

Shareholder Activism Unleashed: Advance Notice Provisions, Poison Pills, and Meeting Requisitions in Canada

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Shareholder activism involves shareholders of a corporation exercising their respective rights to influence and control a corporation's direction and management decisions. In Canada, these rights are established and governed by applicable corporate and securities laws. Activist shareholders often seek support from other shareholders by soliciting proxy votes. When both the activist shareholder(s) and the corporation engage in soliciting proxy votes, it results in a proxy contest that can be highly contested and disputed. Corporations and shareholders have the ability to employ various strategies, with the aid of effective and impactful legal counsel, to mitigate the damages that can be caused by proxy contests. Here we discuss a few common strategies used by both corporations and shareholders in proxy contests.

Proxy Contests Challenges

Proxy contests can lead to several challenges for both corporations and their shareholders. One of the primary issues is the significant costs involved in soliciting proxies, which include expenses for preparing and mailing proxy materials, associated legal fees, and public relations efforts. Additionally, proxy contests can create a divisive atmosphere within the corporation, leading to conflicts between management and shareholders. These conflicts can distract from the corporation's core operations and strategic goals. The time and resources spent on a proxy contest can divert attention from other important business activities, potentially affecting overall performance and growth. The public nature of proxy contests may also impact the corporation's reputation and share price, as investors react to internal uncertainty and potential changes in leadership, as demanded by activist shareholder(s).

Key Strategies for Management and Boards of Directors: Advance Notice Provisions

To mitigate some of the challenges associated with a proxy contest, corporations may implement various strategies, including the adoption of advance notice provisions in a corporation's articles (in provinces such as British Columbia) or by-laws, which establish specific requirements and deadlines for shareholders to submit proposals and nominations at a shareholders' meeting (Advance Notice By-laws). Advance Notice By-laws play a critical role in managing the timing and process in situations of shareholder activism.

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Advance Notice By-laws are an essential component of the public corporation playbook in Canada. As shareholder activism continues to evolve, the importance of clear, well-drafted nomination procedures, as contained in Advance Notice By-laws, has grown organically, especially in the context of contested elections to a corporation's board of directors.

Advance Notice By-laws outline the process by which shareholders must follow if they intend to nominate individuals for election to a corporation's board of directors. Instead of allowing nominations to be made spontaneously from the floor at a shareholders' meeting, Advance Notice By-laws require shareholders to provide formal notice, within a prescribed time window, of their intention to propose nominees to the board of directors of the corporation.

At first glance, the implementation of Advance Notice By-laws in a corporation's articles or by-laws might seem like a housekeeping item for a corporation. However, its real purpose is strategic: to ensure that all shareholders and the board of directors have the opportunity to evaluate proposed nominees with sufficient time and information, particularly during proxy contests or shareholder activist campaigns.

Corporations face several challenges with implementing Advance Notice By-laws in their articles or by-laws, despite their readily apparent benefits. Amendments to articles or by-laws to provide for Advance Notice By-laws are often subject to legal scrutiny from activist shareholders, institutional investors, proxy advisory firms, courts, stock exchanges, and securities regulators, particularly if the wording of such Advance Notice By-laws is perceived as overly restrictive or unfairly implemented by the board of directors and subsequently approved by the corporation's shareholders. Courts may scrutinize Advance Notice By-laws to ensure that they do not unreasonably impede shareholders' rights. The requirements as set forth in Advance Notice By-laws can be complex and often times drafted ambiguously, resulting in disputes over interpretation and compliance, especially regarding definitions such as "acting in concert" or less than onerous disclosure requirements. For example, generally required and accepted disclosure requirements include: (i) basic information about the nominee director; (ii) the shareholder/nominator information; (iii) disclosure of voting control; and (iv) compliance with applicable securities laws, such as the information required in National Instrument 51-102 – *Continuous Disclosure Obligations*. This contrasts with the United States, where the disclosure requirements in Advance Notice By-laws are more inclusive, typically by including lengthy questionnaires for director nominees to complete.

Additionally, the adoption of Advance Notice By-laws can lead to increased commercial litigation, as activist shareholders may challenge the validity of the Advance Notice By-laws contained in the corporation's articles or by-laws, causing significant legal costs and diverting management's attention away from the corporation's core business activities. There is also the risk that corporations might use Advance Notice By-laws to strategically block legitimate shareholder nominations and maintain control over the board of directors at a shareholders' meeting, which can lead to accusations of unfair practices and damage the corporation's reputation. Advance Notice By-laws that are overly restrictive can further damage a corporation's reputation if the corporation is seen as hostile to shareholder democracy and input, which

may lead to a challenging capital raising and overall business environment.

Implementing and enforcing Advance Notice By-laws requires significant administrative effort, as corporations must ensure that all procedural requirements are met and that shareholders are adequately informed about the rules and impact of the Advance Notice By-laws.

The Canadian Approach: Designed for Balance

Unlike in the United States, where Advance Notice By-laws have long been entrenched (often accompanied by detailed disclosure demands and board of director discretion), the Canadian approach is typically more restrained. In *Orange Capital, LLC v Partners REIT*, 2014 ONSC 3315, the court emphasized that Advance Notice By-laws are to be used as a shield to ensure a fair and transparent nomination process, not as a sword to obstruct shareholders from exercising their rights. The Toronto Stock Exchange (the TSX) issued clear guidance in 2017 stating that certain features commonly found in American style Advance Notice By-laws are not acceptable for TSX-listed issuers. Specifically, the TSX discouraged the following: (i) requiring nominee questionnaires; (ii) excessive or open-ended disclosure requirements; (iii) broad board discretion to reject nominations; and (iv) conditions such as nominee agreement to comply with corporate policies in advance. Further, the TSX requires that notice periods for director elections are as follows: (i) for annual and general meetings (an AGM), at least thirty (30) days before the AGM; for AGMs announced less than fifty (50) days prior, at least ten (10) days following the announcement; and for special meetings for electing directors, at least fifteen (15) days following the announcement. The TSX also requires that Advance Notice By-laws must be consistent with the policy objectives of the director election requirements in subsections 461.1–461.4 of the TSX Company Manual. Institutional Shareholder Services (ISS), in its Proxy Voting Guidelines for TSX-Listed Companies Benchmark Policy Recommendations (2025), supports disclosure provided by nominating shareholders and proposed director nominees as applicable under corporate securities laws and disclosure requirements for dissident information circulars. ISS typically endorses disclosure requirements that offer shareholders clear and pertinent details regarding the qualifications, experience, economic, or voting interests, and independence of director nominees. However, disclosure requests that exceed securities law requirements and are not equally demanded of management nominees might be considered problematic.

While Canadian public companies have widely adopted Advance Notice By-laws over the past decade, the approach in Canada is built around the principles of fairness, transparency, and proportionality. Guidance from regulators, courts, and proxy advisory firms have shaped a Canadian consensus: Advance Notice By-laws are meant to facilitate and not frustrate the board of director nomination process.

Well-drafted Canadian Advance Notice By-laws typically reflect the following principles:

- 1. Reasonable Notice Periods:** Corporations often require shareholders to give notice of nominations at least thirty (30) days before the shareholders' meeting date or within ten (10) days of the

corporation issuing its shareholders' meeting notice.

- 2. No Arbitrary Limits:** There is generally no maximum notice period and adjourned or postponed meetings do not restart the notice clock.
- 3. Proportionate Disclosure:** Director nominees are not required to provide information beyond what is already mandated in a dissident information circular under applicable securities laws.
- 4. Avoiding Pre-Commitments:** Corporations do not typically require nominees to agree, in advance, to corporate policies or codes of conduct.
- 5. Flexibility for Boards:** Most Advance Notice By-laws allow the board of directors to waive any of the notice requirements where doing so is in the best interests of the corporation and its shareholders.

This framework strikes a balance: giving corporations time to respond to nominations while safeguarding shareholder rights.

Where Shareholder Activism Meets Advance Notice By-laws Design

As shareholder activists become more sophisticated, Advance Notice By-laws are under greater scrutiny from shareholders, courts, and securities regulators.

Recent cases have shown that overly aggressive use of Advance Notice By-laws adopted into a corporation's articles or by-laws, especially when they deviate from Canadian norms, can lead to legal and reputational issues. Courts emphasize that these provisions should protect the integrity of the nomination process, not hinder shareholder participation.¹

High-profile cases where corporations adopted an American-style approach, such as requiring lengthy nominee questionnaires or granting discretionary powers to invalidating director nominations, faced legal challenges and settlement pressures. These instances highlight that Advance Notice By-laws that go beyond typical Canadian standards can create more problems than they purport to solve.²

Practical Considerations for Board of Directors and Legal Teams

Advance Notice By-laws are no longer just a best practice; they are a critical part of how Canadian public companies manage shareholder engagement and board of director oversight. As with any governance tool, legitimacy depends on proper and reasonable use.

Well-structured Advance Notice By-laws may help prevent disruption, enhance transparency, and support board of director accountability. However, Advance Notice By-laws that deviate from accepted norms risk legal challenges, shareholder backlash, and reputational damage.

For corporations considering adopting or amending Advance Notice By-laws in their articles or by-laws, the

message from the courts and the proxy advisory firms is clear: do not overreach.

In preparing and implementing Advance Notice By-laws, corporations should consult with their legal counsel to:

- benchmark Advance Notice By-laws against peer issuers, stock exchange, and proxy advisory firm expectations;
- avoid adding requirements that are not grounded in applicable securities laws or that introduce unnecessary complexity;
- ensure that Advance Notice By-laws are drafted to withstand scrutiny during contested meetings; and
- anticipate cross-border challenges, especially for dual-listed issuers, where American approaches may not suit the Canadian context.

In today's corporate governance environment, Advance Notice By-laws must do more than check a box; they need to reflect evolving standards of fairness, purpose, and accountability.³

Key Strategies for Management: Poison Pills

Shareholder rights plans, commonly known as “poison pills”, have become a popular defense mechanism for Canadian public corporations against hostile take-overs by activist shareholders. Under these plans, shareholders, except the potential acquirer, are granted the right to purchase shares of the corporation at a discount when the acquirer proposes to complete a share acquisition that will result in the acquirer's share ownership exceeding a specified threshold, which is typically set at twenty percent (20%) or more of the corporation's issued and outstanding shares. When this threshold is hit, the shareholders' purchase rights are engaged and allow the non-acquiring shareholders to acquire discounted shares, dilute the acquirer's share ownership and thereby prevent or delay the hostile take-over.

In addition to diluting the acquirer, public corporations will often include procedures and rules in a shareholder rights plan, commonly known as “permitted bids”, that permit acquirers to complete a take-over of the corporation only where the acquirer complies with such procedures and rules. Permitted bids are specific to each shareholder rights plan, but may include a requirement for the acquirer to offer to purchase all of the issued and outstanding shares of the corporation from all of the existing shareholders. When combined with the shareholders' right to purchase discounted shares, the acquirer could incur significant costs to succeed in the hostile take-over, either by winning the war of attrition against shareholders purchasing discounted shares, or by purchasing all of the issued and outstanding shares of the corporation.

Considerations for Implementing Poison Pills

When contemplating the implementation of a poison pill, corporations should consider the applicable rules and policies governing take-over bids, including National Instrument 62-104 – *Take-Over Bids and Issuer Bids* (NI 62-104) and National Policy 62-202 – *Take-Over Bids – Defensive Tactics* (NP 62-202), the jurisprudence of Canadian courts and provincial securities tribunals and securities commissions interpreting these rules and policies. Additionally, publicly traded corporations should consider applicable stock exchange rules and corporate legislation to determine whether shareholder approval is required to adopt the poison pill.

Recent Developments

Riot Platforms, Inc. v Bitfarms Ltd., 2024 ONCMT 27

Recent developments in the Province of Ontario have highlighted the importance for public corporations to ensure that their shareholder rights plans comply with applicable securities laws while also staying in line with the purpose of such laws. In *Riot Platforms, Inc. v Bitfarms Ltd.*,⁴ the Ontario Capital Markets Tribunal (the ONCMT) heard an application from Riot Platforms, Inc. (Riot), which was the largest shareholder of Bitfarms Ltd. (Bitfarms), requesting the ONCMT to exercise its public interest jurisdiction under section 127 of the *Securities Act* (Ontario) to cease trade Bitfarm's shareholder rights plan (the Plan).⁵ The Plan included an initial fifteen percent (15%) threshold to trigger the rights of shareholders (except the acquirer) to purchase discounted shares and, after three (3) months, the threshold increased to twenty percent (20%). Prior to the Plan being adopted, Riot had attempted to discuss a merger with Bitfarms and requisitioned a special meeting to replace Bitfarms' board of directors due to governance concerns. Bitfarms then adopted the Plan and justified doing so by stating that it was necessary, while the corporation underwent a strategic review process.

In rendering its decision, the ONCMT re-examined its public interest jurisdiction under section 127 of the *Securities Act* (Ontario), emphasizing the importance of the "animating purposes" of the take-over bid regime, which the ONCMT set forth and analyzed as follows:

- **Orderly Process for Changes of Control:** The take-over bid regime is designed to ensure an orderly process for changes in control of a corporation. The fifteen percent (15%) trigger was seen as too low and disruptive to this process.
- **Shareholder Interests:** The regime aims to protect shareholder interests by providing a clear and predictable framework. The fifteen percent (15%) trigger was considered to undermine this predictability and certainty.
- **Lack of Exceptional Circumstances:** Bitfarms did not demonstrate any exceptional circumstances that would justify a lower trigger than the standard twenty percent (20%) threshold.

These key points collectively led the ONCMT to conclude that the fifteen percent (15%) trigger was not in line with the principles intended to govern take-over bids and granted the order to cease trade the Plan.

This decision reinforces the importance of adhering to established thresholds in shareholder rights plans and highlights the willingness of securities commissions and tribunals to intervene where defensive tactics may not be in line with the public interest and animating principles of the take-over bid regime.

Re Greenfire Ltd., 2024 ABASC 170 and the Limits of Poison Pills

A recent decision from the Alberta Securities Commission (the ASC) in *Re Greenfire Resources Ltd.*⁶ highlights how Canadian regulators continue to take a firm stance on the use of poison pills, particularly when deployed to block transactions that comply with the takeover bid rules.

In 2024, Greenfire Resources Ltd. (Greenfire), a TSX (and New York Stock Exchange) listed oil sands producer, was exploring strategic options due to its perceived undervaluation. While this review was underway, Waterous Energy Fund Management Corp., through certain funds that it manages (Waterous), entered into agreements to acquire just over forty-three percent (43%) of Greenfire's shares. These agreements were negotiated with three major shareholders – two (2) of whom were former Greenfire directors – and structured to fall within the “private agreement” exemption pursuant to Canadian takeover bid rules.

Greenfire quickly adopted a poison pill to prevent the proposed acquisition from proceeding, arguing that the acquisition would disrupt its ongoing strategic process and threaten broader shareholder value. In response, Waterous applied to the ASC to cease trading any securities issued or that may be issued in connection with or pursuant to the poison pill. Greenfire filed a cross application with the ASC to cease trading any transfer of Greenfire shares pursuant to Waterous' share purchases.

Ultimately, the ASC sided with Waterous. The ASC cease-traded Greenfire's poison pill and allowed the Waterous share purchases to proceed, sending a clear signal that even when a board is navigating complex strategic decisions, it cannot use a poison pill to retroactively interfere with transactions that comply with securities laws. The ASC also declined to give weight to Greenfire's arguments that its board acted properly or that the business judgment rule should insulate the poison pill from regulatory scrutiny.

Shortly after the ruling, Waterous completed the transaction and moved to requisition a shareholder meeting with the goal of replacing Greenfire's board.

Key Takeaways from the Greenfire Decision for a Board of Directors

This case is a cautionary example of how poison pills, while still a legitimate tool in some contexts, must be used with care:

- timing matters: poison pills adopted after a compliant share acquisition is announced are unlikely to survive regulatory scrutiny;

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- private agreements are protected: Canadian regulators will uphold takeover exemptions where the deal structure follows the letter of the law, even if it creates a significant ownership shift; and
- the business judgment rule has limits: securities regulators retain authority to assess whether a board's defensive measures serve the public interest, regardless of the board's internal process.

In a market where capital is mobile and strategic deals can come together quickly, boards must be prepared to act early, and transparently, if they intend to rely on a poison pill. A board that delays implementing a poison pill until a major shareholder is already in the picture risks losing both strategic leverage and legal defensibility.

Final Thoughts

Proxy contests are often complex, time consuming, and expensive and any legal challenges to a poison pill could add to that complexity, time, and expense. Accordingly, management should consider key factors when adopting a shareholder rights plan, including an assessment of the risks associated with a more aggressive approach.

Key Strategies for Activist Shareholders: Shareholder Proposals and Meeting Requisitions

While corporations may have their own range of strategies for defense in the context of shareholder activism and proxy contests, including the adoption of Advance Notice By-laws and poison pills, activist shareholders are also equipped with their own mechanisms to effectuate a contest, including legislative rights and strategies, which includes the right to requisition a shareholders' meeting.

Shareholder Proposals

One of the key strategies for Canadian shareholders in a proxy contest is the ability to utilize the shareholder proposal regime found under the applicable provincial or federal business corporation legislation.⁷ Under these regimes, shareholders have the right to nominate individuals for election to the corporation's board of directors, however, any such nominations must be included in the management information circular for the applicable annual general meeting of shareholders. In the Province of Alberta, a shareholder must hold voting shares equal to at least one percent (1%) of the outstanding voting shares or have a fair market value of at least \$2,000, held for at least six (6) months prior to submitting the shareholder proposal.⁸ Additionally, shareholder proposals to nominate directors must be signed by holders of at least five percent (5%) of the voting shares of the corporation.⁹

Corporations can reject shareholder proposals on various grounds, such as irrelevance to the business or

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affairs of the corporation. Shareholder proposals must be submitted within a specific timeframe, allowing submissions at least ninety (90) days before the anniversary of the previous year's annual general meeting of shareholders.¹⁰ Despite these provisions, the shareholder proposal mechanism is rarely used for director nominations due to early deadlines, word limitations, and the general preference by activist shareholders to requisition shareholders' meetings.

Shareholder Meeting Requisitions

One powerful tool in the activist shareholder's arsenal is the right to requisition a meeting. This right allows shareholders to directly influence corporate governance by calling for a meeting to address specific issues or propose changes to management of the corporation.

In Canada, shareholders holding at least five percent (5%) of voting shares have a powerful right to request that the directors call a shareholders' meeting.¹¹ This right is often used to propose changes to the board of directors. Upon receiving a valid requisition, the board of directors must announce a meeting date within twenty-one (21) calendar days, although the actual meeting may be scheduled later based on the business judgment of the board of directors.¹²

Proxy Solicitation and Exemptions

What is Required to Solicit Proxies

In the province of Alberta, unless an exemption applies, shareholders who wish to solicit proxies are required to prepare and mail a dissident information circular and form of proxy to each shareholder whose proxy will be solicited.¹³

Timing is crucial in determining whether a communication constitutes solicitation. If there is a significant gap between the initial communication and the formal solicitation, the initial contact may not be deemed solicitation.

Quiet Solicitation

Canadian securities laws and corporate statutes provide an exception to proxy solicitation rules enabling shareholders to avoid the requirement for a dissident information circular if the shareholder(s) solicit proxies from no more than fifteen (15) shareholders.¹⁴ This cost-effective method is particularly advantageous when voting shares are concentrated among a few key shareholders. The exemption offers flexibility in proxy solicitation, allowing dissidents to discreetly gather proxies from a small group of significant shareholders and unexpectedly nominate alternative directors from the floor at annual meetings without prior notice.

Public Broadcast Exemption

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Canadian securities laws and corporate statutes include a “public broadcast” exemption, which permits shareholders to solicit proxies through various media channels without distributing a management information circular. This can be achieved through press releases, radio or television statements, publicly accessible websites, or public speeches. Shareholders utilizing this exemption must file specific information about their nominees on the System for Electronic Document Analysis and Retrieval (SEDAR+), along with the intended communication methods for publication.

Leveraging the public broadcast exemption can be a powerful tool, particularly when combined with other methods of proxy solicitation like a dissident information circular. This exemption allows activist shareholders to engage in comprehensive solicitation campaigns that can include public meetings, press releases, interviews, and a website dedicated to the campaign, which can all occur prior to a corporation filing a management information circular and thereby assist in garnering support for an activist campaign.

It is important to note that management is not completely limited to communicating through their management information circular and that they can counter communications made by activist shareholders engaging the “public broadcast” exemption by issuing news releases to defend their actions and, in many situations, have gone on the offensive against dissident campaigns through such news releases. While corporations must avoid illegal proxy solicitation, they can still challenge the activist’s narrative before filing their management information circular, which can result in a substantial “back and forth” between management and the dissidents through a series of news releases, which may also damage the public perception of the corporation and thereby diminishing the value of the securities.

Additional Considerations for Activist Shareholders

Proxy Solicitation Agents

Proxy solicitation can be a gruelling process, particularly for activist shareholders, but it is a key element in proxy contests that can “make or break” the final outcome of a requisitioned meeting. In many cases, the chair of the meeting will have discretion on whether to accept or reject proxies, meaning if proxy forms are not completed or executed properly, then the applicable votes pursuant to the proxy may not be counted in the activist shareholder’s favour.

To mitigate this risk, activist shareholders will often engage the services of a proxy solicitation agent, which offers several benefits. First, these agents have expertise in navigating the complex regulatory landscape of proxy solicitation, ensuring compliance with legal and regulatory requirements. Second, proxy solicitation agents are experienced in efficiently managing, collecting and the validation of proxies, and therefore can reduce the risk of proxies being rejected and not counted at the shareholders’ meeting. Finally, proxy solicitation agents will often have established networks and extensive experience in proxy contests and would be able to provide strategies to effectively communicate with shareholders and maximize support for

the campaign of activist shareholders. Outcomes from recent proxy contests in Canada show the importance of an effective proxy solicitation process and, if sufficient resources are available to activist shareholders, engaging a proxy solicitation agent can enhance the chances of a successful outcome.

Conclusion

We strongly encourage consulting legal counsel to help navigate through this complex and dynamic landscape. If you have any questions regarding this summary, shareholder activism, proxy contests, or M&A transactions generally, please contact the authors or any other members of our Mergers & Acquisitions or Securities Litigation teams.

¹ *Orange Capital, LLC v Partners Real Estate Investment Trust*, 2014 ONSC 3793.

² Legion Partners Asset Management, LLC, *Legion Partners Takes Legal Action to Protect the Rights of Primo Water Shareholders* (22 May 2023), *Business Wire* (online), at <https://www.businesswire.com/news/home/20230322005443/en/Legion-Partners-Takes-Legal-Action-to-Protect-the-Rights-of-Primo-Water-Shareholders> (last accessed 17 June 2025).

³ Institutional Shareholder Services Inc., Canada TSX-Listed Companies Proxy Voting Guidelines (February 2025) (online) at <https://www.issgovernance.com/file/policy/active/americas/Canada-TSX-Voting-Guidelines.pdf> (last accessed 17 June 2025).

⁴ *Riot Platforms, Inc. v Bitfarms Ltd.*, 2024 ONCMT 27.

⁵ *Riot Platforms, Inc. v Bitfarms Ltd.*, 2024 ONCMT 27.

⁶ 2024 ABASC 170.

⁷ *Canada Business Corporations Act*, RSC 1985, c-C44, s. 137(1); *Business Corporations Act*, RSA 2000, c B-9, s. 136(4) [ABCA]; *Business Corporations Act*, RSO 1990, c B-16, s. 99(1).

⁸ *Business Corporations Regulation*, Alta Reg 118/2000, s. 18.1.

⁹ ABCA, s 136(4).

¹⁰ ABCA, s 136(5).

¹¹ ABCA, s 142(1).

¹² ABCA, s 142(4).

¹³ ABCA, s 150(1)(b).

¹⁴ ABCA, s 150(2).