relating to director independence, see **4.5 Rules/Requirements Concerning Independence of Directors**. In addition, public companies are required to have audit committees composed of directors that are independent directors (see **4.5 Rules/Requirements Concerning Independence of Directors**) and that are financially literate.

4.4 Appointment and Removal of Directors/Officers

In Canada, shareholders elect the company's directors at the company's AGM or at a special meeting called, in whole or in part, for the election of directors. Directors are generally removed either by being replaced at a subsequent AGM or by resolution at a special meeting held between AGMs. Majority voting applies to uncontested elections at companies governed by the CBCA or listed on the TSX. The board appoints the company's officers and these officers serve at the pleasure of the board.

4.5 Rules/Requirements Concerning Independence of Directors

There are different definitions of "independence" as it relates to corporate governance in Canada. The CBCA provides that a director is independent if they are not employed by the company or any of its affiliates. Canadian securities laws define independence as the lack of a "material relationship" with the company.

A material relationship is defined as one which could be reasonably expected to interfere with

the exercise of independent judgement. Certain relationships are automatically deemed to be material, including being a current or recent executive officer (or other employee) of the company or being a current or recent partner (or employee) of the company's auditor.

Canadian securities laws also require that public companies disclose which directors are independent and which are not. Where a majority of the board does not qualify as independent, the company must disclose what the board does to ensure the independent exercise of judgement in fulfilling its duties. Canadian securities laws also require that all members of an audit committee are independent and provide guidance (which is adhered to by almost all public companies) that all members of a compensation committee be independent.

Directors must disclose the nature and extent of any conflict of interest they have in a material contract or material transaction, whether made or proposed, with the company where the director (i) is a party to the contract or transaction, (ii) is a director of a party to the contract or transaction, or (iii) has a material interest in a party to the contract or transaction. Subject to limited exceptions (see **4.10 Approvals and Restrictions Concerning Payments to Directors/Officers**), the director cannot vote on any board resolution relating to the contract or transaction.

For a discussion of key legal issues related to nominee directors, see **5.1 Relationship Between Companies and Shareholders**.

4.6 Legal Duties of Directors/Officers

The principal legal duties of officers and directors under Canadian corporate law are twofold: the duty of care and the duty of loyalty.

Satisfying their duty of care in managing the company requires that officers and directors exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This includes the officers and directors sufficiently informing themselves and considering all related material information before taking action.

Satisfying their duty of loyalty in managing the company requires that officers and directors act honestly and in good faith with a view to the corporation's best interests. They must act impartially and free of self-interest or self-dealing and always put the company's best interests first, regardless of any competing or conflicting interests, including their own or of any of the company's shareholders.

Importantly, and unlike in certain other jurisdictions, neither the duty of care nor the duty of loyalty can be waived, whether in the company's articles, by contract or otherwise. That said, as further discussed at **5.1 Relationship Between Companies and Shareholders**, such duties can be partially or wholly transferred from the officers and directors to the company's shareholders by the functioning or express terms of a unanimous shareholders' agreement governing the company.

4.7 Responsibility/Accountability of Directors

Canadian law is clear that directors owe their duties to the company and not to any of its stakeholders, including shareholders. However, the CBCA and a substantively similar ruling by the Supreme Court of Canada (Canada's highest court) provide that, in pursuing the company's best interests, directors may take into account, without limitation, (i) the interests of shareholders, employees, retirees and pensioners, credi-

tors, consumers and governments, (ii) the environment, and (iii) the corporation's long-term interests.

Directors and officers in Canada also benefit from the "business judgement rule." This provides that, so long as the company's directors and officers act honestly, in good faith, and with a reasonable degree of care and diligence, Canadian courts will not second-guess their business decisions, even where those decisions ultimately result in negative consequences for the company. Stated differently, the business judgement rule recognises that directors and officers often face complex and uncertain business situations, and thus should be afforded a degree of discretion in making decisions without fear of personal liability, provided they act in pursuit of the corporation's best interest and within the scope of their authority.

4.8 Consequences and Enforcement of Breach of Directors' Duties

As the duties of care and loyalty are owed by directors and officers to the company, a claim for breach of these duties lies with the company. However, and as further discussed at **5.4 Shareholder Claims**, Canadian corporate law allows for derivative actions whereby a shareholder can pursue a claim against the directors or officers on behalf of the company for a breach of duty owed by them to the company.

4.9 Other Bases for Claims/Enforcement Against Directors/Officers

As further discussed at **5.4 Shareholder Claims**, the actions of directors and officers may give rise to an oppression claim under Canadian corporate law, which is a broad and potentially powerful statutory remedy. That said, Canadian courts have held the fundamental purpose of the oppression remedy is to provide recourse regarding actions taken by the company. As such, the actions of the directors or officers will generally only be oppressive when they are acting in their capacity as directors and officers, and the claim is against the company as opposed to the directors.

4.10 Approvals and Restrictions Concerning Payments to Directors/Officers

The CBCA expressly permits directors to vote on their own remuneration as directors, notwithstanding the conflict of interest. That said, management typically provides significant input into the compensation process, including by considering recent "comparables" and/or by engaging compensation advisers. Canadian securities guidelines recommend that the company's compensation committee is ultimately responsible for making recommendations on director compensation, and this best practice is generally followed. Also, "say-on-pay" shareholder proposals have been common for Canadian public companies for several years.

4.11 Disclosure of Payments to Directors/Officers

Canadian securities law requires the disclosure of the process followed in deciding director and officer remuneration. This should include explanation of the board's process, the rationale for the board's decision, and why the remuneration is otherwise appropriate or justified. Best practice includes also disclosing the frequency and form of compensation. This disclosure of officer remuneration is required to be included in the Compensation Discussion and Analysis portion of a public company's proxy circular.

5. Shareholders

5.1 Relationship Between Companies and Shareholders

The relationship between a Canadian company and its shareholders is governed primarily by the company's business corporations statute (federal, provincial or territorial; see **1.1 Forms of Corporate/Business Organisations**).

Generally speaking, shareholders in a Canadian company do not owe any fiduciary duties or other duties to the company. Nor do shareholders in Canadian companies owe any fiduciary duties or other duties to other shareholders of the company. A possible exception is where the company's shareholders have entered a unanimous shareholders' agreement (USA) in which case, to the extent the USA limits or otherwise restricts the authority of the directors to manage the company, the related duties and liabilities of the directors will be transferred from the directors to the shareholders. Caution should also be exercised where a shareholder nominates a director to the company's board, as the nominee director will owe duties to the company without regard to any duties they may owe to the nominating shareholder in any other capacity.

Canadian corporations statutes generally provide that shareholders who dissent regarding shareholder votes on specified fundamental matters can compel the company to acquire their shares at fair value, a process referred to as "dissent and appraisal rights". A prominent example is where the shareholder dissents in relation to a squeeze-out transaction. It is also typical for shareholders to be granted dissent and appraisal rights in connection with a proposed plan of arrangement effecting any negotiated (ie, "friendly") acquisition of the company.

Lastly, the principle of separate corporate personality is a fundamental rule of Canadian law. As such, a shareholder will only be liable for the company's actions should a court rule it appropriate to "pierce the corporate veil". Due to the very high standard generally imposed in such claims – eg, where the company is used to perpetrate a fraud, this occurs relatively infrequently in Canada.

5.2 Role of Shareholders in Company Management

The principal role of shareholders in the management of the company is their right to elect the company's directors (see **4.4 Appointment and Removal of Directors/Officers**). The approval of shareholders is also required to effect various fundamental changes. These generally include (i) amendments to the company's articles or by-laws, (ii) transactions involving substantially all of the company's assets or property, (iii) a merger (referred to as an "amalgamation" in Canada) of the company with another company, (iv) a migration or "continuation" of the company under another governing corporations statute, and (v) dissolution of the company.

Beyond the foregoing, shareholders of Canadian companies may also be entitled to (i) make a shareholder proposal, and (ii) requisition a shareholder meeting.

Regarding shareholder proposals, these can generally be made by a shareholder owning a minimum 1% interest and require that the company include the proposal in a management proxy circular being distributed by the company. The proposal and its supporting statement cannot exceed 500 words. Shareholder proposals in Canada are typically made in connection with a company's AGM. Note, however, that where the shareholder proposal relates to the election of

one or more directors, a minimum 5% interest is generally needed.

Regarding requisitioning a shareholder meeting, this can be done by a shareholder owning a minimum 5% interest. This is most commonly done by shareholder activists as part of a proxy campaign to elect a dissident slate of directors. Requisitioning a shareholder meeting requires strategic planning and careful compliance with various technical requirements. Also, even where a shareholder meeting has been requisitioned, it is not uncommon for Canadian courts to allow the subject matter of the requisitioned meeting to be deferred to the next scheduled shareholder meeting (ie, the company's AGM).

While shareholders in Canadian companies do not benefit from approval rights regarding the vast majority of the company's business decisions, practically speaking a dialogue often occurs between public companies and their largest investors. Moreover, in Canada, this is particularly so regarding public companies and their institutional shareholders (eg, pension funds). This reflects the fact that Canadian institutional investors often own (either individually or in groups) large blocks of shares in Canadian public companies. This can give the institutional investor(s) outsized influence on the company compared to other jurisdictions where public companies may be more widely-held than many public companies in Canada. See also **1.2 Sources of Corporate Governance Requirements**.

5.3 Shareholder Meetings

Canadian companies are required to hold an AGM. This must occur not later than 15 months following the last AGM or six months following the company's most recent financial year. AGMs and other shareholder meetings are conducted in accordance with the company's by-laws.

The principal business conducted at AGMs in Canada is (i) the election of the company's board of directors, (ii) presentation of the company's financial statements and the report of the company's auditors on the financial statements, and (iii) the appointment of the company auditor. A "special meeting" is a meeting called for the purpose of conducting business other than the foregoing – eg, a meeting requisitioned by an activist shareholder.

Although shareholders of Canadian public companies are entitled to attend AGMs in person, they more commonly vote by proxy. Since the COVID-19 pandemic, it has become increasingly common for shareholder meetings in Canada to be held virtually. As such, several Canadian corporations' statutes have been amended to expressly address virtual meetings as well as to impose rules companies must satisfy in conducting such meetings. Guidance has also been issued by Canadian securities regulators regarding their expectations for virtual meetings held by Canadian public companies.

Where a matter to be addressed at a shareholder's meeting is subject to a shareholder vote, the matter must be comprehensively described in a management information circular made available to shareholders in advance of the meeting. This circular must include, among other things, the recommendation of the company's board regarding the matter. For example, where a Canadian public company has negotiated a change of control transaction whereby it is to be acquired, the company will send to shareholders proxy materials and a meeting circular containing the board's recommendation in advance of

a meeting called for shareholders to vote on the transaction.

5.4 Shareholder Claims

Canadian corporate law provides for three main varieties of shareholder claims. These are (i) a personal action, (ii) a derivative action, and (iii) an oppression claim.

A personal action seeks to enforce rights personal to the shareholder. One instance in which personal actions are more common is in the context of a shareholder activist campaign. For example, the activist may seek a court order compelling the requisitioning of a shareholder meeting where the company has refused to act. Similarly, an activist can resort to court action to challenge the company's invocation of its advance notice by-laws amid a proxy contest and the activist's attempted nomination of a dissident slate of directors. Other examples of rights personal to a shareholder include the right to vote, the right to timely and informative notice of meetings, and the right to inspect the company's books and records.

A derivative action is where the shareholder seeks to pursue a claim not in its own name but on behalf of the company. The classic example of a derivative action is a claim against the company's directors for breach of their fiduciary duties. To bring a derivative action, the shareholder must first obtain the court's approval. This generally requires satisfying three conditions. First, that the shareholder must have given at least 14 days' notice to the company of its intent to bring the derivative action if the company does not bring the applicable claim itself. Second, the shareholder must convince the court that it is acting in good faith in bringing the claim. Third, the shareholder must convince the court that its proposed claim is in the company's best interests.

An oppression claim is unique to Canadian corporate law and is a broad and potentially powerful statutory remedy, including as it grants the court wide discretion in devising any resulting relief. In brief, an oppression claim enables shareholders – as well as other security holders, creditors, directors or officers – to seek judicial intervention where they believe the company (or its directors or officers) have acted in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the claimant's interests. Conduct that can give rise to oppression includes actions contrary to the company's governing documents, actions contrary to the directors' fiduciary duties, and/or actions that disregard or undermine the claimant's legal rights or interests. Unlike a derivative action, a shareholder need not first seek court approval to bring an oppression claim with the result that an oppression claim (or the threat of an oppression claim) is often the first recourse of a disaffected shareholder in Canada.

5.5 Disclosure by Shareholders in Publicly Traded Companies

Disclosure obligations can arise for shareholders in Canadian public companies in several different circumstances.

Canadian securities laws generally require that "insiders" of Canadian public companies file reports disclosing information regarding transactions involving the company's securities. The term "insider" is broadly defined and includes persons who have significant influence over the company and/or routine access to material undisclosed company information. This also includes the company's officers and directors (as well as those of the company's subsidiaries)

and the company itself where it has purchased, redeemed or otherwise acquired some of its own securities and significant shareholders (ie, 10% shareholders). Insider reports must disclose, among other things, (i) the insider's direct or indirect beneficial ownership of, or control or direction over, company securities, and (ii) any change to the foregoing. Separate and supplementary insider reporting requirements exist for derivatives. Various exemptions from Canadian insider reporting requirements are available depending on the circumstances.

Should a shareholder acquire a 10% or more interest in a Canadian public company, the early warning reporting (EWR) system under Canadian securities laws is triggered. This requires that the shareholder (i) issue a news release before the opening of trading on the next business day, (ii) file an early warning report within two days of the 10% threshold being crossed, and (iii) not acquire additional shares from the time the reporting requirement is triggered until at least one business day after the early warning report is filed. Prescribed information for disclosure includes the amount of the shareholding and the shareholder's investment intent. Additional news releases and early warning reports are required thereafter (i) each time the shareholder increases or decreases its shareholding by 2% or more, (ii) for every change in material information contained in a previously filed report, and (iii) should the shareholder's ownership percentage fall below the 10% threshold. The reporting threshold under the EWR system drops from 10% to 5% if the public company becomes the target of a takeover bid.

The Investment Canada Act (Canada) and Competition Act (Canada) have thresholds for the acquisition of shares (33.33% and 20% respectively) of a Canadian public company that could trigger considerations under these statutes. Finally, any acquisition of shares in a Canadian public company by a shareholder that, together with the shareholder's current interest (if any), would bring the shareholder's interest to 20% or more must comply with Canada's takeover bid regime.

6. Corporate Reporting and Other Disclosures

6.1 Financial Reporting

Canadian public companies are required to file several annual financial reports. These include the following.

- Annual and Quarterly Financial Statements including the company's income statement, balance sheet, statement of changes in equity and cash flow statement.
- Annual and Quarterly Management's Discussion and Analysis (MD&A) which provides management's analysis of the company's financial condition, results of operations, and future prospects.
- An Annual Information Form (AIF) that details the company's operations, management, governance structure, and risk factors.
- A Proxy Circular distributed in advance of the company's AGM that provides information to shareholders regarding matters subject to a shareholder vote – eg, the election of directors and auditor appointment.
- Annual and Quarterly CEO/CFO certifications of the accuracy and completeness of the company's financial statements and disclosures.

6.2 Disclosure of Corporate Governance Arrangements

Canadian securities laws have, since 2005, required the disclosure of certain public company corporate governance practices, including as relates to (i) board composition and independence, (ii) the board's mandate, (iii) ethical business conduct and codes, (iv) the continuing education of directors, (v) the nomination process for directors, (vi) the compensation process for directors, and (vii) standing board committees. Canadian securities regulators have also issued related guidelines for corporate governance disclosure best practices.

In 2014, most Canadian jurisdictions (ie, provinces and territories; see **1.2 Sources of Corporate Governance Requirements**) adopted requirements that non-venture Canadian public companies disclose their policies and targets for female representation on their boards and in executive officer positions, as well as the number and proportion of women in those roles. In 2021, Canadian public companies governed by the CBCA became required to disclose prescribed information regarding "designated groups", being women, Aboriginal people, members of visible minorities, and persons with disabilities. In 2023, the CSA published alternative amendments for public comment that could impose additional corporate governance disclosure requirements regarding persons from specifically identified groups. Overall, corporate governance disclosure requirements and best practices in Canada continue to evolve.

6.3 Companies Registry Filings

The registry filings required to be filed by a Canadian company are as prescribed by the company's governing corporate statute. For example, under the CBCA these include (i) an Annual Return detailing the company's registered office address, directors, and officers, and (ii) prompt filing of any changes to information included in an Annual Return. Failure to comply with these filing requirements can result in penalties, administrative dissolution, or other adverse consequences. As discussed at **2.1 Hot Topics in Corporate Governance**, as of 2024, CBCA companies must file information regarding individuals with significant control over the company, some of which information will be publicly available.

7. Audit, Risk and Internal Controls

7.1 Appointment of External Auditors

Canadian private companies generally have the option regarding whether or not to appoint an external auditor, and often waive this requirement. Public companies in Canada must appoint an external auditor and the auditor must meet independence requirements. It is not uncommon for large Canadian public companies to have an auditor independence policy which, among other things, establishes a process for determining whether the audit and other services provided by the external auditor to the company affect its independence vis-à-vis the company.

7.2 Requirements for Directors Concerning Management Risk and Internal Controls

Unlike Delaware corporate law, Canadian corporate law does not expressly provide for a "Caremark" claim – ie, where a plaintiff can file suit where a company's board either failed to properly implement an internal system of reporting and controls for key risks facing the company or, having established such an internal system, failed to properly monitor it. Nonetheless, instituting an effective enterprise risk management system is best practice in Canada, including as

a failure to do so could potentially give rise to a breach of duty of care claim against the company's directors (see **4.6 Legal Duties of Directors/Officers**). It is therefore common for large Canadian public companies to have one of their committees address enterprise risk considerations and regularly report to the full board.