The Corporate Governance Review

Second Edition

Editor
Willem J L Calkoen

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I am proud to present this new edition of *The Corporate Governance Review* to you.

In this second edition, we can see that corporate governance is becoming a hotter topic with each passing year. What should outside directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most outside directors know the business? How much time should they spend on the function?

Governments, the European Commission and the Securities and Exchange Commission are all pressing for more formal inflexible acts, especially in the area of remuneration, as opposed to codes of best practice.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, wise boards have ‘selected engagements’ with stewardship shareholders in order to create trust.

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at GM and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries produced national codes along the model of the Cadbury ‘comply or explain’ method. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been many instances where imperial CEOs gradually amassed too much power and companies have fallen into bad results – and sometimes even failure. More have failed in the financial crisis than in other times, hence the increased outside interest in government acts, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists.
This all implies that executive and non-executive directors should work harder and more as a team on strategy and entrepreneurship. It is still a fact that more money is lost due to lax directorship than to mistakes. On the other hand, corporate risk management is an essential part of directors’ responsibility, and especially the tone from the top.

Each country has its own measures; however, the various chapters of this book show a convergence. The concept underlying this book is to achieve a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that will permit convenient comparisons where a quick ‘first look’ at key issues would be helpful to general counsel and their clients.

My aim as General Editor has been to achieve a high quality of content so that The Corporate Governance Review will be seen, in time, as an essential reference work in our field.

To meet the all-important content quality objective, it was a condition sine qua non to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law by reading about the laws of others.

Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
April 2012
Chapter 3

CANADA

Andrew MacDougall, Robert Yalden and Elizabeth Walker

I OVERVIEW OF GOVERNANCE REGIME

Canada’s system of corporate governance is derived from the British common law model and strongly influenced by developments in the United States. While corporate governance practices in the United Kingdom and the United States are similar in many respects, where there are differences Canadian practice usually falls somewhere in between. For example, a Canadian corporation is more likely than a US corporation to have a chair who is not the CEO and typically has fewer executives on the board than a UK corporation.  

Under Canada’s Constitution, provincial governments have exclusive power over property and civil rights within the province. As a result, corporations may choose to incorporate under federal corporate law or under the corporate laws of any of the 10 provinces in Canada. In addition, securities law in Canada is regulated by securities administrators in Canada’s 10 provinces and three territories. A recent initiative to create a federal securities act and national securities regulator has been declared unconstitutional by the Supreme Court of Canada. Regulation of Canada’s national stock exchange is divided between the Province of Ontario for the senior exchange, the Provinces of British Columbia and Alberta for the venture exchange and the Province of Quebec for the derivative exchange.

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1 Andrew MacDougall, Robert Yalden and Elizabeth Walker are partners at Osler, Hoskin & Harcourt LLP’s Toronto, Montreal and Ottawa offices, respectively.

2 According to reports by Spencer Stuart in 2011, in Canada 85 per cent of corporations had a chair who is not the CEO and 81 per cent of directors were independent; in the UK the CEO rarely serves as chair but only 67 per cent of the directors are non-executives; and in the US only 41 per cent of corporations have a chair who is not the CEO but 84 per cent of directors are independent. See the Canadian Spencer Stuart Board Index for 2011 and the Spencer Stuart 2011 UK Board Index.
Corporate governance practices in Canada are shaped by legal rules and best practices promoted by institutional shareholder groups, the media and professional director associations such as the Institute of Corporate Directors (‘the ICD’). Sources of legal rules include provincial corporate statutes, securities laws and rules, stock exchange requirements and the common law, as well as a wide variety of other regulatory statutes, regulations and policies. The 10 provincial securities commissions are very active in corporate governance matters, often overlapping corporate law areas of concern. Canadian corporate governance has also been influenced by the high proportion of public corporations in Canada that have a dominant or controlling shareholder, either through equity ownership or the ownership of multiple voting rights.

Canadian institutional investors have a profound influence on Canadian corporate governance practices and Canada may be unique in that has a national institutional investor organisation formed to promote good governance practices in corporations whose shares members own. The Canadian Coalition for Good Governance (‘the CCGG’) comprises 48 members, including many of Canada’s largest institutional investors, collectively managing nearly C$2 trillion in assets, and has pursued an organised programme of articulating its views and encouraging best practices generally without resorting to proxy battles.

### Recent developments

Recent corporate governance initiatives have focused on the exercise of shareholder voting rights. On 14 January 2011, staff at the Ontario Securities Commission (‘the OSC’) issued OSC Staff Notice 54-701, *Regulatory Developments Regarding Shareholder Democracy Issues*, seeking input on three shareholder democracy issues:

- a slate voting and majority voting for uncontested director elections;
- b shareholder advisory votes on executive compensation; and
- c the effectiveness of the proxy voting system.

Although neither the OSC nor their counterparts in other jurisdictions in Canada have yet proposed changes to practices for the election of directors in response to the input received, on 9 September 2011, Toronto Stock Exchange (‘the TSX’) issued for comment proposed amendments to its listing requirements, which would require listed issuers to:

- a have annual elections for all directors;
- b provide for proxy voting for directors on an individual basis;
- c disclose in their proxy materials whether the issuer has adopted a majority voting policy for directors, and if not, explain why not; and
- d notify the TSX if a director of a listed issuer that does not have a majority voting policy receives a majority of ‘withhold’ votes.

The TSX noted in its request for comments that 83 per cent of listed issuers in the S&P/TSX Composite Index hold individual elections and 98 per cent of such issuers elect the entire board of directors annually. The TSX also cited a report from the CCGG stating that 57 per cent of such issuers have adopted a majority voting policy for the election of directors.³

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³ TSX Request for Comments dated 9 September 2011.
Initiatives to provide shareholders with an opportunity to cast a non-binding vote with respect to a corporation's executive compensation practices began in Canada five years ago when certain large Canadian issuers, particularly Canadian financial institutions, began receiving shareholder proposals requesting the adoption of an annual say on pay vote. Although shareholder say on pay is not a legal requirement in Canada, a group of large Canadian corporations worked with the CCGG to settle on a form of advisory resolution to submit to shareholders and several corporations began holding say on pay votes in 2010. To date, a total of 84 Canadian issuers have adopted say on pay resolutions. Although the CCGG promotes the adoption of say on pay, the ICD opposes it, as does one of Canada’s largest institutional investors, the Ontario Teachers’ Pension Plan.

II CORPORATE LEADERSHIP

i Board structure and practices
Responsibility for the governance of a corporation is vested in the corporation's board of directors (‘the board’). The board is a single-tiered body elected by the shareholders that supervises the management of the corporation. If shareholders are not satisfied with the performance of the board, they may remove the directors or refuse to re-elect them.

The role of directors is one of stewardship and oversight. Directors have complete discretion to exercise their powers as they deem appropriate, subject to the constraints imposed by law. The board discharges its responsibilities through majority approval of the directors at board meetings.

Directors are neither required nor expected to devote their full time and attention to the corporation's affairs. Instead, responsibility for the day-to-day management of a corporation's affairs is delegated to the CEO and other senior executives who are responsible to, and report back to, the board. Appointing these senior executives and evaluating their performance are among the most important functions of the board. Notwithstanding such delegation, the board retains the ability to intervene in management's decisions and must exercise final judgement on matters that are material to the corporation. National Policy 58-201 Corporate Governance Guidelines (‘NP 58-201’), issued by the Canadian securities administrators (a group composed of the 10 provincial regulators) (‘the CSA’), recommends that a board adopt a written mandate in which it acknowledges responsibility for stewardship of the corporation.

Committees
The board may delegate certain of its responsibilities to committees of directors. Certain responsibilities may not be delegated to a committee of the board, including (under the Canada Business Corporations Act):

a making changes to the by-laws;

b approving the annual financial statements, a management proxy circular, a takeover bid circular or directors’ circular;

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4 Shareholder Association for Research and Education, list of ‘Canadian companies that have adopted a Say on Pay’, available at www.share.ca.
Canada

c issuing securities (except on terms already approved by the board);
d declaring dividends; and
e purchasing or redeeming shares of the corporation.

In practice, the committees of many boards do not formally approve the matters before them, but return the matter to the full board with their recommendation.

All public corporations are required by statute to have an audit committee. Private corporations frequently choose to have an audit committee as a matter of good practice. Most public corporations also have separate committees to deal with compensation matters, and director nominations and corporate governance. Corporations with larger boards may also have an executive committee. Boards also strike ad hoc or special committees from time to time to address specific issues or transactions.

Under the corporate statutes, the audit committee of a public corporation must be composed of at least three directors, a majority of whom must not be employees of the corporation or any of its affiliates. However, National Instrument 52-110 Audit Committees (‘NI 52-110’) of the CSA requires that public corporation audit committees be composed of at least three members, all of whom must be ‘independent’ directors, as defined in that instrument. NI 52-110 also requires that all members of the audit committee be ‘financially literate’ – that is, that they have the ability to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of the issues that can reasonably be expected to be raised by the corporation’s financial statements. Furthermore, corporations must disclose the education and experience of each audit committee member that is relevant to the performance of his or her responsibilities as an audit committee member.

Public corporations are required to disclose publicly on an annual basis the processes by which a board determines compensation for the corporation’s directors and officers, including the responsibilities, powers, experience and operation of the compensation committee of the board, if any, and the identity, mandate and compensation paid to any advisors retained by the committee in the past financial year. The overwhelming majority of Canadian public corporations establish a board committee that has responsibility for overseeing compensation matters. NP 58-201 of the CSA recommends that a board appoint a compensation committee composed entirely of independent directors with responsibilities for oversight of the compensation payable to senior executives. The members of the compensation committee are not required to be independent or to have any particular expertise. However, if the compensation committee is not comprised solely of ‘independent’ directors as defined in Section 1.4 of NI 52-110, the corporation must disclose what steps the board takes to ensure an objective process for determining executive compensation.

Most Canadian public corporations also have a board committee that has responsibility for overseeing the process for nominating directors for election by shareholders. NP 58-201 recommends that, before an individual is nominated as a director, the board, with advice and input from the nominating committee, should consider the competencies and skills that the board, as a whole, should possess; the competencies and skills of each existing director and of each new nominee; and whether the new nominee can devote sufficient time and resources to serving as a director. Public
corporations are required to disclose publicly on an annual basis the process by which the board identifies new candidates for nomination and the responsibilities, powers and operation of the nominating committee. The members of the nominating committee are not required to be independent or to have any particular expertise. However, if the nomination committee is not comprised solely of ‘independent’ directors as defined in Section 1.4 of NI 52-110, the corporation must disclose what steps the board takes to ensure an objective nominating process.

**Board chair**

Boards appoint a chair from among the directors with responsibility to provide leadership to the board to enhance board effectiveness. The chair is responsible for, among other things, managing the board, setting the agenda, ensuring that directors are kept informed, presiding at director and shareholder meetings, and acting as a key liaison between the board and senior management.

Canadian boards typically do not appoint the CEO as board chair. Concerns about board accountability and process and the desire to provide independent leadership to the board have led most larger public corporation boards in Canada to appoint an independent director as board chair. NP 58-201 recommends that the chair of the board should be an independent director and, where this is not appropriate, an independent director be appointed as lead director. Public corporations are required to disclose whether or not the chair is an independent director and, if not, to disclose whether the board has a lead director. If there is no independent chair or independent lead director, a corporation must then disclose what the board does to provide leadership for its independent directors.

**ii Directors**

Directors are fiduciaries of the corporation they serve. This obligation and duty arises under common law and is codified in the corporate statutes in the requirement that directors act honestly and in good faith with a view to the best interests of the corporation, and must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This fiduciary relationship requires a strict standard of conduct that includes loyalty and good faith and requires directors to avoid putting themselves in a position where their duty to act in the best interests of the corporation conflicts with their other obligations.

Directors are required by corporate statutes to discharge their fiduciary duty ‘with a view to the best interests of the corporation’. The Supreme Court of Canada has recently stated that directors owe their fiduciary duty to the corporation and that the best interests of the corporation must not be confused with the interests of the corporation’s shareholders or any other stakeholders of the corporation.

**Director qualifications**

Canadian corporate statutes impose minimal qualifications for directors. Any individual who is 18 or over and of sound mind and who is not bankrupt may serve as a director. Some Canadian corporate statutes also require that a certain percentage of directors of the board and committees be resident Canadians.
The ability of the board to exercise independent judgement is of fundamental importance to the governance of public corporations. As a result, most public corporation boards have a number of ‘independent’ directors. Independent directors and the role they play in ensuring the board is able to exercise independent judgement have been a focus for those concerned with accountability in corporate governance. Rules for the determination of who may be considered to be an independent director are set out in both corporate and securities legislation in Canada. In addition, some Canadian institutional shareholders set their own standards for assessing director independence.

The corporate statutes define an independent director as any director who is not employed by the corporation or one of its affiliates. Under this definition, recently retired employees of the corporation and representatives of a controlling shareholder of the corporation would qualify as ‘independent’. Further, as the term ‘affiliates’ involves the concept of control, directors or employees of a major, but not controlling, shareholder are technically independent under the corporate statutes.

The TSX requires a listed corporation to have at least two independent directors. For this purpose, an independent director is a person who:

a) is not a member of management and is free from any interest and any business or other relationship that could reasonably be perceived to materially interfere with the director's ability to act in the best interest of the corporation; and

b) is a beneficial holder, directly or indirectly, or is a nominee or associate of a beneficial holder, collectively of 10 per cent or less of the votes attaching to all issued and outstanding securities of the corporation.

For publicly traded corporations, there is yet another definition of ‘independent director’. The definition is set out in Section 1.4 of NI 52-110 of the CSA and requires the board to consider whether there is a material relationship between the director and the corporation that could, in the board’s view, be reasonably expected to interfere with the exercise of that director’s independent judgement. In making its determination, the board must consider all direct and indirect relationships between a director and the corporation – past, present and anticipated – both individually and collectively. The board’s determination is subject to certain ‘bright line’ tests that are similar to the director independence tests under the New York Stock Exchange’s corporate governance listing requirements. Under such tests, recently retired employees and employees of a parent of the corporation are not ‘independent’. Public corporations are required to disclose annually which of the directors on the board are independent and which are not, and describe the basis for determining that a director was not independent. For audit committee purposes, there are additional ‘bright line’ director independence tests set out in Section 1.5 of NI 52-110 that correspond to requirements under the Securities Exchange Act of 1934 in the United States.

**Election and term**

Directors are usually elected by shareholders at the corporation’s annual meeting. Shareholders may be provided with the opportunity to vote for a slate of directors en bloc, but most Canadian corporations provide shareholders with the opportunity to vote on each director individually. Shareholders may vote for directors or withhold their vote but cannot vote ‘against’ a director. A corporation’s articles may provide for cumulative
voting for directors, whereby each shareholder may cast one vote for each share held multiplied by the number of directors to be elected. However, this is very rare. The articles of a corporation may also permit a particular class of security holders, such as preferred shareholders, to elect one or more directors, or may permit a particular class of security holders to hold multiple voting rights, such as 10 votes per share.

Directors are generally elected annually, although they may be elected for terms of up to three years. Directors need not all be elected at the same time or for the same length of time. However, staggered boards are rare in Canada as most Canadian corporate statutes permit shareholders to remove one or more directors from office and elect their replacements.

III DISCLOSURE

All Canadian corporations are subject to periodic reporting to shareholders. In the case of a private corporation, periodic reporting may consist solely of the delivery of annual financial statements and a notice of an annual shareholder meeting. Public corporations are also subject to continuous disclosure reporting requirements under Canadian securities laws.

Periodic disclosure requirements require public corporations to file publicly certain documents on the System for Electronic Document Analysis and Retrieval (‘SEDAR’) including:

- annual and quarterly financial statements, and related management’s discussion and analysis;
- an annual information form describing the corporation and its business; and
- information circulars in respect of shareholder meetings, including disclosure respecting compensation paid or payable to the directors and certain named executive officers.

Canadian public corporations are also subject to timely disclosure obligations. Under Canadian securities laws, public corporations must issue and file on SEDAR a press release as soon as there has been a material change in the business, operations or capital of the corporation that would reasonably be expected to have a significant effect on the market price or value of any of the corporation's securities. They must also file a material change report on SEDAR within 10 days of the date of such material change. TSX rules also require listed corporations to promptly disclose by press release any fact that would reasonably be expected to have a significant effect on the market price or value of any of the corporation's securities.

Failure to comply with periodic filing requirements and timely disclosure obligations may lead to enforcement proceedings by securities administrators. In addition, investors in most jurisdictions in Canada may have a statutory right of action against the corporation and its directors and officers for damages in the event that written or oral disclosure by the corporation is misleading or untimely. Although there are statutory limits on such liability, class action proceedings alleging misleading or untimely disclosure are becoming increasingly prevalent in Canada.
Directors, certain officers, 10 per cent shareholders and certain others are required to file on the System for Electronic Disclosure by Insiders (‘SEDI’) insider reports detailing their holdings of securities and related financial instruments, including equity-based compensation holdings, and other arrangements involving, directly or indirectly, a security of the public corporation or related financial instrument. Persons acquiring more than 10 per cent of any class of securities of the public corporation are required to issue a press release and file a report disclosing their holdings.

Many Canadian corporations also provide a range of supplemental voluntary disclosures that they publish on their corporate websites. Public corporation websites typically include links to documents filed on SEDAR and press releases issued by the corporation, as well as supplemental information provided to analysts, recordings or transcripts of analyst or investor calls, and key corporate governance documents (such as the board and committee charters and code of conduct).

IV CORPORATE RESPONSIBILITY

Directors are permitted to consider various stakeholder interests in determining whether they are acting in the best interests of the corporation. In the Supreme Court of Canada’s recent decision in *BCE Inc. v. 1976 Debentureholders*, the Court stated that where there are conflicting stakeholder interests, it falls to the directors to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a ‘good corporate citizen’. By this reference, together with the Court’s focus on what is in the corporation’s best interests, the Supreme Court of Canada has rejected a purely shareholder-centric understanding of the duties of a board. Rather, there is recognition that corporations have a duty to the community in which they operate and boards have to balance many competing factors and interests when making decisions.

Many Canadian corporations seek to enhance stakeholder trust including through voluntary participation in initiatives such as the Global Reporting Initiative’s Sustainability Reporting Guidelines.

Boards are responsible for setting the tone at the top by approving codes of conduct for employees and directors that set out the board’s expectations regarding compliance with laws, handling of conflicts of interest and use of resources and stakeholder relations. NP 58-201 states that the board is responsible for satisfying itself as to the integrity of the CEO and other executive officers of the corporation and that the CEO and other executive officers create a culture of integrity throughout the organisation. The audit committee is required under NI 52-110 to establish procedures for the receipt, retention and treatment of complaints received by the corporation regarding accounting, internal accounting controls or auditing matters and the confidential, anonymous submission by employees of the corporation of concerns regarding questionable accounting or auditing matters. Most corporations satisfy this requirement by adopting a whistle-blowing policy that not only addresses reporting of such matters but also reporting of potential violations of the corporation’s code of conduct.
V SHAREHOLDERS

Although directors owe a duty to the corporation and not its individual shareholders, shareholders are accorded a special role in the governance of Canadian corporations. Increasingly, shareholders in Canada are taking steps to make their views known to the board and are exercising their rights when the board’s response or corporate performance is not satisfactory.

i Shareholder rights and powers

Under Canadian corporate statutes, shareholders elect the directors and appoint the external auditors of the corporation. Certain matters of fundamental importance are also required to be approved by shareholders, including changes to the articles and by-laws, amalgamations, reorganisations, the sale of all or substantially all of the corporation's assets and the continuance of the corporation to the laws of another jurisdiction. In addition, TSX rules require listed corporations to obtain shareholder approval of certain dilutive transactions and for share-based compensation arrangements involving new issuances of shares.

If a shareholder believes that the actions of the corporation have been unfairly prejudicial to its interests, the corporate statutes provide several ways for the shareholder to take action against directors. First, a shareholder may apply to the court for an order compelling the directors to comply with the corporation’s articles, by-laws or governing statute. Second, a shareholder can pursue a derivative action, which allows the shareholder to require the corporation to take action against the directors in the name and on behalf of the corporation. Third, a shareholder may take advantage of the oppression remedy. The oppression remedy is a very broad remedy available to a complainant where the corporation, the board or the corporation’s affiliate has acted in a manner that was oppressive or unfairly prejudicial to, or that unfairly disregarded, the complainant’s interests. The remedy gives a court ‘broad, equitable jurisdiction to enforce not just what is legal but what is fair’ to protect the reasonable expectations of the shareholders.

In addition, shareholders have available to them a range of tools in Canada to exert pressure on corporations they feel are underperforming, all of which are intended to force a reluctant management or board to engage in a dialogue.

Canadian corporate statutes allow shareholders holding at least 5 per cent of the issued shares of a corporation to require directors to convene a shareholder meeting for a broad range of purposes relating to the business of the corporation so long as they respect certain prescribed criteria.

The corporate statutes also permit a shareholder to circulate a proposal to shareholders with a supporting paragraph containing not more than 500 words describing the topic the shareholder wishes to raise at an upcoming shareholder meeting. If the proposal meets time parameters and certain other limited criteria, it must be included in the management information circular sent to shareholders of the corporation. A shareholder proposal submitted by shareholders representing more than 5 per cent of the outstanding shares may include proposed director nominees. Although there is considerable opposition to proposed rules on ‘proxy access’ in the United States, the ability of shareholders to submit a shareholder proposal including director nominees has been a long-standing provision of Canadian corporate law.
Once a shareholder meeting has been called, any shareholder can solicit proxies either for or against any matter properly before the meeting, including the election of one or more directors, by providing a dissident proxy circular containing prescribed information to the person solicited prior to or contemporaneously with the solicitation. In recent years, rules respecting what constitutes solicitation and exempting certain practices from the proxy solicitation rules have been relaxed in favour of shareholders. For example, Canadian securities laws now allow a shareholder to solicit proxies by way of public broadcast or speech, or by way of publication, without having to incur the costs associated with preparing and mailing a dissident proxy circular, provided certain conditions are met.

ii Shareholder activism

Shareholders of Canadian corporations now seem to be increasingly prepared to exercise voting rights and submit shareholder proposals as a means of encouraging change at corporations. In part, this reflects increased activity in Canada from a number of US-based funds that have traditionally been active in trying to influence the governance of US corporations and have come to realise that the Canadian environment is comparatively favourable to shareholder activist activity. For example, some Canadian companies have tangled with Carl Icahn (Fairmont Hotels, Lions Gate Entertainment), Crescendo Partners (Cott Corporation) and Pershing Capital (CP Rail). In addition, although Canadian fund managers have historically been more than comfortable making their views known to corporate boards and the public, they have recently demonstrated an increased appetite for formally opposing corporate activity. In 2010, the Canada Pension Plan Investment Board and the Ontario Teachers’ Pension Plan Board were highly vocal opponents of the terms on which Magna International proposed to eliminate its dual class share structure (and launched an ultimately unsuccessful court challenge).

Some of the reasons the Canadian environment is more favourable to shareholder activists are:

\[ a \] the use of staggered boards is ineffective, as most Canadian corporations’ directors may be removed at any time by a simple majority vote of shareholders;

\[ b \] advance notice by-laws are not a common feature in the Canadian legal landscape;

\[ c \] there are clear rights to requisition meetings with a 5 per cent ownership interest and a clear entitlement to a shareholder list;

\[ d \] it is easier for shareholders to include proposals on the election of directors in management proxy circulars;

\[ e \] the threshold for giving notice that a shareholder has accumulated a significant ownership position is higher at 10 per cent and the reporting regime after hitting that threshold is less onerous; and

\[ f \] the TSX requires any listed issuer adopting a shareholder rights plan (i.e., poison pill) to obtain shareholder approval of the plan within six months of its adoption, which gives institutional shareholders the ability to influence the terms of these plans. Moreover, unlike the Delaware courts in the US, Canadian securities regulators have consistently been prepared to terminate rights plans once they have given a board time to pursue alternatives to a hostile bid, with the result that rights plans in Canada rarely provide a target with more than 45-65 days of protection.
Shareholder activism has prompted the widespread voluntary adoption by Canadian corporations of majority voting for director policies, with over 133 Canadian corporations to date having done so.

iii Contact with shareholders
Shareholder communication is a fundamental and long-standing aspect of the board’s fiduciary oversight responsibility. Boards must take shareholder interests into consideration, and so they have an interest in understanding shareholder views about the corporation, its governance and its operations. Accordingly, Canadian corporations have a long-standing practice of consulting with their principal shareholders on matters that may be of interest to them. The importance of shareholder communications is recognised in NP 58-201, which states that the board is responsible for adopting a communication policy for the corporation.

All Canadian corporations have some form of shareholder communications programme through which the corporation communicates material information to shareholders. Typically, the corporation’s disclosure practices are summarised in a disclosure policy, and a management disclosure committee is tasked with responsibility for ensuring compliance with the disclosure policy and the corporation’s disclosure controls and procedures.

However, traditional shareholder communication and investor relations practices no longer satisfy shareholder demands for increased transparency, more frequent communications and more opportunities to express their views on how the corporation should be run, as evidenced by recent shareholder-led initiatives on majority voting for directors and say on pay. Some investors have actively sought the opportunity to meet with directors in addition to, or in lieu of, management. The CCGG has a regular annual programme through which its representatives meet with directors of between 30 and 50 Canadian corporations each year to share perspectives on the corporation, its strategies, performance and management. Generally, management is not present for these meetings.

VI OUTLOOK
Although Canada’s economy and corporate Canada have fared relatively well in recent years, there are signs that Canadian investors are expecting better performance and may be more willing to take action to effect board change to get better results. Developments in the US, including SEC rule-making under the Dodd-Frank Wall Street Reform and Consumer Protection Act, are likely to have a spill-over effect in the continued evolution of Canadian corporate governance practices.
Appendix 1

ABOUT THE AUTHORS

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Andrew J MacDougall is a partner in Osler’s Toronto office and practises corporate and securities law, with a particular focus on mergers and acquisitions and corporate governance. In his corporate governance practice, he advises boards and management on a broad spectrum of corporate governance issues, including directors’ duties, executive compensation, shareholder engagement and shareholder meeting matters, and he has written and spoken extensively on these topics. He has also advised Canadian securities regulators and various professional bodies in Canada that are active in the governance area.

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Robert Yalden is a partner in Osler’s Montreal office. He was co-chair of the firm’s mergers and acquisitions group for 10 years prior to becoming a member of the firm’s executive committee. Mr Yalden is ranked as one of Canada’s leading business lawyers in Chambers Global: The World’s Leading Lawyers for Business, IFLR 1000: The Guide to the World’s Leading Financial Law Firms, The Best Lawyers in Canada and The Canadian Legal Expert Directory. Mr Yalden has advised boards of directors and senior management in connection with a wide range of corporate governance and M&A mandates. Robert was part of the Osler team that implemented the first poison pill in Canada. More recently, he led the Osler legal teams involved in Canada’s largest ever completed leveraged buy-out, as well as the largest ever buy-out in the oil field services section. He is the co-author of Business Organizations, Policies and Practices (2008) and teaches a course in comparative corporate governance at McGill University’s Faculty of Law.
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