

## **Canadian Public Companies - Shareholder Proposals: Background and Process**

This note was prepared on 8 March 2021. Your attention is drawn to the disclaimer at the end of this note.

Canadian business corporations statutes provide an avenue through which shareholders with relatively small holdings of shares of public corporations can submit proposals, including proposals relating to disclosure of a corporation's greenhouse gas emission levels and any reduction plans relating thereto, to be voted on at an annual meeting of shareholders of the corporation. Though these proposals are advisory or "precatory" only, they still have the potential to have a significant impact on a corporation's business and operations.

### **Background**

If one could generalize, Canada would be considered to be a progressive society and this could be expected to provide a favourable environment for a positive shareholder response to ESG-related proposals. Research carried out for Royal Bank of Canada indicates that 98 per cent of Canadian institutional investors expect ESG-integrated portfolios to perform on par or better than those that do not integrate ESG factors.

However, empirical evidence may not support the conclusion that Canada provides such a favourable environment. During the 2020 proxy season, there were approximately 35 ESG-related proposals submitted by shareholders to Canadian public corporations. These proposals received an average level of support of only approximately 12.5%.

There were, however, a couple of scenarios in 2020 where ESG-related shareholder proposals were adopted by shareholders of Canadian public corporations. At the 2020 annual meeting of the shareholders of iA Financial Corporation, a proposal that iA analyze climate risk and report the results of its analysis in the Risk Management section of its 2020 annual report was approved by approximately 76.3% of the votes cast and a proposal that iA adopt measured environmental impact reduction objectives with clearly identified targets in its Sustainable Development Policy was approved by approximately 60.7% of the votes cast. A proposal regarding advisory expertise in sustainable development was rejected by approximately 92.1% of the votes cast. Interestingly, management initially recommended voting against all three proposals, but ultimately reversed this recommendation on the first two proposals.

The Pension Plan of the United Church of Canada submitted a proposal to the 2020 annual meeting of the shareholders of Ovintiv Inc. that Ovintiv "...disclose climate-related targets that are aligned with the goal of the Paris Agreement to limit global average temperature increase to well below degrees (*sic*) Celsius relative to pre-industrial levels and pursue efforts to limit the increase to 1.5°C." In spite of management's recommendation to vote against this proposal, it received approval of 56.4% of the votes cast at the meeting.

The low level of recent support overall in recent years for ESG-related shareholder proposals at Canadian public corporations may be, in part, related to the unique nature of Canadian capital markets and the relative prevalence of shareholders who hold sufficient shares to materially affect the control of Canadian public corporations. In many such cases, a shareholder legally controls the corporation, either by holding greater than 50% of the outstanding voting shares or through the ownership of multiple voting shares to which are attached greater than 50% of the votes attached to all outstanding shares.

By way of example, at the 2020 annual meetings of the shareholders of Loblaw Companies Limited and Thomson Reuters Corporation, shareholders considered proposals relating to human rights matters submitted by the B.C. Government and Service Employees' Union. In the case of Loblaw, George Weston Limited beneficially owned approximately 52% of the outstanding common shares, and in the case of Thomson Reuters, the Woodbridge Company Limited and other companies affiliated with it beneficially owned approximately 66% of the outstanding common shares. In cases such as these, unless the controlling shareholder supports the proposal, it is destined to fail. In these two particular cases, in spite of the proposals receiving the affirmative votes of 18.5% and 29.5% of the minority shareholders, they failed when the controlling shareholder voted against them.

However, developments may be afoot at the regulatory level that may obviate the need for at least a portion of ESG-related shareholder proposals at Canadian public corporations. In January 2021, the Ontario government received the report of its Capital Markets Modernization Taskforce which had been struck to review the status of Ontario's capital markets. Among the Taskforce's recommendations was a recommendation that disclosure of material ESG information, specifically climate change-related disclosure that is compliant with the Taskforce on Climate-Related Financial Disclosures (the "TCFD"), be mandated for issuers through regulatory filing requirements of the Ontario Securities Commission (the "OSC").

The key elements of the Taskforce's proposed ESG disclosure requirements are as follows:

- The requirements would apply to all reporting issuers (other than investment funds).
- The requirements would include:
  - Mandatory disclosure recommended by the TCFD related to governance, strategy and risk management (subject to materiality). This would exclude mandatory disclosure of scenario analysis under an issuer's strategy.
  - Disclosure of Scope 1 (direct emissions from owned or controlled sources), Scope 2 (indirect emissions from the generation of purchased electricity, steam, heating and cooling consumed), and, if appropriate, Scope 3 (all other indirect emissions that occur in the issuer's value chain) greenhouse gas emissions on a "comply-or-explain" basis.

There would be a transition phase for all issuers to comply with the new disclosure requirements, beginning when the new requirements are implemented. The length of each issuer's transition phase would depend on the issuer's market capitalization at the time the requirements are implemented, with each issuer grouped into one of three market capitalization tiers that correspond to a certain transition phase.

The transition phase would continue to apply to each issuer regardless of whether the issuer's market capitalization subsequently changes. The transition phases proposed are as follows:

- Large capitalization issuers: greater than \$500 million - transition phase of two years.
- Medium capitalization issuers: between \$150 million and \$500 million - transition phase of three years.
- Small capitalization issuers: less than \$150 million - transition phase of five years.

After the transition phase is complete, the requirements would apply to each issuer going forward.

The Taskforce encouraged the Canadian Securities Administrators (the "CSA"), a group comprised of all Canadian provincial securities regulatory authorities, including the OSC, to proceed in alignment with Ontario and implement similar disclosure requirements across Canada. Should the Ontario government proceed with this recommendation of the Taskforce, there may be limited need for shareholder proposals going forward on climate change disclosure. Even in the unlikely event that the CSA do not follow Ontario's lead, since most public issuers in Canada are "reporting issuers" in Ontario and, therefore, subject to the regulatory oversight of the OSC, this regime would become a *de facto* national standard in Canada for public issuers.

### **Shareholder Proposals in General**

In Canada, there is a federal business corporations statute, the *Canada Business Corporations Act* (the "CBCA") and, in addition, each of the ten provinces and three territories has its own business corporations statute. Canadian public corporations can be incorporated under any one of these statutes (or even a business corporations statute of a foreign jurisdiction). In addition, there are specialty statutes under which certain Canadian public corporations must be incorporated if they carry on certain businesses, including the *Bank Act* (Canada) and the *Insurance Companies Act* (Canada).

It is worth noting that certain Canadian public issuers are formed as trusts or limited partnerships. In those cases, the ability, if any, of their securityholders to make proposals will be governed by the declaration of trust or limited partnership agreement, as applicable.

The first step in the proposal process will be determining with the assistance of your counsel the applicable statute (or other document or agreement) governing your particular proposal.

The S&P/TSX Composite Index is the benchmark Canadian index, representing roughly 70% of the total market capitalization on the Toronto Stock Exchange, Canada's leading stock exchange. As of December 2020, 222 issuers comprised the S&P/TSX Composite Index, of which approximately 35% were incorporated under the CBCA, almost twice the number of issuers as incorporated under the next leading statute, the *Business Corporations Act* (Ontario). Consequently, this note will focus on a discussion of proposals made by shareholders of public corporations incorporated under the CBCA.

Section 137 of the CBCA sets out the framework under which a registered holder or beneficial owner of shares of a corporation that are entitled to be voted at an annual meeting of shareholders of that corporation may (a) submit proposals to be considered at an annual shareholders meeting of the corporation and (b) discuss at an annual shareholders meeting of the corporation any matter in respect of which such person would have been entitled to submit a proposal.

While the person submitting the proposal may attend the annual meeting in person or by proxy to present the proposal, this is not required. However, failure to do so provides grounds for the corporation to refuse to include future proposals and statements made in support of those proposals received from such person within a two year period of the annual meeting not attended in a future management information circular.

### **Eligible Persons**

In order to be eligible to submit a proposal pursuant to the CBCA, a person must have been the registered holder or the beneficial owner for at least six months before the submission of the proposal of (a) at least 1% of the outstanding voting shares of the Corporation on the day of the submission of the proposal, or (b) voting shares of the Corporation with a fair market value, determined at the close of business on the day before the submission of the proposal, of at least \$2,000. Alternatively, a person is eligible to submit a proposal pursuant to the CBCA if that person has the support of other persons, who, together with the person submitting the proposal, have held voting shares of the Corporation exceeding one of the two thresholds described above for at least six months before the submission of the proposal.

A proposal may include nominations for the election of directors if the proposal is signed by one or more holders of shares representing in the aggregate not less than five per cent of the shares or five per cent of the shares of a class of shares of the corporation entitled to vote at the meeting to which the proposal is to be presented. This, however, does not preclude nominations made by a shareholder at a meeting of shareholders. This may be useful in the ESG context if used, for example, to nominate as directors persons who will make ESG a priority or have a history of being progressive with respect to ESG initiatives.

### **Proof of Eligibility**

A proposal submitted under the CBCA must be accompanied by (a) the name and address of the person submitting it and the person's supporters, if applicable, and (b) the number of shares held or owned by the person submitting it and the person's supporters, if applicable, and the date the shares were acquired. While the proposal is not required to be accompanied by proof of the shares held or owned, the corporation may request within 14 days of the receipt of the proposal proof that the person and/or such person's supporters meet one of the minimum shareholding requirements. If proof is requested, the person must provide such proof within 21 days after the day on which the person receives the corporation's request or, if the request was mailed to the person, within 21 days after the postmark date stamped on the envelope containing the request.

While it seems unlikely that proof will be requested if the person and his supporters are the registered holders of the minimum number of shares, if it is requested, the burden will be met by obtaining from the corporation's registrar and transfer agent a list of the registered shareholders and providing it along with evidence, such as a trade confirmation, of the date on which the shares were acquired.

Alternatively, if the person making the proposal and the person's supporters are only beneficial owners of the shares, with the shares being registered in the name of an intermediary (typically, a broker, a bank or a depository, such as the Canadian Depository for Securities), the corporation can be provided with a written statement from the "record holder" of the shareholder's securities verifying that at the time of submission the shareholder had continuously held the requisite number of voting shares (the letter should be dated on or after the date of submission). Large shareholders who own 10% or more of a corporation's voting securities and have issued the required press release and filed an early warning report with the CSA, will likely be able to meet their burden of proof by providing copies of these filings as evidence of eligibility to make the proposal.

For those shareholders relying on a bank or broker letter, below is an example:

[BROKER LETTERHEAD]

[DATE] [NOTE: MUST ON OR AFTER THE DATE YOU SUBMIT PROPOSAL]

[CORPORATION NAME]

[CORPORATION REGISTERED OFFICE ADDRESS]

ATTN: [CORPORATE SECRETARY]

Dear Sirs/Mesdames,

Please be advised that [BROKER NAME] holds, and has continuously held from [DATE] through the date hereof, on behalf of [FUND/ENTITY/PERSON], a minimum of \$2,000 in market value of [CLASS OF SHARES] of [CORPORATION], [CUSIP NUMBER].

As a custodian for [FUND/ENTITY/PERSON], [BROKER NAME] holds these shares with [the Canadian Depository for Securities] under participant number [NUMBER].

If there are any questions concerning this matter, please do not hesitate to contact me directly.

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[BROKER/BROKERAGE SIGNATURE]

If you are asked to provide proof of eligibility to submit the proposal, a determination of what will satisfy your burden of proof in your particular circumstances should be made in consultation with your counsel.

## **Other Compliance Issues**

Although the thresholds for being eligible to make a proposal are very low, persons who hold a significant number of voting shares of a corporation or who may be considering acquiring additional shares in connection with making a proposal, should consult counsel to discuss the impact on their plans of certain applicable laws and regulations, including the “early warning” requirements discussed below. A full analysis of the implications of these laws and regulations is beyond the scope of this note, but the following is a very high level summary of certain of the “early warning” requirements.

Under rules put in place by the CSA, a requirement to issue a press release and file an early warning report is triggered when a person acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the person’s securities of that class, constitute 10% or more of the outstanding securities of that class. A further press release is required to be issued and a new report filed if the person who filed the report, or any person acting jointly or in concert with that person, acquires or disposes beneficial ownership of, or acquires or ceases to have control or direction over (a) securities in an amount equal to 2% or more of the outstanding securities of the class of securities that was the subject of the most recent report, or (b) securities convertible into 2% or more of the outstanding securities of the class of securities that was the subject of the most recent report.

A further press release is also required to be issued and a new report filed if there has been a change in any material fact contained in the most recent early warning report. Persons who have made an early warning report filing should as part of their ongoing analysis of whether there has been a change in any material fact contained in their most recent report should consider whether the submission of the proposal constitutes such a change in any material fact. Such material facts may include the purposes of the person and any joint actors for holding the shares and the future intentions of the person and any joint actors with respect to their shares, as well as any impact the submission of the proposal may have on such matters. Any such analysis will be specific to the particular facts and circumstances of your case and should be made with the assistance of your counsel.

In this context, you should consider with counsel whether obtaining support of the proposal from other persons or any other actions may, in your particular circumstances, result in you being considered to be acting jointly or in concert with, or a joint actor with, such person, requiring aggregation of your shareholdings and/or purchases in determining whether the thresholds requiring the issuance of a press release and the filing of an early warning report are crossed.

In addition to considering the impact on your plans of certain laws and regulations applicable in Canada, including the “early warning” requirements, you and your Canadian counsel should coordinate advice from counsel in other jurisdictions in appropriate circumstances. Even though the relevant corporation may be incorporated in Canada, it may have operations in other jurisdictions, or other connecting factors with those jurisdictions, such as being a registrant under their securities laws, which trigger certain requirements under the laws of those jurisdictions.

## **Submission Timeline**

A proposal must be submitted to the corporation at least 90 days before the anniversary date of the notice of meeting sent to the shareholders of the corporation in connection with the previous annual meeting of shareholders.

## **Requirements Applicable to a Corporation Which Has Received a Proposal**

If a corporation receives a proposal and the corporation solicits proxies for its annual meeting (this is a requirement for Canadian public issuers in virtually all cases), it is required to set out the proposal in its management information circular for the meeting or attach the proposal thereto. It is also required, if requested by the person submitting the proposal, to include in or attach to its management information circular for the meeting a statement from the person submitting the proposal in support of the proposal, not to exceed 500 words (not including any information accompanying the proposal as to the name of the person submitting it and the names of that person's supporters and any voting shares held by them). Notwithstanding the foregoing, the corporation may be exempt from the requirement to include the proposal and the statement in support of the proposal in its management information circular for the meeting based on one of the grounds summarized below.

## **Grounds for Exclusion of a Proposal**

While the grounds upon which a corporation can exclude an otherwise properly made proposal have been narrowed in recent years, there are still a number of bases on which this can be done as enumerated in subsection 137(5) of the CBCA. A corporation is not required to set out a proposal in its management information circular for the meeting or attach the proposal thereto, or to include in or attach to the management information circular for the meeting a statement in support of the proposal, if:

- (a) the proposal is not submitted to the corporation by the required deadline;
- (b) it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or securityholders;
- (c) it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation;
- (d) within the two years preceding the receipt by the corporation of the proposal the person submitting the proposal failed to present, in person or by proxy, at a meeting of shareholders of the corporation, a proposal that, at such person's request, had been included in a management proxy circular relating to the meeting;
- (e) substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident's proxy circular relating to a meeting of shareholders of the corporation held not more than five years before the receipt of the proposal and it did not

receive a minimum support of (i) at least 3% of the total number of shares voted, if the proposal was introduced at one annual meeting of shareholders, (ii) at least 6% of the total number of shares voted at its last submission to shareholders, if the proposal was introduced at two annual meetings of shareholders, or (iii) at least 10% of the total number of shares voted at its last submission to shareholders, if the proposal was introduced at three or more annual meetings of shareholders; or

- (f) the rights conferred by Section 137 of the CBCA are being abused to secure publicity.

Further, if a person who makes a proposal fails to continue to hold or own the minimum number of shares to be eligible to submit a proposal up to the day of the meeting at which the proposal is to be considered, the corporation is not required to set out a proposal made by that person in its management information circular for a meeting (or attach the proposal thereto) for a period of two years following the date of the meeting or to include in or attach to the management information circular for a meeting a statement in support of such a proposal.

If a corporation refuses to include a proposal in a management information circular, the corporation shall, within 21 days after the day on which it receives the proposal or the day on which it receives the proof of ownership of the requisite number of voting shares, as the case may be, notify in writing the person submitting the proposal of its intention to omit the proposal from the management information circular and of the reasons for the refusal.

A person submitting a proposal who claims to be aggrieved by a corporation's refusal to include a proposal in a management information circular may apply to a court for an order restraining the holding of the meeting to which the proposal is sought to be presented and for any further order as the court thinks fit.

The corporation or any person claiming to be aggrieved by a proposal may apply to a court for an order permitting the corporation to omit the proposal from the management information circular, and the court, if it is satisfied that any of the grounds in subparagraphs (a) through (f) above apply, may make such order as it thinks fit.

### **Further Steps Taken by Persons Submitting a Proposal**

It would be reasonable to expect that a person submitting a proposal to a corporation may wish to convince other shareholders to vote their shares in support of the proposal or to submit a proxy directing that their shares be voted in support of the proposal, or persuade the public of the merits of the proposal. Certain actions taken in this regard may constitute a solicitation of proxies under the applicable business corporations statute and/or National Instrument 51-102 - *Continuous Disclosure Obligations* of the CSA, triggering certain requirements, including, without limitation, the requirement to prepare, file and provide a dissident's proxy circular. A discussion of these requirements and the actions that could trigger them is beyond the scope of this note, but they should be considered carefully with your own counsel.

## **Conclusion**

Canadian business corporations statutes provide a means by which shareholders of Canadian public corporations can voice their opinions at annual shareholder meetings without, in appropriate circumstances, the expense of preparing, circulating and filing dissident proxy materials. The applicable statutory provisions are relatively simple and straightforward. Nevertheless, we recommend that any person considering submitting a proposal to a Canadian corporation consult with counsel before making such a submission so as to avoid encountering any potential pitfalls.

## **Counsel**

This note was prepared by lawyers at Allen McDonald Swartz LLP. Investors considering taking any of the actions described in this note should seek independent legal advice in advance from their own counsel.

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