# Shareholder Activism in Canada: The Legal Framework

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# Contents

# 1. Overview

Shareholder activism is firmly entrenched in the Canadian corporate landscape, and Canada has proven fertile ground for dissidents. This guide provides a concise but comprehensive overview of key tactics and related legal issues fundamental to shareholder activism in Canada.

We begin by reviewing four critical issues applicable to activist stake-building and shareholder engagement. We next consider the offensive tactics available to an activist under Canadian law. We then consider potential target defensive strategies and other responses to a dissident campaign. This is followed by a review of how an activist may counter such target defensive tactics. We conclude with various additional legal issues for both targets and activists to consider.

**Shareholder activism in Canada raises numerous and varied legal issues under both corporate law and securities law. Whether conducting or defending against an activist campaign, foresight, preparation and responsiveness are imperative.**

# 2. Stake-Building and Shareholder Engagement

Any shareholder considering commencing an activist campaign or engaging with an activist or potential activist should carefully navigate relevant securities law and corporate law regarding (1) stake-building and public disclosure, (2) acting jointly or in concert, (3) insider trading and tipping, and (4) the solicitation of proxies. Conversely, public issuers the subject of an activist campaign or potential activist campaign will want to closely monitor for, and capitalize on, any breach of these laws.

- **Stake-Building and Public Disclosure:** An essential consideration throughout a dissident campaign is early warning reporting requirements under securities law. Activists can acquire up to a 9.9% shareholding without being required to make any public disclosure. Once a 10% stake is accumulated, however, a press release must be immediately issued and an "early warning report" must be filed within 2 business days. The shareholdings of persons acting "jointly or in concert" will be aggregated for the purpose of this 10% threshold. The mere formation of a group (e.g. an activist and its "joint actors") holding 10% or more will not trigger early warning reporting requirements (unless one of the group members is already an early warning filer and the formation of the group is a change in material fact in a previously filed report). However, absent an exemption, the subsequent acquisition of a single share by any group member will trigger reporting requirements. Among other things, early warning reports require the activist to disclose its identity, ownership position and investment intent. The early warning regime is not intended to capture proxy holders given that the shareholder retains control over how the shares are voted.

**An essential consideration throughout an activist campaign is early warning reporting requirements under securities law.**

- ***Ongoing Reporting:*** Upon attaining a 10% shareholding, an activist assumes ongoing reporting obligations. These include disclosure of (1) each time the activist acquires or disposes 2% or more of the subject securities, (2) if the activist falls below the 10% threshold, and/or (3) a material change in information within a previously filed report.
- ***Eligible Institutional Investors:*** Shareholders qualifying as "eligible institutional investors", which includes eligible pension funds, hedge funds and financial institutions, are able to use the Alternative Monthly Reporting System (AMRS). Regarding stake-building in the activist context, the AMRS requires disclosure (1) within 10 days of the end of the month in which the 10% threshold is crossed, (2) whenever, after the 10% threshold is crossed, ownership increases or decreases 2.5% or more relative to the previous report, (3) when ownership decreases below 10%, and (4) upon a change in a material fact within prior disclosure.
- ***Derivatives:*** At present, swaps generally do not count toward determining whether the 10% (early warning reporting) or 20% (takeover bid) thresholds have been reached. However, they may count where the activist has either a legal right to control or direct the voting of swap shares or a contractual right to influence voting decisions regarding swap shares. Moreover, regulators have held inadequate disclosure of swap holdings – such as in the context of a takeover bid – as a failure to comply with securities laws and even "abusive". Once the 10% threshold is crossed such that early warning reporting is required, such disclosure must include details of equity derivatives in the issuer held by the shareholder.

**Derivatives may count toward the 10% early warning reporting threshold where the activist has either a legal right to control or direct the voting of swap shares or a contractual right to influence the voting of swap shares.**

- **<u>Acting Jointly or in Concert</u>**
  - If an activist has an agreement, commitment or understanding with one or more other persons and intends to exercise voting rights in concert with such other persons, they are presumed to be "joint actors". If the agreement, commitment or understanding is with respect to the acquisition of shares of the target company, they are deemed to be "joint actors". Importantly, the shareholdings of "joint actors" are aggregated for purposes of the 10% early warning reporting threshold and 20% takeover bid threshold.
  - It has been held that acting jointly or in concert is a "relatively high" bar and requires balancing the benefit of disclosing shareholder blocks against the benefit of allowing the "free flow of information" among public company shareholders. It has also been held that becoming "joint actors" generally requires "actively working together to achieve a joint specific purpose," and not "simply being aligned in interest." In one case a court held that two funds and three individuals were "joint actors" in a dissident campaign based on evidence that included (1) a conference call involving a proxy advisory firm, (2) the discussion of confidential governance committee proceedings, (3) their collaboration on a draft dissident proxy circular, and (4) their joint preparation of a formal voting support agreement. A company alleging certain of its shareholders are "joint actors" bears the burden of proving this on the balance of probabilities. This can include circumstantial evidence, but this will be balanced "against the reasonableness of other explanations that might explain the same circumstance."

**Becoming "joint actors" generally requires "actively working together to achieve a joint specific purpose", and not "simply being aligned in interest".**

- **Insider Trading and Tipping:**
  - ***Insider Trading:*** Trading with knowledge of material non-public information (MNPI) is prohibited. This includes MNPI that an activist learns in private discussions with a target. However, the fact an activist is considering campaigning to replace target directors generally does not, in and of itself, prohibit the activist from acquiring target shares.
  - ***Tipping:*** A person in a "special relationship" with a public issuer is prohibited from "tipping" or informing another person of MNPI, other than "in the necessary course of business". Securities law classifies those persons in a "special relationship" with a public issuer broadly, and this includes shareholders owning 10% of the voting rights attaching to the issuer's shares. Activists with access to MNPI therefore face an increased risk of violating, or being alleged to have violated, insider trading and tipping laws, and so should proceed with caution. The "in the necessary course of business" exception to the prohibition against tipping was recently addressed by a securities tribunal for the first time, although not in the activist context. The tribunal provided four main guideposts, being (1) the standard is objective, (2) the exception should be interpreted narrowly, (3) the "necessary" course of business does not mean the "ordinary" course of business, and (4) the tipper bears the burden of proving the exception has been met. The tribunal also underscored the significance of the process whereby the availability of the exception is considered around the time the MNPI is disclosed.

**Activists with access to material non-public information face an increased risk of violating insider trading and tipping laws.**

- **What Qualifies as a "Solicitation" of Proxies?:**
  - Subject to the "private solicitation" and "public broadcast" exemptions discussed below, Canadian corporate and securities laws prohibit activists and issuers from soliciting proxies unless they have sent a proxy circular to each shareholder whose proxy is being solicited. "Solicitation" is broadly defined to include "a request to execute or not execute a form of proxy" and a "communication to a shareholder under circumstances that are reasonably calculated to result in the procurement, withholding or revocation of a proxy."
  - Courts have held that the nature, context and purpose of the communication is key. In one case, even though the activist's letter to shareholders expressly stated it was not requesting proxies at that time, the letter was held to be a solicitation for also including a request not to execute the form of proxy circulated by the target. In another case, a shareholder post on a public forum was held to be a solicitation for urging shareholders to vote "withhold" or "against" the target's slate of directors. The courts have also indicated that two or more communications (e.g., press releases) considered together can amount to a solicitation. Defensive communications by a target in response to an activist campaign and before the issuance of the company's proxy circular will generally be viewed in that context and thus afford the target some latitude to defend directors and explain the company's position.

**Courts have held that the nature, context and purpose of the communication is key to determining whether it amounts to a proxy solicitation.**

# 3. Offensive Tactics Available to Activists

Often characterized as "activist friendly", Canadian law affords several avenues by which a dissident may pursue effecting change at a public company.

- **Shareholder Proposals:** Canadian corporate law accommodates "activism-lite" via a shareholder proposal. Specifically, a dissident owning as little as a 1% shareholding is entitled to have included in a target's proxy circular a paragraph of not more than 500 words advocating its cause. However, where the proposal relates to the election of one or more directors, a minimum 5% shareholding is needed. In either case, the minimum shareholding must have been held for at least six months prior to the proposal's submission. The inclusion of an activist's proposal in the target's proxy circular does not relieve the activist of the obligation to mail its own circular if it seeks to solicit proxies. A court has ruled against an attempt by one shareholder to use a shareholder proposal to remove a director at an upcoming shareholder meeting already requisitioned by another shareholder, holding that a separate requisition was required.

**"Vote No" campaigns do not require a proxy circular or an alternative slate of directors, and can rely on the private solicitation and public broadcast exemptions.**

- **"Vote No" Campaigns:** "Vote No" campaigns are generally both easier and less costly to wage than proxy contests, and this holds true in Canada. Per the majority voting rules under the CBCA, shareholders can vote "for" or "against" a nominee director in an uncontested election, and each nominee must receive a majority of "for" votes to be elected. Similar rules also apply to all TSX-listed issuers, who must have a majority voting policy. "Vote No" campaigns do not require a proxy circular and can rely on the private solicitation and public broadcast exemptions (discussed below). Nor do they require an alternative nominee or slate. They can thus be a cost-effective means of targeting a specific director or board committee. "Vote No" campaigns can also serve as a valuable fallback strategy, e.g., where the activist has missed a nomination window under the target's advance notice bylaws (discussed below). In a recent example, a TSXV-listed issuer with a majority voting policy substantially similar to that required by the TSX rules found itself in a situation where each of its directors was concurrently required to tender their resignation after none of the directors received a majority vote at the issuer's AGM and following an activist campaign. This led to the immediate appointment of a new, independent director to recommend next steps, which eventually included a reformed board that included a director closely affiliated with the activist.

- **Meeting Requisition:** Upon accumulating a 5% shareholding an activist is entitled to requisition a shareholder meeting. The mere existence of this right is a significant source of leverage, including because Canadian corporate law prevents public issuers from instituting "staggered" boards whereby only a subset of directors are up for election at a shareholder meeting. A requisitioned meeting will therefore make the entire board vulnerable to replacement. The TSX rules also inhibit "staggered" boards by requiring that shareholders are entitled to vote on the election of the entire board at each AGM. Procedurally, the requisition notice must give sufficient information regarding the proposed business to be discussed. Furthermore, given target-friendly caselaw, the exercise of this right necessitates careful planning and compliance with technical requirements. For example, while statute may not expressly require that a shareholder requisitioning a meeting for the removal of directors necessarily include its proposed nominees, it has been held that, in the context of a proxy contest, reasonable detail regarding the business to be conducted at the meeting would include the names and qualifications of the proposed nominees. A practical consequence is that an activist should recruit its board nominees sufficiently in advance of requisitioning a shareholder meeting.

**While statute may not expressly mandate that a meeting requisition include the activist's proposed board nominees, this has been required by the courts.**

- **Private Solicitation:** In most jurisdictions, exemptions permit activists to solicit proxies from up to 15 shareholders without mailing a dissident proxy circular. This allows for a degree of stealth, including as small numbers of institutional investors often holds large blocks of shares in Canadian public issuers. That said, as discussed above, complex laws regarding "joint actors", "insider trading" and "tipping" – to which institutional investors are typically highly sensitive – must be carefully navigated. Private solicitation can be used alone or in conjunction with the "public broadcast" exemption (discussed below). It has been held that an activist conducting a private solicitation could use the management form of proxy and the discretionary authority granted thereunder to appoint himself as proxy holder and then elect a new board from the floor of the company's AGM.

**Most jurisdictions provide an "private solicitation" exemption whereby activists are permitted to solicit proxies from up to 15 shareholders without mailing a dissident proxy circular.**

- **Public Broadcast:** Another alternative to mailing a dissident proxy circular is proceeding by public broadcast, which can be by press release, advertisement or other notice generally available to the public. This allows the activist to avoid the time and costs associated with a circular (although certain information required in a circular must still be filed as part of the broadcast). This also provides an activist the opportunity for a loud opening salvo, including control over the initial proxy contest narrative. A public broadcast can also be followed by a dissident proxy circular to reinforce and continue the narrative and strategy set by the public broadcast. However, an activist should be mindful that using the public broadcast exemption does not thereafter give it the right to engage in private meetings with shareholders beyond the private solicitation exemption (discussed above).

**The "public broadcast" exemption permits an activist to issue a press release, advertisement or other notice to the public without mailing a dissident proxy circular.**

- **Dissident Proxy Circular:** Should an activist wish to move beyond private solicitation and/or a public broadcast, the mailing of a dissident proxy circular is facilitated by each shareholder being entitled to a list of each other registered shareholder. Such a request will, however, alert the target to the activist if this has not already occurred. Often, but not always, an activist will wait to mail its circular until after the target's circular to take issue with or criticize aspects thereof. In some cases, activists have prepared "pre-emptive" dissident circulars that are provided to shareholders prior to the record date to facilitate meetings beyond what would be allowed under the private solicitation exemption.
- **Proxy Advisor Support:** Proxy advisory firms can have crucial influence over shareholder voting, as institutional investors often follow their recommendations and retail shareholders may be influenced as well. Winning proxy advisor support is a significant advantage for any activist and can be achieved by presenting a compelling case for change and, where necessary, effectively communicating a well-reasoned and persuasive business plan to them.
- **White Papers:** Many activists find benefit in producing a "white paper" prior to launching their campaign. These are based on publicly available information on the target that is required to be disclosed under applicable securities laws. White papers often present a "case for change" in support of the activist's agenda and can be key in winning support from other shareholders and/or proxy advisory firms. They can also be of great value in private discussions with management (and not only should a proxy battle eventuate).

# 4. Defensive Tactics Available to Targets

Targets have at their disposal several structural defensive measures as well as other tactics available in defence of an activist campaign.

- **Advance Notice Bylaws:** Previous high-profile activist campaigns have prompted most public companies to adopt advance notice bylaws (ANBs). These have been accepted by Canadian courts on the grounds they provide reasonable advance notice of a contested board election and thus promote an orderly director nomination process and informed shareholder decision-making. ANBs typically require (1) at least 30 days advance notice of an activist nomination, (2) the identity, age and residency of nominees, and (3) details of any arrangements between nominees and the activist. Certain disclosure by the activist is also typically required, including (1) its other economic or voting interests, including derivatives, and (2) proxies collected and any other ability to vote shares. Each of the TSX, ISS and Glass Lewis have provided guidance regarding the appropriate substance of ANBs. In a recent case, the court held an activist's alternative slate was permissibly rejected by the AGM chair for a failure of the activist's written notice to correctly account for the proxies obtained by the activist in connection with a tender offer made by the activist in the months preceding the AGM. In another case, a securities commission declined jurisdiction over an activist's claim the target had inappropriately relied on its ANBs to reject the activist's nominations, holding that the "core of the dispute... engages corporate law, not securities law."

**Canadian courts have endorsed advance notice bylaws on the basis that they promote an orderly director nomination process and informed shareholder decision-making.**

- **Shareholder Rights Plans:** Many Canadian public issuers have adopted shareholder rights plans (SRPs). While the utility of such plans in the context of hostile bids diminished markedly with the overhaul of Canada's takeover bid regime in 2016, in one case a securities commission declined to cease-trade a SRP that effectively denied a hostile bidder the ability to purchase additional target shares during the course of its bid. Specifically, the commission held the SRP was a reasonable response to several concerns raised by the bidder's use of derivatives in connection with its bid, including regarding (1) the willingness of other bidders to take part in an auction, (2) the willingness of shareholders to vote on a competing transaction, and (3) the outcome of any vote that might occur. Some companies have adopted "voting pills" which expand the circumstances in which a SRP is triggered by capturing proxy solicitation activity and agreements among shareholders to vote together, thereby hindering efforts by shareholders to use their collective voting power to control the issuer. However, commentary by proxy advisory firms and securities regulators indicates that SRPs should not be expanded beyond the takeover context and into circumstances involving shareholder voting such as in contested director elections.

**Securities regulators and proxy advisory firms have cautioned against the use of shareholder rights plans in the context of contested director elections.**

- **Opposing Meeting Requisitions:** Several courts have interpreted Canadian corporate statutes narrowly and technically to foil activist meeting requisitions. This has made target attempts to invalidate requisitions somewhat common. Other courts have shown considerable deference to the business judgment of boards regarding the timing of requisitioned meetings. The end result is that boards have been permitted to delay a requisitioned meeting until the company's next-scheduled AGM and in one case for more than 150 days. However, the court must be convinced the board, in delaying the meeting, acted honestly, in good faith and with a view to the corporation's best interests. Where the court allowed a delay of 155 days it did so because it accepted the board's concerns that holding two separate meetings would (1) strain the company's limited financial resources, (2) lead to voter fatigue, (3) put undue pressure on management, and (4) not result in any prejudice to the requisitioning shareholder.

**The courts have at times shown considerable deference to the business judgment of boards regarding the timing of requisitioned meetings.**

- **Complaints to Securities Regulators:** Another common target reaction to a dissident campaign is alleged noncompliance by the activist with securities legislation, such as regarding (1) early warning reporting requirements, (2) prohibitions against insider trading or tipping, (3) share accumulation triggers resulting from alleged "joint actor" status, (4) compliance with proxy solicitation rules, and/or (5) alleged material public misstatements. In responding to an activist campaign, targets should also be careful they do not go offside corporate or securities law themselves. In one case, after the activist requisitioned a shareholder meeting and issued a subsequent press release criticizing the target's board, the target responded with its own press release (1) criticizing the activist, (2) defending its leadership, and (3) explaining its reasons for combining the requisitioned meeting with its AGM. The target press release also stated the target board would continue to engage with shareholders and that the target would be issuing a management information circular. The court rejected the activist's allegation that the target press release constituted a improper solicitation of proxies for occurring without a circular, holding that the principal purpose of the press release was to defend the target's position, and not to solicit.

- **Private Placements:** Several companies have made private placements amid an activist campaign. In one case, a court permitted a private placement shortly ahead of a requisitioned shareholder meeting, in part because the court accepted evidence the private placement was a legitimate business decision taken in the company's best interests, and thus deserving of the court's deference under the business judgment rule. In another case, securities regulators permitted a private placement made following activist activity that began as a "vote no" campaign and evolved into an unsolicited takeover bid, in part because the securities tribunal accepted evidence the company had a serious and immediate need for financing. However, target directors contemplating a private placement amid an activist campaign should tread carefully as an issuance of shares interpreted as inappropriately intended to defeat a dissident's attempt to replace incumbent directors could give rise to liability under claims of oppression of minority shareholders or for breach of fiduciary duty.

**Any private placement made by a target amid an activist campaign must be a legitimate business decision taken in the company's best interests, e.g., in response to a serious and immediate need for financing.**

# 5. Potential Activist Responses to Target Defences

Canadian law allows for numerous potential activist responses to the target defensive tactics canvassed in the previous section.

- **Challenging ANBs:** Activists have been successful in challenging a target's invocation of ANBs amidst a proxy contest. Importantly, the courts have held that ANBs should operate as a "shield" to protect against "ambush" and not as a "sword" designed to exclude nominations given on reasonable notice or to buy excess time to attempt to thwart a dissident campaign. So too have courts held that any ambiguity in the drafting of ANBs should be resolved in favour of shareholders' voting rights. In one case the court was not prepared to declare a company's ANB as invalid for being overly broad such that they violated statutory shareholder rights. The court stated such a remedy could be possible in appropriate circumstances but that the scope of ANB's should generally be left for shareholders to approve and that the court should not be put in the position of re-drafting corporate documents. Instead, the court focused on the "purpose and intent" of the ANB to hold that the activist had met its requirements.

**Courts have held that advance notice bylaws should operate as a "shield' to protect against "ambush" and not as a "sword" in an attempt to buy excess time to thwart an activist campaign.**

- **Challenging SRPs:** Proxy contests in Canada include several examples of regulators cease-trading SRPs put in place by targets. In so doing, a key principle invoked by regulators and courts has been protecting the opportunity of shareholders to exercise their rights as such. Regulators have also indicated that SRPs should generally not be utilized to deem a shareholder to beneficially own shares subject to a lock-up agreement "in circumstances where they would not be deemed joint actors under the applicable rules." In addition, proxy advisors have made it clear that they would generally recommend voting against the approval of voting pills, and it is expected that securities regulators would intervene to cease-trade voting pills out of public interest concerns that they are abusive of shareholders' rights. Recently, securities regulators cease-traded a SRP instituted after acquisition discussions broke down and the prospective buyer responded by requisitioning a special shareholder meeting to nominate new directors for election. The SRP prohibited any person from acquiring more than a 15% interest in the company except pursuant to a formal takeover bid, and in cease-trading it the tribunal repeatedly emphasized the "primacy" of the takeover bid regime's "essential components" following the 2016 regime amendments, which in this case was the 20% trigger the plan effectively sought to lower to 15%.

**Securities regulators have cease-traded shareholder rights plans amid an activist campaign for impeding shareholders' ability to exercise their rights as such and for impinging on the "essential components" of the 2016 takeover bid regime.**

- **Contesting Delayed Special Meetings:** Where a 5% activist requisitions a meeting, the target's board is required to call the meeting within 21 days of receipt of the requisition. Moreover, if the board doesn't call the meeting within 21 days of the requisition, the activist can call the meeting directly. In such circumstances the activist will also be entitled to be reimbursed its reasonable costs incurred in calling and holding the meeting. If the target's board calls the meeting but selects a date involving "unreasonable" delay, the activist can seek a court order forcing an earlier date. Notably, recent caselaw emphasizes the importance of the process a board adopts in responding to a meeting requisition: if the board does not give sufficient consideration to the specific requisition in the specific circumstances, the board's deliberations may be deemed undeserving of the court's deference. In this case, the court refused to permit a delay of five months taking issue, among other things, with the fact (1) the board had held only a single, two-hour meeting to discuss the requisition, (2) the requisition was only a single agenda item at the meeting, and (3) the trustees targeted by the activist did not recuse themselves from the discussion. The substance of the board's decision must also withstand basic scrutiny. The court rejected the company's justification of combining the meeting with the company's AGM based on cost concerns given the company's significant financial resources. The court rejected the company's justification that the delay would allow it to see through its business plans on the basis that this would defeat the shareholder's very purpose in requisitioning the meeting.

**Recent caselaw indicates courts will scrutinize both the process adopted by the target board in responding to a meeting requisition as well as the substance and reasonableness of the board's ultimate decision.**

- **Contesting Tactical Private Placements:** Securities regulators have impeded private placements made amid an activist campaign on multiple occasions. In one case, the TSX refused to approve a private placement following concerns raised by the activists (who had requisitioned a shareholder meeting) that the issuance was an inappropriate defensive tactic and after the TSX's investigation identified the company was in breach of two of the exchange's policies. In another case, the TSX's conditional approval of the issuance of equity for existing debt eight days prior to the record date for a shareholders' meeting requisitioned to replace the company's directors was set aside by securities regulators pending a meeting of shareholders to either ratify the issuance or instruct the board to reverse the issuance. In a third case, a private placement after an activist had requisitioned a shareholder meeting led to undertakings to securities regulators that the issuer could and would unwind the issuance in the event the activist's application to the securities commission was successful.

- **Oppression Remedy:** A powerful and versatile weapon in an activist's arsenal in Canada is an oppression claim. A creature of statute, oppression protects against corporate or director conduct that is unfairly prejudicial to one or more shareholders. Moreover, available remedies include restraint of the oppressive conduct, setting aside a transaction, or even the removal or replacement of directors. For example, oppression claims have been brought in pursuit of (1) appointing an independent chair for a shareholder meeting, (2) limiting commercial acts a target can engage in prior to the meeting, and (3) compelling additional target disclosure. In another example, the disqualification of proxies at a shareholder meeting on the basis of improper solicitation as alleged by the meeting chair (and where no such improper solicitation had actually occurred) was held to constitute oppression.

**An oppression claim is a versatile option in an activist's arsenal in Canada and has been brought in pursuit of various different remedies amid dissident campaigns.**

# 6. Additional Legal Considerations

Select additional legal considerations for targets and activists include the following.

- **Soliciting Dealer Fees:** Although soliciting dealer fees are technically not illegal in Canada, the practice is not risk free. Any such arrangement must be disclosed in a dissident's and/or target's proxy circular. Significant reputational consequences may also ensue, as illustrated by previous high-profile proxy battles and given certain market disfavour toward such strategies. Related regulations also come into play, including of the Canadian Investment Regulatory Organization (CIRO).
- **Protocol Agreements:** Activists can attempt to persuade a target to enter a protocol agreement establishing meeting mechanics, including the ability to review proxies and the procedure for accepting proxies. The reality, however, it that the target has no legal obligation to accede to a protocol agreement, and so such attempts are often rebuffed. Nor is the target under any duty to disclose any voting results before their announcement at a meeting.
- **Independent Chair:** Canadian courts would not be expected to appoint an independent chair based on alleged conflict of interest arising merely from the chairman standing for re-election. Where activists have been successful securing an independent chair, it has generally been based on a more acute conflict or evidence of bias indicating an independent chair is necessary to achieve fairness. In the words of one court: "[T]he test for the appointment of an independent chair is... whether there is evidence that the proposed chair has threatened to or will not act fairly or reasonably in relation to duties as chair of the meeting, or whether there is evidence that the proposed chair has committed any act or omission that has created a reasonable apprehension that the proposed chair will not act fairly or reasonably." That said, the court added: "The appointment of an independent chair is warranted where it is in the company's best interests to avoid bias or the appearance of it..."

**Before appointing an independent chair, courts will generally require evidence of a reasonable apprehension the proposed chair will not act fairly or reasonably.**

- **Settlement Agreements:** Targets often recognize that defending against a proxy contest requires the commitment of significant time and resources and will disrupt management's execution on business objectives. As such, opportunities to reach settlement typically arise, sometimes even before the activist campaign becomes public. Alternatively, opportunities for settlement may be delayed and only arise as the anticipated results of the proxy contest become clearer. It is common for settlement agreements in Canada to include board nomination rights, committee representation and reimbursement of expenses. In exchange, activists often accept standstill provisions that prevent the activist from acquiring any additional interest in the target or taking any action to remove directors for a stipulated period of time.

**Settlement agreements between targets and activists commonly include nomination rights, committee representation, reimbursement of expenses, and standstills.**

- **Governance Issues Raised by Nominee Directors:** Where an activist successfully secures the nomination of one or more directors, applicable corporate governance law must be carefully navigated: nominee directors in Canada must balance a delicate tension. On the one hand, activists campaign and negotiate for nomination rights to monitor company business and have their views advanced in the target's boardroom. On the other hand, a nominee director's duties remain owed solely to the company and are not at all attenuated by virtue of being a nominee director. This conflict between the activist's expectations and the director's fiduciary duties must be carefully managed, including regarding potential conflicts of interest and the potential sharing of confidential target information. This is particularly the case for U.S. activists, as corporate governance law in Canada differs from Delaware law on several key points. For example, unlike in Delaware where a contractual right to nominate a director automatically carries a presumption the nominee director will share confidential information with the nominating shareholder, in Canada a nominee director can only share confidential company information where the company has expressly or impliedly consented. Canadian caselaw also creates the potential risk, albeit generally remote, that in exceptional circumstances a nominee director could be required by their fiduciary duty of loyalty to the company to disclose information of the nominating shareholder to the company. Securities law regarding insider trading and tipping (discussed above) will also have to be carefully navigated, including because the nominee director will be a person in a "special relationship" with the company.

**Nominee directors must navigate a delicate tension between their fiduciary duties to the company and the expectations of the nominating activist, including regarding confidential company information.**

- **Corporate Law vs Securities Law:** Certain overlaps between Canadian corporate law and securities law raise the possibility of shareholder activism leading to proceedings before both courts and securities regulators. For example, amid one activist campaign a court held a private placement was not oppressive because its primary purpose was debt reduction. However, a securities commission concurrently held the same private placement should not have been approved by the TSX because, among other things, there was strong evidence of tactical motivation by the company without any compelling business objective to excuse it. After learning of the conflicting securities commission ruling, the court independently exercised its discretion to adjourn the pending shareholder meeting requisitioned by the activist to allow for "appropriate steps" to "resolve the conflict" between the two rulings. This resulted in a split appellate court ruling regarding whether the lower court had acted appropriately, the majority ruling it had not and that the shareholder meeting should not have been adjourned. In addition to potential overlapping jurisdiction, this example highlights that courts may be more reluctant to question a company's decisions (i.e., out of deference to directors under the business judgment rule under corporate law) than securities regulators.

**Activist campaigns in Canada can lead to proceedings before both courts and securities regulators, and the latter may be less deferential to the business judgment of target directors than the former.**

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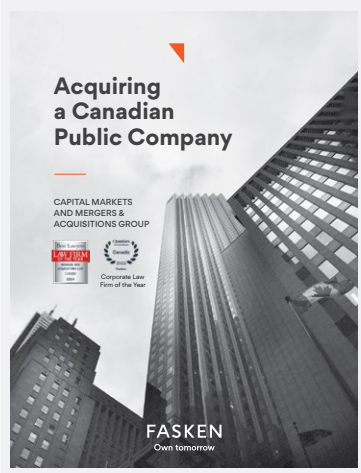


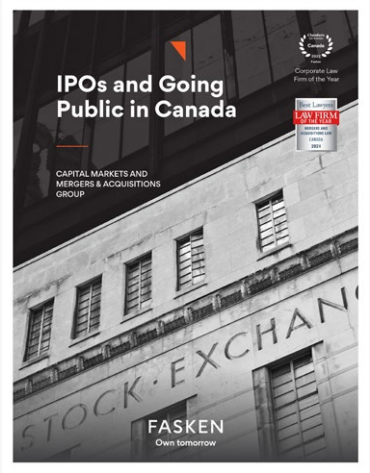


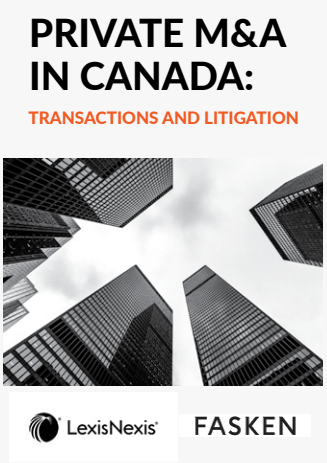


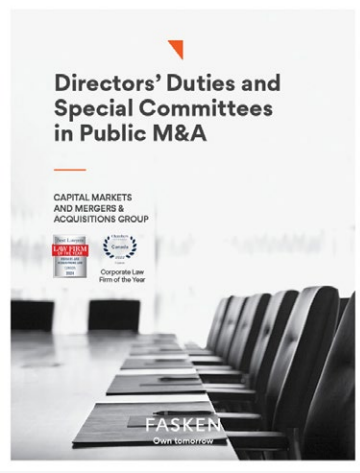


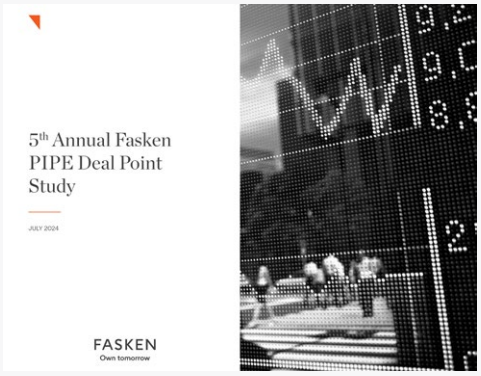


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