

# Cassels

## Think Before You Act(ivism): An Overview of Shareholder Activism

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### What is Shareholder Activism?

Shareholder activism is the mechanism by which shareholders exercise their rights to gain control and influence over the company and management's actions and behaviour. Shareholder and company rights are grounded in governing corporate and securities laws. When an activist shareholder seeks support for a cause, they may solicit proxy votes from other shareholders. When both the activist shareholder and the company actively solicit proxy votes, this is considered a proxy contest. A company's management or board of directors can seek to minimize shareholder activism through various strategies. Both company and shareholder strategies are discussed below.

### Company Strategies

#### Effective Shareholder Engagement

Effective shareholder engagement is a proactive measure may reduce the likelihood of shareholder activism. In order to maintain effective communication with shareholders, management should understand the composition and concerns of shareholders, and tailor messaging to the group appropriately, keeping the message consistent. Establishing systems for consistent shareholder feedback, and responding effectively to feedback gathered can be an essential communication tool.

#### Advance Notice By-Laws

Advance notice by-laws can be enacted by companies to require advance notice on terms set forth by the company ahead of any nomination for directors. In effect, this removes shareholders' ability to ambush the board at shareholder meetings with an unexpected director nomination. Advance notice by-laws have become gradually more popular in Canada over the last decade.

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## Enhanced Quorum Provisions

Public companies require a quorum of votes, according to their bylaws, in order to enact certain changes. Enhanced quorum provisions increase quorum requirements to a higher percentage where shareholders vote on a contested director election.

## Voting Support Agreements

A voting support agreement is a contract between shareholders and the company, that requires shareholders to vote a certain way. In the context of activist shareholders, a voting support agreement could require that shareholders party to the agreement vote against new director elections.

## Poison Pills/Shareholder Rights Plans

The poison pill defence keeps individual shareholder stakes down by stipulating a maximum amount of shares an investor is permitted. When a shareholder exceeds this limit, the company will issue discounted or free shares to other shareholders in order to dilute the activist shareholder's accumulation.

## Private Placements

Private placements involve the company selling to pre-selected investors rather than on the open market. While used increasingly by start-ups in order to bypass the IPO requirement, private placements can also be used by the company to ensure control over who holds shares.

## Activist Strategies

## Meeting Requisitions

Requisitioning a shareholder meeting is a useful tool and often the first step for activist shareholders seeking to replace board members. Different jurisdictions have different requirements for the requisition but in Ontario and British Columbia, shareholders holding 5% of the issued voting shares may requisition a shareholders' meeting and the company must call the meeting within 21 days following receipt. There are several conditions for the requisition to be valid, including containing sufficient detail regarding the business to be conducted at the meeting.

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## Shareholder Proposals

Shareholder proposals allow shareholders to table an issue for consideration at the company's next annual meeting of shareholders. Different jurisdictions contain different requirements for the form and content of the proposal. In Ontario, this tool is open to any registered or beneficial owner of voting shares, however proposals involving the election of directors must be made by the holder(s) of at least 5% of the outstanding voting shares.

## Proxy Solicitation and Exemptions

### What is Required to Solicit Proxies

In order to formally solicit proxies, the activist shareholder must mail a dissident proxy circular to each of the shareholders whose proxy is solicited subject to the exemptions below. If the subject matter of the solicitation relates to director nominations, the nominee names must be included in the circular. Typically, the activist shareholder will hold off on mailing the dissident circular until receiving the management information circular.

### Quiet Solicitation

A quiet solicitation allows a shareholder to solicit proxies from up to 15 shareholders without following formal solicitation requirements under corporate and securities laws. If the ownership of shares is concentrated in the hands of a few holders, this can be an effective way to surprise the board and control a shareholder vote without providing warning.

### Public Broadcast Exemption

This exemption allows the activist shareholder to publicly solicit proxies by making the solicitation generally to the public pursuant to a public broadcast, speech or publication (for example, a press release or advertisement). However, if the solicitation of proxies involves the nomination of directors, a dissident proxy circular containing the prescribed information concerning the proposed nominees must be filed on SEDAR.

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