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Canadian Advance Notice Provisions Study

August 1, 2013

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1. INTRODUCTION

Following the adoption of advance notice provisions ("**ANPs**") for director nominations by our clients commencing in October 2011, we publicly advocated for issuers to adopt ANPs, concluding that an "advance notice bylaw is an important tool for a public company in order to ensure that all shareholders are treated fairly and are provided with timely information in connection with the nomination of directors."[1] During the 2012 and 2013 proxy seasons, more than 560 Canadian public companies and trusts[2] adopted, implemented or announced ANPs. In March 2012, we thought we were being somewhat aggressive in stating that "[i]t is expected that over the next few years, numerous Canadian public companies – particularly mid and micro-cap companies – will implement such bylaws."[3] As it turns out, the rate of adoption has been more significant than we originally thought, and ANPs are now commonplace in Canada.

Given the recent rapid adoption of ANPs, we reviewed ANPs to consider various issues, including:

- the forms of ANPs and the type of provisions being adopted;
- the manner in which ANPs are being implemented – by policy, bylaw, articles or declaration of trust;
- the results of shareholder votes taken to approve ANPs; and
- the impact of proxy advisory firms on the adoption of ANPs.

In order to better understand the current state of affairs of ANPs in Canada, we also look back and review the history of the development of ANPs in Canada. We then conclude the Study by looking ahead, as we seek to be better prognosticators of the surprising evolution of ANPs.

[1] Paul Davis & Stephen Genttner, "Advance Notice By-Laws – A Tool to Prevent a Stealth Proxy Contest or Ambush" (March 2012), online: McMillan LLP <http://www.mcmillan.ca>.

[2] Canadian companies are companies incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*], or under one of the applicable provincial or territorial statutes. Canadian trusts are trusts governed by the laws of a province or territory of Canada.

[3] *Supra* note 1.

2. EXECUTIVE SUMMARY

In response to the inquiries of a client in the spring of 2011, McMillan pursued the development of an advance notice bylaw with the goal of developing a form of ANPs suited for the Canadian legal framework and able to withstand legal challenge.

We were successful and, in October 2011, our clients were the first to adopt this form of ANPs. Today, ANPs remain largely unchanged from the form we introduced in 2011.

Following the successful adoption of ANPs by our clients between October 2011 and March 2012, we publicly advocated for issuers to adopt ANPs. Various other factors also contributed to the recent significant adoption of ANPs, a large portion of which occurred during the 2013 proxy season. These factors included increased shareholder activism during 2012; favourable judicial rulings by courts in British Columbia and Ontario in June and July, 2012; and support of ANPs by the leading proxy advisory firms, Institutional Shareholder Services Inc. ("**ISS**") and Glass Lewis & Co., LLC ("**Glass Lewis**"), in their 2013 proxy voting guidelines published in November 2012 (respectively, the "**ISS 2013 Guidelines**"[4] and the "**Glass Lewis 2013 Guidelines**"[5]). The support of proxy advisory firms was particularly important for public issuers with a significant institutional shareholder base, as recommendations by proxy advisory firms to vote for or against matters such as ANPs are usually followed by institutional shareholders.

McMillan undertook this Study to examine, in an empirical manner, the evolution of ANPs in Canada. We also take this opportunity to share the history of how we developed our forms of ANPs and comment on our expectations for ANPs in the hope that this information will assist others as they seek to improve upon our efforts.

2.1 Highlights

- Significant rate of adoption: The rate of adoption of ANPs has been more significant than we originally thought. With more than 560 issuers having adopted, implemented or announced ANPs, there can be no doubt that ANPs are now commonplace in Canada.

- McMillan form remains largely unchanged: The core provisions of the form of ANPs McMillan introduced to Canada in 2011 remain largely unchanged and are widely used by issuers in Canada.

- ANPs implemented mainly by bylaws: The majority of ANPs have been implemented by bylaws (mainly by corporations incorporated under the *Canada Business Corporations Act* (the "***CBCA***")[6] and the *Business Corporations Act* (Ontario) (the "***OBCA***")[7]). In contrast, due to the manner in which constating documents are amended for a company incorporated under the *Business Corporations Act* (British Columbia) (the "***BCBCA***"),[8] the trend in British Columbia has been to implement ANPs by policy. The majority of British Columbia companies (53.7%) adopted policies and subsequently sought shareholder approval of the policy. A minority of British Columbia companies (9.1%) adopted policies as an interim step, subsequently seeking shareholder approval for an amendment to their articles.

- British Columbia leading the way: More British Columbia companies (42.8%) adopted ANPs than issuers in any other jurisdiction in Canada. A significant portion of ANPs were also adopted by issuers incorporated under the *CBCA* and the *OBCA* (21.2% and 18.4%, respectively).

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[4] Institutional Shareholder Services Inc, "Canadian Corporate Governance Policy 2013 Updates" (16 November 2012), online: ISS <http://www.issgovernance.com> [*ISS 2013 Guidelines*].

[5] Glass, Lewis & Co, LLC, "Guidelines 2013 Proxy Season An Overview of the Glass Lewis Approach to Proxy Advice" (2012), online: Glass Lewis & Co <http://www.glasslewis.com> [*Glass Lewis 2013 Guidelines*].

[6] *CBCA*, *supra* note 2.

[7] *Business Corporations Act*, RSO 1990, c B.16 [*OBCA*].

[8] *Business Corporations Act*, SBC 2002, c 57 [*BCBCA*].

- Prominence of TSX Venture Exchange-listed and small-cap issuers: As would be expected, a majority of the issuers that adopted ANPs (59.6%) were listed on the TSX Venture Exchange ("**TSXV**") and had a market capitalization of below $100 million (75.2%). This is consistent with the fact that the primary reason for using ANPs is to provide advance notice of director nominations and that, generally, the larger the issuer, the more difficult it would be for a dissident to proceed with a proxy fight without alerting the market and the issuer.

- ISS and Glass Lewis support ANPs: The ISS 2013 Guidelines and the Glass Lewis 2013 Guidelines supported ANPs – clearing the final hurdle for broad adoption of ANPs.

- Consistent approach to timing provisions, while other provisions continue to evolve: ISS and Glass Lewis support ANPs that provide for notice provisions of no less than 30, nor more than 65, days prior to the date of the annual meeting. There is significant uniformity in the timing provisions with respect to the delivery of notices in ANPs, which is consistent with our initial form of ANPs. However, more unique provisions (including provisions requiring the delivery of representations and agreements) have begun to appear in ANPs.

- Overwhelming shareholder approval: Shareholders have overwhelmingly voted in favour of ANPs put to them for approval. Specifically, of the issuers that have reported voting results for shareholders' meetings at which approval was sought for ANPs, 98.2% received shareholder approval. Only five issuers have had their ANPs rejected by shareholders.

- Increased litigation expected: We expect that, notwithstanding court decisions favourable to the adoption of ANPs, we will be entering a phase of increased litigation in Canada relating not only to the validity of ANPs (particularly ANPs adopted by policy) but also the interpretation of ANPs. We expect that the oppression remedy will be the tool most often used by dissidents to attack ANPs.

3. METHODOLOGY AND ABBREVIATIONS

As used in this Study, ANPs refer to any provisions (other than those set out in the applicable corporate statute) requiring that for nominations of directors of an issuer to be validly made by anyone other than the issuer or its directors or management, such nominations must be made in advance of the shareholders' meeting at which such directors are to be nominated by providing advance notice to the issuer or a representative thereof. In this Study, the term "issuer" refers to a Canadian corporation or trust that is a reporting issuer (as such term is defined in applicable Canadian securities legislation) and, for purposes of simplicity, any reference to (i) "directors" includes trustees, (ii) "Board" means either a board of directors or the trustees of a trust and (iii) "shareholders" includes unitholders. In this Study, unless expressly stated otherwise, references to "articles" are to articles of issuers incorporated under the *BCBCA* and not to articles of incorporation or articles of amendment of issuers incorporated under other Canadian provincial or territorial corporate statutes.

This Study was prepared based on a review and analysis of ANPs adopted, implemented or announced, on or prior to June 28, 2013, by companies incorporated under the *CBCA* or under one of the applicable Canadian provincial or territorial corporate statutes or by trusts governed by the laws of a Canadian province or territory. The 565 issuers with ANPs included in this Study are listed in Appendix A to this Study. It was not a pre-condition for inclusion in this Study that shareholder approval of ANPs had been sought or obtained.

The ANPs that form the basis of this Study were identified from public filings made on the System for Electronic Document Analysis and Retrieval ("**SEDAR**"), available at www.sedar.com, retrieved through various search parameters using the DisclosureNet™ database.

All percentages in this Study have been rounded to the nearest tenth of one percent.

The results of this Study are necessarily limited by several factors. First, the Study was limited to the extent that ANPs were publicly available. There are issuers that disclosed their adoption of ANPs, but have not included the ANPs in a publicly available document identifiable through DisclosureNet™ searches. As a result, we could not review and compare the provisions of such ANPs. This accounts for the fact that our analysis related to the provisions of ANPs is limited to ANPs of 537 issuers, notwithstanding that we have identified 565 issuers that have adopted, implemented or announced ANPs. Second, there may also be issuers that have adopted ANPs without any public disclosure of such adoption or the substance of the ANPs, or where references to ANPs are in a document that was not searchable using DisclosureNet™. As a result, we expect the number of issuers that have adopted ANPs is greater than the number set out in this Study. Third, our analysis of shareholder approval of ANPs is limited to the extent that the voting results of shareholders' meetings were disclosed. Issuers listed on the TSXV are not required to disclose voting results; and in several instances we could not locate voting results for issuers listed on the Toronto Stock Exchange ("**TSX**"), notwithstanding that such issuers are required to disclose voting results. Fourth, we sought to rely on an issuer's profile page on SEDAR under "Jurisdiction Where Formed" to identify its governing jurisdiction, and this proved to be incorrect on numerous occasions. We similarly relied, for the most part, on an issuer's profile page on SEDAR under "Stock Exchange" to identify the stock exchange(s) on which the issuer was listed. Fifth, the identification and inclusion of ANPs in this Study was dependent on the specific search parameters that we used. Finally, we have exercised our judgment and discretion in compiling, categorizing and summarizing the specific provisions of ANPs that form the basis of this Study. To the extent that the ANPs reviewed included typographical or grammatical errors that could possibly lead to various interpretations, we have interpreted them literally and, if that was not possible, we interpreted them strictly against the issuer. However, despite the above-noted limitations, we believe that given the number of ANPs reviewed, this Study provides meaningful insight into the state of affairs of ANPs in Canada.

4. HISTORICAL PERSPECTIVE

McMillan's history with ANPs began on a Sunday afternoon in the spring of 2011 when the Chair of a TSXV-listed issuer sent an email to one of our partners requesting assistance. The Chair had received a phone call on the prior day from a shareholder informing the Chair that the shareholder had legally accumulated enough proxies and obtained the support of enough registered shareholders to elect his own nominees as directors at the issuer's shareholders' meeting scheduled for 10:00 a.m. that Monday.

This call, which was made less than 48 hours prior to the shareholders' meeting, was a total surprise to our client. In fact, the shareholder did not legally have to provide any advance notice to the issuer or its shareholders, and could simply have stood up at the meeting and successfully nominated his slate without providing any information about his nominees, other than their names and, possibly, background information.

4.1 A mandate to prevent an ambush

After the shareholders' meeting had occurred, an associate of this client asked the firm whether we could recommend something that would prevent such an ambush from happening to another issuer. One of our partners had previously reviewed ANPs while a partner at another prominent national law firm. Armed with that history, and the knowledge that advance notice bylaws had been utilized by American companies for over 20 years and were prevalent in the United States, we began our analysis.

4.2 Our analysis

In reviewing the Canadian landscape, we were not able to find any Canadian issuers that had adopted ANPs prepared with the Canadian legal framework in mind. However, we did find U.S.-incorporated issuers listed on the TSX that had ANPs and also one Canadian issuer that appeared to have adopted U.S.-style ANPs prior to October 2011 (see the discussion below in section 4.3.1). While our review was extensive, we could not be certain that no other ANPs were introduced by Canadian issuers prior to October 2011 due to many of the limitations discussed above in section 3.

Our analysis included (i) a review of Canadian, American and British jurisprudence; (ii) a detailed review of the provisions of the *CBCA* and the *OBCA* and the legislative history thereof in respect of certain key provisions; and (iii) a review of the forms of ANPs most commonly utilized by U.S. corporations.

After intense research and internal debate, we concluded that ANPs would likely be upheld by Ontario courts if adopted as a bylaw or in the articles of an *OBCA* or *CBCA* corporation. Our analysis would later expand to include corporations governed by other provincial corporate statutes, including the *BCBCA* and the *Business Corporations Act* (Québec) (the "***QBCA***").[9]

4.3 Developing our form of ANPs

In considering the form of ANPs that we would introduce to our clients, we began by focusing on the experience in the United States. As the laws of Delaware appear to govern most public companies in the United States, we focused on Delaware corporations. ANPs are generally adopted by Delaware corporations as bylaws. *Delaware General Corporation Law* ("***DGCL***")[10] governs the power to adopt bylaws and the subject matter that bylaws may address.[11] We understand that, under Delaware law, directors may adopt bylaws that relate to the right and power of shareholders, without shareholder approval, if the power to adopt bylaws is provided in the certificate of incorporation. Once so adopted by a Board, such bylaws become part of the constating documents of the corporation, but shareholders nevertheless have the power to repeal or amend such bylaws.

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[9] *Business Corporations Act*, RSQ 2012, c S-31.1.

[10] 8 Del C §§ 101-398 (2013), online: State of Delaware <http://delcode.delaware.gov/title8/c001/> [*DGCL*].

[11] *Ibid*, § 109.

4.3.1 ANPS LIMITED TO NOMINATIONS THROUGH "NON-REQUISITIONED PROXY FIGHTS" AND "AMBUSHES"

Under the *OBCA* and *CBCA*, the following four methods would appear to be available to shareholders to nominate directors at shareholders' meetings:

- *Shareholders' requisition.* Shareholders owning not less than five percent of the shares of an issuer may requisition the directors to call a shareholders' meeting (the "**shareholders' requisition**") for the purpose of electing directors. Subject to certain exceptions, if the directors do not call a shareholders' meeting within 21 days of receiving the shareholders' requisition, any shareholder who signed the requisition may call the meeting. The *OBCA* and *CBCA* require that notice of the time and place of a shareholders' meeting be sent not less than 21 days before the meeting.

- *Shareholder proposal.* Shareholders owning not less than five percent of the shares of an issuer may submit to the issuer notice of a proposal to nominate persons for election to the Board. Under the *OBCA*, the proposal must be submitted not later than 60 days before the anniversary date of the previous annual meeting, in respect of an annual meeting (or, in respect of a special meeting, 60 days before a special meeting). Under the *CBCA*, the proposal must be submitted not later than 90 days before the anniversary date of the previous notice of annual meeting. Upon receipt of the proposal, the issuer would be obligated, subject to certain exceptions, to set out the proposal (and, if requested, a brief statement of the shareholder in support of the proposal) in its proxy circular for the meeting or attach the proposal (and, if applicable, such shareholder statement) thereto. Accordingly, if an issuer's annual meeting is held on or after the anniversary date of the previous year's annual meeting, the issuer will have ample notice of a proposal relating to nominations of persons for election to the Board.

- *Non-requisitioned proxy fight.* Following the mailing of proxy materials by an issuer relating to the election of directors, any person may nominate their own nominees and solicit proxies, so as to elect their own nominees to the Board of the issuer, by delivering a dissident's proxy circular (or by way of public broadcast, speech or publication in circumstances prescribed by the legislation).[12] This type of activity is referred to herein as a "**non-requisitioned proxy fight**." There is no time restriction as to when one may solicit proxies through these means, subject of course to practical time constraints. As a result, a non-requisitioned proxy fight could be commenced with very little prior notice to the issuer or its shareholders.

- *Nominations at a meeting.* Shareholders or proxyholders may, at a meeting called for the purpose of electing directors, nominate from the floor of the meeting one or more persons to serve as a director. No prior notice of such nomination need be given to the issuer or its shareholders. A nomination made in such circumstances is referred to herein as an "**ambush**."

In considering the specific provisions of Delaware advance notice bylaws, it was important to remember that Delaware advance notice bylaws generally require that advance notice of various shareholder proposals be provided to a public company, not just proposals with respect to the nomination of directors. Moreover, Delaware advance notice bylaws generally relate to all nominations of directors, regardless of how such nominations arise.

[12] It should be noted that, although it is unusual, a non-requisitioned proxy fight could commence prior to the mailing of management's proxy materials. For example, in 2012, Pershing Square Capital Management, LP ("**Pershing Square**") launched a proxy fight to replace directors of Canadian Pacific Railway Limited ("**Canadian Pacific**") by utilizing the "public broadcast" exemption which requires the filing of a document containing prescribed information on SEDAR. Pershing Square engaged in a robust proxy fight by first filing a "pre-emptive" proxy circular on SEDAR months before Canadian Pacific filed its management proxy circular. See Canadian Pacific Railway Limited, *Pershing Square Announces Nominees for Election to the Board of Directors of Canadian Pacific Railway,* News Release (24 January 2012), online: SEDAR <http://www.sedar.com>; Canadian Pacific Railway Limited, *Solicitation by and on behalf of Pershing Square Capital Management, LP, Pershing Square, LP, Pershing Square II, LP and Pershing Square International, Ltd for the support of the holders of common shares of Canadian Pacific Railway Limited,* Information Circular (24 January 2012), online: SEDAR <http://www.sedar.com>; and Canadian Pacific Railway Limited, *Notice of Annual Meeting of Shareholders and Management Proxy Circular,* Management Information Circular (22 March 2012), online: SEDAR <http://www.sedar.com>.

The many differences between Delaware law and Canadian law caused us to think carefully about a wholesale adoption of the Delaware forms of advance notice bylaws. For example, *DGCL* does not provide for a shareholders' requisition; only through provisions in the certificates of incorporation or bylaws can Delaware shareholders be given the power to requisition meetings.[13]

In fact, in considering the forms of Delaware advance notice bylaws, we reviewed in detail the ANPs of a Canadian-listed Delaware corporation (which were not dissimilar to the ANPs of the one Canadian corporation we found that appeared to have adopted ANPs before our clients). We had many concerns, including the following:

- Such ANPs provided that the shareholder making the nominations (the "**Nominating Shareholder**") had to be a holder of not less than five percent of the shares entitled to vote at the meeting. This would appear inconsistent with the *CBCA* and *OBCA* which specifically state that the provisions requiring the holding of at least five percent of shares in order to nominate directors at a meeting by way of a shareholder proposal do not "preclude nominations made at a meeting of shareholders."[14]

- Such ANPs required that the Nominating Shareholder or a qualified representative be present at the meeting or its nominations would be invalid. It would appear that this provision arose from the fact that certain state corporate laws may preclude proposals being made by shareholders other than in person and therefore the ability of a "qualified representative" to make a proposal provides greater flexibility.[15] We understand that even under Delaware law this provision may prove problematic unless a qualified representative refers to a proxyholder of the Nominating Shareholder.[16]

- Such ANPs applied to shareholders' requisitions. The *OBCA* and the *CBCA* provide that if there is a proper shareholders' requisition, the issuer is compelled to hold a meeting for the purpose set forth in the requisition, failing which, the shareholders that requisitioned the meeting may call the meeting. It is therefore not clear to us how ANPs could seek to impose additional notice obligations on a shareholder that has put forward a valid shareholders' requisition with the result that, if such notice obligations were not met, the very purpose of the requisitioned meeting (i.e. the election of nominated directors) could purportedly be invalidated by ANPs.

Having concluded early on that we would limit the use of ANPs such that they would have clear utility under Canadian law and be better able to withstand any court challenge, we designed ANPs to be limited to non-requisitioned proxy fights and ambushes, since these were the only circumstances in which an issuer might not receive sufficient advance notice of the nominations of directors. The limitation was also necessitated by our concern that ANPs (or any other provisions in an issuer's constating documents) may not be valid if they were inconsistent with, or imposed additional obligations on, the legislated process for shareholders' requisitions or shareholder proposals.

In limiting the utility of ANPs to non-requisitioned proxy fights and ambushes, we believed that large-cap issuers would likely not be significant adopters of ANPs since, as a practical matter, it would be difficult to initiate a process to change the Board of a large-cap issuer without providing significant notice to the issuer.

4.3.2 TIMING OF NOTICE

In the United States, the length of the notice period for ANPs varies, but in the case of an annual shareholders' meeting, is usually not later than 90 days and not earlier than 120 days before the anniversary date of the preceding year's meeting. We were not comfortable with tying the notice to the anniversary date of the previous year's annual meeting and thought definitive dates tied to the actual meeting date would be more appropriate (with caveats if an issuer did not give sufficient prior public

[13] *DGCL*, *supra* note 10, § 221(d).

[14] *CBCA*, *supra* note 2, s 137(4); *OBCA*, *supra* note 7, s 99(4).

[15] Latham & Watkins LLP, "Form of Advance Notice and Related Bylaw Provisions" (November 2011), online: Latham & Watkins LLP <http://www.lw.com>; *Shareholder proposals*, 17 CFR § 240.14a-8(h) (2013), online: US Government Printing Office <http://www.gpo.gov>.

[16] The Delaware Court of Chancery has found that the ability to nominate is a fundamental aspect of the right to vote. See *Harrah's Entm't Inc v JCC Holding Co*, 802 A2d 294 at 311 (Del Ch 2002); see also *DGCL*, *supra* note 10, § 212, which specifically grants stockholders the power to vote by proxy.

notice of a meeting). We therefore chose notice provisions for annual meetings of not less than 30, nor more than 65, days prior to the date of the annual meeting. While somewhat arbitrary, we concluded that the timing worked well from the perspective of an issuer under National Instrument 54-101 – *Communication with Beneficial Owners of Securities of a Reporting Issuer,* while still providing dissident shareholders with sufficient time. In the case of a special shareholders' meeting, in order to provide flexibility, we selected a notice period of not less than 15 days following the date of the public announcement of the date of the special meeting. It is clear that these notice provisions continue to be utilized by most issuers (see section 5.8 below).

4.3.3 CONTENT OF NOTICE

In terms of the content of the notice to be provided by the Nominating Shareholder, we looked to the United States once again. However, as we thought our clients would be the first Canadian-incorporated issuers to adopt ANPs and may be subject to challenge, we focused on limiting the disclosure primarily to that required of dissidents in a proxy circular under Canadian securities law and the governing corporate statute of the issuer. We also emphasized certain information related to nominees by including specific requests for information related to age and address, employment history and share ownership. Within the next year, provided any court challenges were successfully defended, we planned to include mandatory disclosure related to full ownership of, and control or direction over, securities (whether through derivatives or convertible securities or through agreements to vote securities) with respect to nominees and Nominating Shareholders. In the 2013 proxy season, we did indeed update our standard form of ANPs to include these provisions through a broad definition of the term "owned beneficially."

4.3.4 WAIVER PROVISIONS

U.S. ANPs do not generally allow Boards to waive any of their provisions. We were concerned that the oppression remedy (a remedy not available in the U.S.) could be used to strike down ANPs in circumstances in which the timing requirements to provide notice under ANPs proved to be unfair – e.g. a change of material circumstances or change of strategic direction after the notice period had elapsed, or a shortened notice period that deprived shareholders of the opportunity to nominate their own slate (these are actual examples from U.S. court decisions).[17] Accordingly, we thought it may be prudent to provide Boards with the right to waive certain provisions in ANPs.

On the other hand, we were concerned it would be unusual for directors to have the ability to waive provisions of constating documents (articles and bylaws), and broad discretionary rights, if exercised, could subject directors to liability under the oppression remedy or for breach of fiduciary duty. In addition, it was important to obtain ISS and Glass Lewis approval of ANPs in Canada. In light of their recommendation to vote against shareholder rights plans that provide Boards with discretion to amend the plans or waive the application thereof without shareholder approval, we were concerned that broad discretionary powers to waive would not be viewed positively by ISS or Glass Lewis.

In the end, we concluded that, on balance, it was appropriate to include a limited waiver right for directors to waive only the timing provisions. A waiver requirement with respect to the content of a Nominating Shareholder's notice was considered unnecessary, as we believed it was important to ensure the content requirements were clear and could easily be interpreted from an objective perspective. In any event, we clearly did not expect that our approach would be viewed as not sufficiently aggressive (see section 6.1 below).

[17] See *RD Hubbard v Hollywood Park Realty Enterprises,* 1991 WL 3151 (Del Ch), 17 Del J Corp L 238 [*Hubbard*]. In *Hubbard,* the plaintiff alleged that a shift in the Board's position after the deadline for advance notice of nominations had passed represented a material change of circumstances that could not have been anticipated. As a result, the Delaware Court of Chancery issued a preliminary injunction directing the Board to allow the shareholders the opportunity to nominate an opposing slate. The Court noted that the relevant issue is whether shareholders have been afforded a reasonable opportunity to nominate an opposing slate, and consider opposing views. This principle was recently reiterated in *Icahn Partners LP v Amylin Pharmaceuticals Inc,* 2012 WL 1526814 (Del Ch) [*Icahn*]. In *Icahn,* the strategy of the incumbent Board significantly changed after the deadline for advance notice of nominations had passed. The Delaware Court of Chancery granted the plaintiff's motion to proceed on an expedited basis to enjoin the enforcement of the advance notice bylaw's timing requirement. See also *Linton v Everett,* CA No 15219 (Del Ch July 31, 1997) [*Linton*]. In *Linton,* the company's directors sent a notice of meeting 30 days before the meeting date. As this notice was sent less than 31 days prior to the date of the meeting, the company's advance notice provisions required nominations to be submitted within 10 days of the date of the mailing of the notice. One of the plaintiffs presented evidence that he did not receive this notice until three days prior to the deadline, and argued that the timing restrictions were therefore inequitable. The Delaware Court of Chancery ordered a new date for election of directors, as the short notice of meeting triggered the advance notice provisions in a manner that deprived shareholders of a reasonable opportunity to nominate an opposing slate.

4.3.5 DISCRETION TO SEEK ADDITIONAL INFORMATION

Consistent with the analysis that led us to limit waiver provisions, we believed that granting a Board the right to request or seek, on a discretionary basis, additional information from Nominating Shareholders would likely subject the ANPs to unnecessary legal risk with limited benefit to an issuer. Accordingly, we decided not to adopt U.S.-style provisions that allowed a Board to request additional information related to the eligibility and independence of nominees and other matters. To the extent such information was considered important, we included provisions in our form of ANPs that required mandatory disclosure thereof. For example, in the 2013 proxy season, we included a requirement for the Nominating Shareholder to provide a statement as to the independence of each nominee and the reasons and basis for such determination. In any event, it is clear that others have found our approach on this issue to be too limiting (see section 5.9.1 – "Other information to be provided at the issuer's request").

4.4 First clients adopt ANPs

Having designed a form of ANPs with which we were comfortable, we then approached a few of our clients and asked them to consider adopting ANPs. We are grateful they had sufficient confidence in us to move forward in adopting ANPs. Between October 2011 and March 2012, a few of our clients adopted ANPs and, in each case, the ANPs were approved by shareholders without legal challenge.

4.5 The momentum builds

As a result of our encouraging experiences with the adoption of ANPs, in March 2012, we felt comfortable publicly advocating the adoption of ANPs in the Canadian context. We did not do so for altruistic purposes, but because of our belief that there was safety in numbers.

Within months, in June 2012, ANPs were tested before the courts in *Northern Minerals Investment Corp. v. Mundoro Capital Inc.* ("***Mundoro***").[18] As stated in our bulletin from July 2012,[19] while we were grateful that the reasoning of the Court fully supported the rationale for ANPs, we remained concerned with the adoption of ANPs by way of a policy.

The next month, in July 2012, the Ontario Superior Court of Justice in *Maudore Minerals Ltd. v. The Harbour Foundation* ("***Maudore***")[20] noted there "was nothing unfair or inappropriate" in the implementation of an advance notice bylaw in connection with a proxy fight "to ensure that all shareholders would have sufficient notice of a contested election of directors."[21] Judicial approval of the form of ANPs adopted within the framework of the Canadian legal system provided issuers with added confidence in moving forward with the implementation of ANPs.

As 2012 progressed, issuers were faced with a historic number of proxy fights in Canada, many of which were high profile. Accordingly, issuers were more inclined to listen to advisors in seeking appropriate defences to shareholder activism.

When ISS and Glass Lewis announced their support for ANPs in their respective 2013 voting guidelines in November 2012, the final hurdle for the widespread adoption of ANPs was cleared.

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[18] 2012 BCSC 1090 [*Mundoro*].

[19] Paul Davis, James Munro & Stephen Genttner, "Advance Notice By-Laws, Part II – The *Mundoro Capital* Decision" (July 2012), online: McMillan LLP <http://www.mcmillan.ca>.

[20] 2012 ONSC 4255.

[21] *Ibid* at para 114.

5. RESULTS OF OUR STUDY

5.1 Adoption rate of ANPs

As of June 28, 2013, there were 565 issuers that had adopted, implemented or announced ANPs.

Figure 1 reflects the growing acceptance of ANPs, quarter by quarter. We see no reason for this trend to abate. As more and more issuers and their advisors became aware of, or more comfortable with, ANPs in 2012, the 2013 proxy season ushered in a phase of widespread adoption. Over 89% of issuers that had adopted, implemented or announced ANPs on or prior to June 28, 2013 did so during 2013.

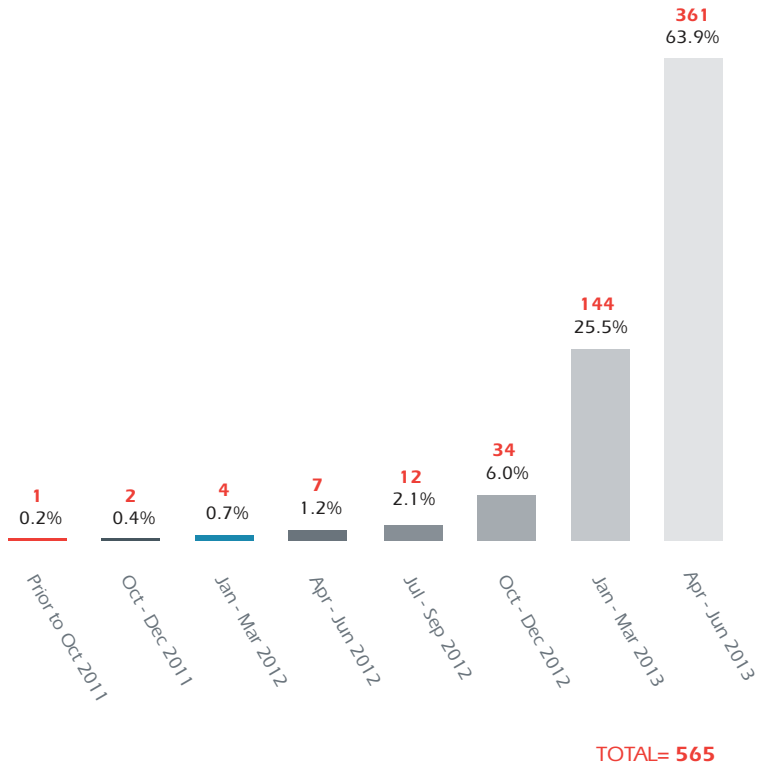

Figure 1 – Adoption rate by quarter

5.2 Governing jurisdiction

More British Columbia companies (42.8%) adopted ANPs than issuers in any other jurisdiction. In light of the fact that ANPs are likely to benefit smaller cap issuers more than larger issuers, it is not surprising that British Columbia, the province with the highest proportion of TSXV-listed issuers in our Study, led the charge in the adoption of ANPs.

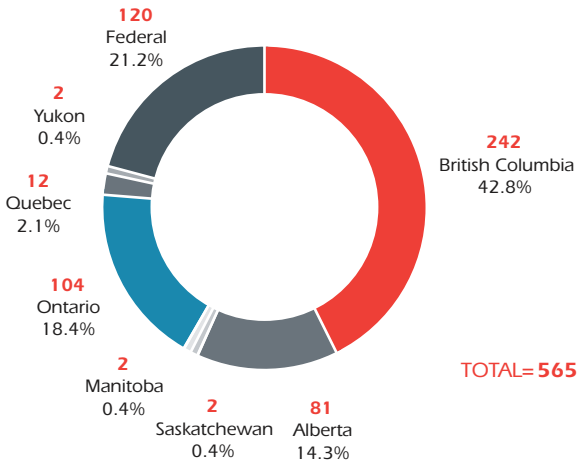

Figure 2 – Governing jurisdiction of issuers

5.3 Stock exchange

337 (or 59.6%) of the issuers that adopted, implemented or announced ANPs were listed on the TSXV, with 215 (or 38.1%) being listed on the TSX. Where an issuer was dual-listed, it was categorized based on the Canadian stock exchange on which it was listed. The "Other" category includes issuers that were listed on a stock exchange other than the TSX or TSXV (including those in the United States) and issuers that were not listed.

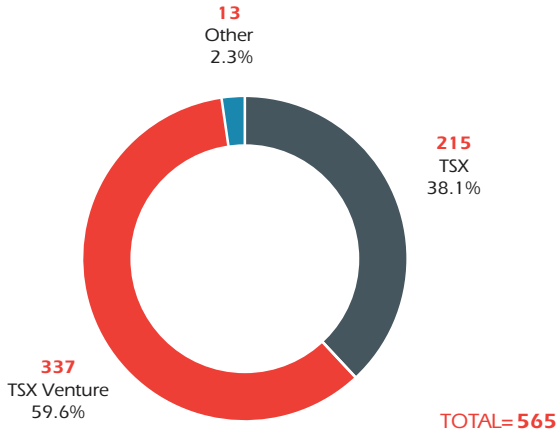

Figure 3 – Principal stock exchange of issuers

5.4 Market capitalization

Set out in Figure 4 is a breakdown of the issuers that have adopted, implemented or announced ANPs based on market capitalization, as of June 28, 2013. This data is consistent with the fact that most issuers that adopted, implemented or announced ANPs were TSXV-listed issuers and therefore had a smaller market capitalization. It is also consistent with the fact that the primary reason for ANPs is to provide advance notice of director nominations and that, generally, the larger the issuer, the more difficult it would be for a dissident to proceed with a proxy fight without alerting the market and the issuer.

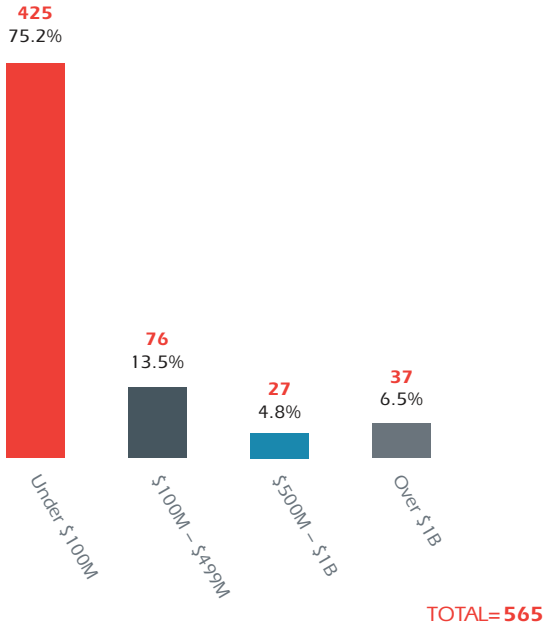

Figure 4 – Market capitalization of issuers

5.5 Shareholder approval

Of the 278 issuers that have reported results for shareholders' meetings at which approval was sought for ANPs, 273 (or 98.2%) received shareholder approval, and five (or 1.8%) did not receive shareholder approval. One of the five issuers that did not receive the requisite shareholder approval (a two-thirds vote for amendment of articles was required) received majority support of its shareholders. In addition, two issuers withdrew the resolution approving ANPs from the matters to be voted on at the meeting. 82 (or 14.5%) of ANPs reviewed were to be placed before shareholders at meetings taking place after June 28, 2013, the cut-off date for the data used in this Study.

117 of the 278 issuers that reported voting results disclosed actual percentages for or against resolutions. Figure 5 shows that 98 (or 83.8%) of these 117 issuers received a vote of more than 80% in favour of ANPs.

It should be noted that the results of the Study relating to shareholder approval are necessarily limited since only TSX-listed issuers are required to file a report of voting results, and these reports do not require specific details for matters carried by a show of hands.

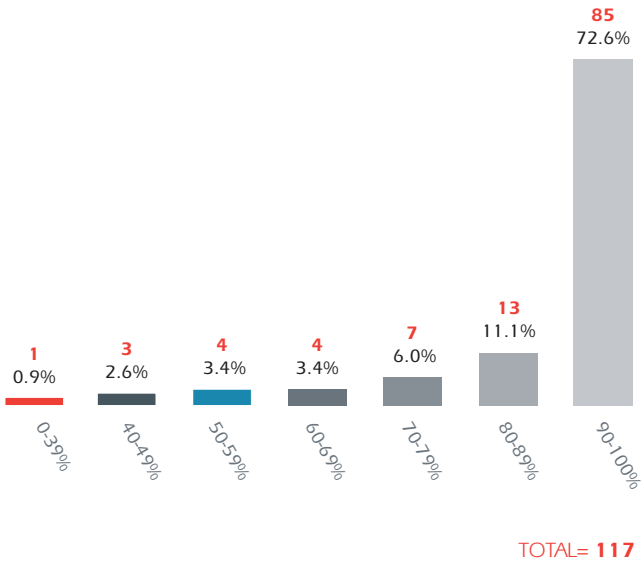

Figure 5 – Percentage of votes in favour of ANPs

5.6 Bylaws, policies, articles or declarations of trust

ANPs have been implemented by way of bylaws, policies, articles for companies governed by the *BCBCA*, and declarations of trust.

5.6.1 CORPORATIONS

For most corporations, particularly *CBCA* and *OBCA* corporations, adoption of ANPs by bylaws was the most typical manner in which ANPs were put into effect. Directors of such issuers may pass an advance notice bylaw by resolution, following which the bylaw must be submitted by the directors to the shareholders for approval at the next shareholders' meeting. However, the advance notice bylaw would be effective from the date of such directors' resolution until it is confirmed, confirmed as amended or rejected by the shareholders at the next meeting. If the advance notice bylaw is confirmed or confirmed as amended at the next meeting, it would continue in effect in the form in which it was confirmed. If the advance notice bylaw is rejected by shareholders at the next meeting, or the directors do not submit the advance notice bylaw to the shareholders at the next meeting, the advance notice bylaw would cease to be effective following the conclusion of the meeting. Additionally, in such a case, no subsequent resolution of the directors to make, amend or repeal a bylaw having substantially the same purpose or effect as the advance notice bylaw would be effective until confirmed or confirmed as amended by the shareholders.

British Columbia companies

Under the *BCBCA*, the manner in which the constating documents may be amended is different from that under the *CBCA* or *OBCA*. As a result, British Columbia companies began to implement ANPs by policy in order to ensure that they were effective immediately and without the necessity of first obtaining shareholder approval. The constating documents of a company governed by the *BCBCA* consist of (i) "notice of articles," which contains prescribed information such as the company's name, names and addresses for each of the directors, registered and records office address, authorized share structure and whether there are special rights or restrictions attached to a class or series of shares; and (ii) "articles," which set out the general rules governing the company's internal affairs and any restrictions on the businesses that may be carried on by the company and the power that the company may exercise.

The company adopts its notice of articles and articles at the time of incorporation. In order to amend the notice of articles or articles, as the case may be, the company's shareholders must approve the amendment prior to such amendment becoming effective (by ordinary resolution or special resolution, as specified by the company's articles). Accordingly, for the purpose of adopting ANPs, the key difference between bylaws of a *CBCA* or *OBCA* corporation and articles of a British Columbia company is that bylaws become effective immediately upon director approval and are subject to confirmation (or rejection) at the next shareholders' meeting by ordinary resolution, whereas any amendment to the articles of a company incorporated under the *BCBCA* is subject to shareholder approval (by ordinary resolution or special resolution, as specified by the company's articles) and the amendment is effective only upon obtaining the requisite shareholder approval. As a result, the implementation of ANPs by amendment of articles for a British Columbia company would not take effect immediately, and would therefore not apply to the meeting at which the amendment of articles is being approved.

Accordingly, British Columbia companies typically adopt ANPs by policy. It is interesting to note that practically all policies are stated to be effective upon adoption by the Board, and if they are put to shareholders for approval, it is usually done on the basis that policies would cease to be effective at the conclusion of the shareholders' meeting (and therefore after the election of directors) if not approved by shareholders at that meeting.

Notwithstanding the *Mundoro* decision (which validated an advance notice policy), as a result of concerns regarding the validity of ANPs adopted by way of a policy, some British Columbia companies have adopted ANPs by policy as an interim step and then proceeded with an alteration to their articles at the next annual meeting.

Québec corporations

Although the *QBCA* has a similar structure to the *CBCA* and the *OBCA*, corporations governed by the *QBCA* may have a similar, if not more difficult, dilemma than *BCBCA* companies. Article 113 of the *QBCA* provides that "procedural matters with respect to shareholders meetings" – which, according to the then Québec Justice Minister, include such matters as notice[22] – may be set out in amendments to a corporation's bylaws, provided they receive shareholder approval before coming into effect. It may therefore be argued that, for *QBCA* corporations, advance notice bylaws cannot be effective without shareholder approval and, if this is correct, it would be challenging to seek to implement the same provisions with immediate effect by way of a policy.

5.6.2 TRUSTS

For trusts, ANPs have been adopted either by way of a declaration of trust when first established or by an amendment of a declaration of trust (with such amendment being valid only when approved by unitholders in accordance with the terms of the declaration of trust).

[22] Québec, Ministre des finances, *Document de référence: explications et commentaires aux parlementaires sur le projet de loi sur les sociétés par actions*, vol 1 (Québec: Finances Québec, 2009).

5.7 Breakdown by method

5.7.1 ADOPTION OF ANPS BY ALL ISSUERS

Figure 6 breaks down the methods used by issuers to adopt ANPs. The significant number of policies and articles corresponds to the fact that 42.8% of the issuers that have adopted ANPs are governed by the *BCBCA* (see Figure 2 above).

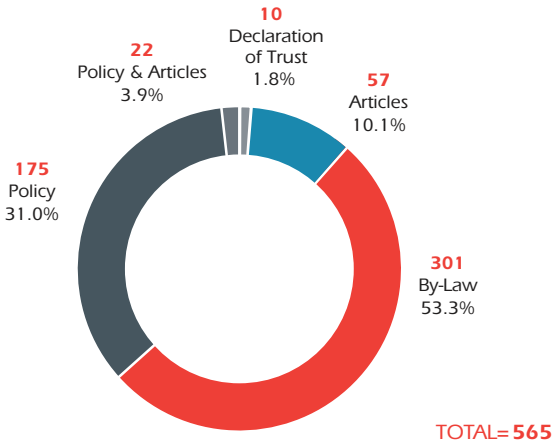

Figure 6 – Methods used to adopt ANPs

5.7.2 ADOPTION OF ANPS BY BRITISH COLUMBIA COMPANIES

As noted above, British Columbia companies began the trend of using policies to adopt ANPs. Of the 242 British Columbia companies that adopted ANPs: 130 (or 53.7%) adopted policies and subsequently sought shareholder approval of the policy; 22 (or 9.1%) adopted policies as an interim step, subsequently seeking shareholder approval for an amendment to articles; and 33 (or 13.6%) adopted policies without apparently seeking shareholder approval. Therefore, in total, 185 (or 76.4%) of all British Columbia companies adopted ANPs by way of a policy. The remaining 57 (or 23.6%) adopted ANPs solely by way of articles.

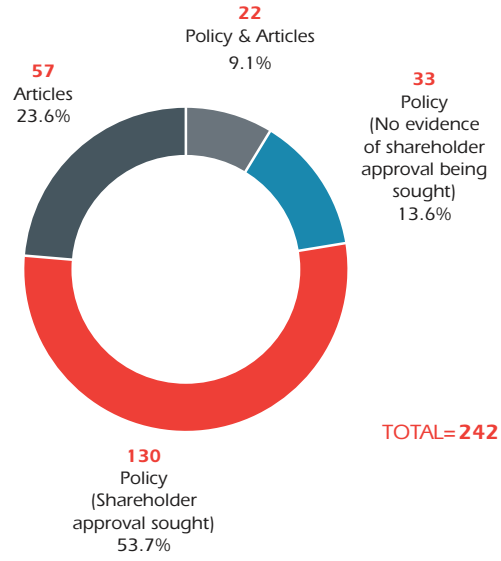

Figure 7 – Methods used to implement ANPs by British Columbia companies

5.7.3 ADOPTION OF POLICIES BY NON-BRITISH COLUMBIA CORPORATIONS

As there is no apparent practical or legal necessity for corporations incorporated outside of British Columbia to adopt policies, we thought it would be interesting to review the adoption of policies by corporations not governed by the *BCBCA*. Upon closer examination, many of the 12 such issuers that adopted policies appear to have done so without a detailed examination of the path being pursued. For example, many were headquartered in British Columbia and appeared to have simply utilized a precedent from a BCBCA company including, in some instances, making references to the *BCBCA*. However, it is clear that one Ontario corporation intentionally adopted a policy in order to avoid the need to seek shareholder approval, while the other Ontario issuer that adopted a policy made the policy effective only on obtaining shareholder approval.

JURISDICTION	SHAREHOLDER APPROVAL SOUGHT	NO EVIDENCE OF SHAREHOLDER APPROVAL BEING SOUGHT	TOTAL
Alberta	**4**	**0**	**4**
Ontario	**1**	**1**	**2**
Federal	**5**	**1**	**6**
Total	**10**	**2**	**12**

Figure 8 – Policies adopted by non-British Columbia corporations

5.7.4 EFFECTIVE DATE OF POLICIES

Based on Figure 6, it is clear that 197 (or 34.9%) of all issuers adopted ANPs by policies (including those British Columbia companies that then sought approval of articles to give effect to ANPs). Of these, 162 sought shareholder approval of their policies, and 144 (or 88.9%) of these 162 issuers made it clear the policies would be effective for the meeting at which approval was being sought, regardless of whether shareholder approval was obtained. Such policies were adopted by Boards on the basis that the policies would cease to be effective at the conclusion of the shareholders' meeting (and therefore after the election of directors) if not approved by shareholders at that meeting.

5.7.5 QUÉBEC CORPORATIONS

As noted above in section 5.6.1 – "Québec corporations," it may be argued that, for *QBCA* corporations, ANPs need to be implemented by bylaws and cannot be effective without shareholder approval. We therefore reviewed whether ANPs adopted by Québec corporations were stated to be effective prior to shareholder approval and whether any were adopted by policies. None of the 12 Québec corporations that adopted ANPs utilized policies.

However, to our surprise, we were unable to ascertain whether the ANPs for seven Québec corporations were effective prior to shareholder approval. The disclosure provided by four Québec corporations clearly stated that their ANPs were to be effective upon obtaining shareholder approval. Conversely, the ANPs of one Québec corporation were stated to be effective immediately upon adoption of the bylaw by the Board.

5.8 Notice periods

In general, the ANPs reviewed provided that notice of a nominee must be provided within a specified period before a shareholders' meeting, subject to modification depending on when the meeting was first publicly announced.

5.8.1 ANNUAL MEETINGS

With respect to the notice required in respect of annual meetings, our first form of ANPs provided that a Nominating Shareholder's notice must be made:

> not less than 30 [the minimum notice] nor more than 65 days [the maximum notice] prior to the date of the annual meeting of shareholders;

> provided, however, that in the event that the annual meeting of shareholders is called for a date that is less than 50 days [the modifying date] after the date [the notice date] on which the first public announcement of the date of the annual meeting was made, notice by the Nominating Shareholder may be made not later than the tenth (10th) day [the modified minimum notice] following the notice date.

Of the ANPs reviewed, 474 (or 88.3%) had a minimum notice of 30 days and a maximum notice of 65 days prior to the date of the annual shareholders' meeting. This is not surprising given that these minimum and maximum notice dates were adopted in the first Canadian ANPs and that the ISS 2013 Guidelines and Glass Lewis 2013 Guidelines support ANPs that provide for these minimum and maximum notice dates. Of the ANPs reviewed, the minimum notice ranged from 30 days to 65 days before the annual meeting and the maximum notice ranged from 50 days to 75 days before the annual meeting (although three ANPs had timing requirements tied to the anniversary date of the previous annual meeting).

All but four of the 537 ANPs reviewed modified the minimum notice in instances where the date of the annual meeting is less than a prescribed number of days after the notice date. Of the ANPs reviewed, the modifying date ranged from 40 days to 75 days. In 461 (or 85.8%) of the ANPs, the modifying date was 50 days and in 42 (or 7.8%) of the ANPs reviewed the modifying date was 40 days. 525 ANPs (or 97.8%) had a modified minimum notice of 10 days and six (or 1.1%) had a modified minimum notice of 15 days.

Of the ANPs reviewed,16 (or 3.0%) had no maximum notice date, and only one required that, in all cases, notice be provided not later than the tenth day after the notice date.

5.8.2 SPECIAL MEETINGS

Of the ANPs reviewed, 516 (or 96.1%) required that in the case of a special meeting (which is not also an annual meeting) called for the purpose of electing directors, notice must be provided not later than the fifteenth day following the day on which the first public announcement of the date of the special meeting was made. 11 ANPs (or 2.0%) required that such notice be provided not later than the tenth day following such announcement, while 10 (or 1.9%) had the same timing requirements for special meetings as those applicable to annual meetings.

5.8.3 MISCELLANEOUS TIMING REQUIREMENTS

There were interesting deviations for a minority of the notice provisions in ANPs that are worth mentioning.

Four ANPs provided different notice provisions for issuers that used notice-and-access.[23] In these cases, the timing provision changed to not fewer than 40 days and not more than 75 days in connection with an annual meeting if notice-and-access was implemented.

Five ANPs varied the timing provisions for the annual meeting at which approval of the ANPs was being sought in order to ensure that shareholders would have sufficient time to deliver a notice in light of the short time period between the meeting date and the public disclosure of the ANPs. However, in our experience, Boards more frequently announced the variation by press release, in accordance with the applicable ANPs, rather than providing for the change within the provisions of the ANPs.

Six issuers provided in their ANPs that the ANPs would not apply at all to the meeting at which approval of the ANPs was being sought.

Interestingly, one issuer provided that the timing of the notices would be subject to and governed by any agreement granting Board nomination rights to a Nominating Shareholder.

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[23] "Notice-and-access" is a mechanism by which issuers can deliver proxy-related materials by (i) posting the relevant information circular (and if applicable, other proxy-related materials) on a website that is not SEDAR; and (ii) sending a notice informing shareholders that the proxy-related materials have been posted, and explaining how to access them – see Canadian Securities Administrators, National Instrument 54-101 - *Communication with Beneficial Owners of Securities of a Reporting Issuer* (amended 29 November 2012), ss 2.7.1– 2.7.8, online: Ontario Securities Commission <http://www.osc.gov.on.ca>; and Canadian Securities Administrators, National Instrument 51-102 - *Continuous Disclosure Obligations* (amended 29 November 2012), ss 9.1.1- 9.1.4, online: Ontario Securities Commission <http://www.osc.gov.on.ca>.

5.8.4 TIMING OF DELIVERY OF AGREEMENT REGARDING COMPLIANCE WITH POLICIES AND GUIDELINES

Of the ANPs reviewed, 32 (or 6.0%) required nominees to agree in writing to comply with all policies and guidelines applicable to directors from time to time. Of these, 28 required a document evidencing such agreement to be delivered to the issuer no later than five days before the scheduled date of the meeting. One required such delivery no later than 10 days before the scheduled date of the meeting. Finally, three required delivery in accordance with the timing requirements for the Nominating Shareholder's notice. See also sections 5.9.1 – "Requirement to comply with policies and guidelines," 6.2 and 6.3.

5.9 Content of Nominating Shareholder notice

The following sections identify the information required by ANPs to be included in, or supplied with, the notice provided by a Nominating Shareholder. This information is divided below into that related to the nominee and that related to the Nominating Shareholder.

5.9.1 INFORMATION REQUIRED IN RESPECT OF EACH NOMINEE

Age and address

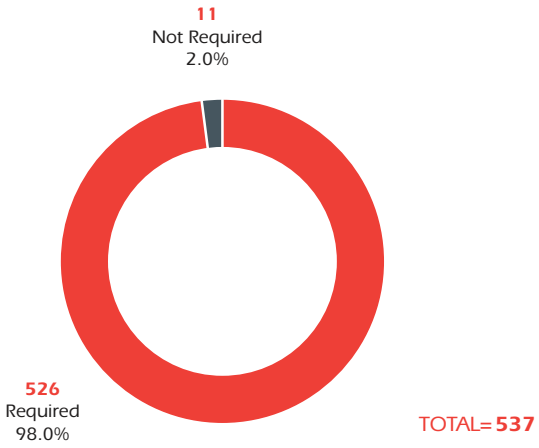

Figure 9 – Disclosure of age and address of nominee

Citizenship

There appears to be no legal reason for disclosure regarding a nominee's citizenship and it is not apparent how this information could assist issuers or their shareholders.

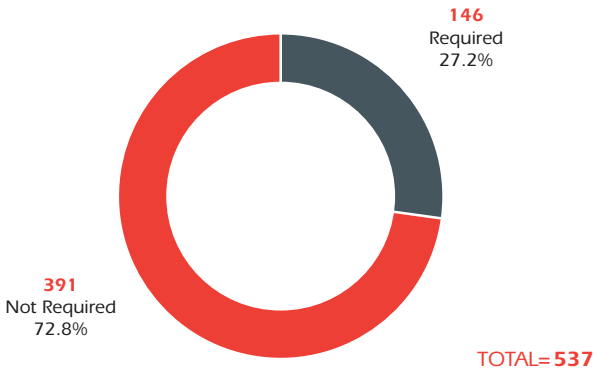

Figure 10 – Disclosure of citizenship of nominee

Residency

Information on the residency of the nominee was required by a small number of issuers, as shown in Figure 11.

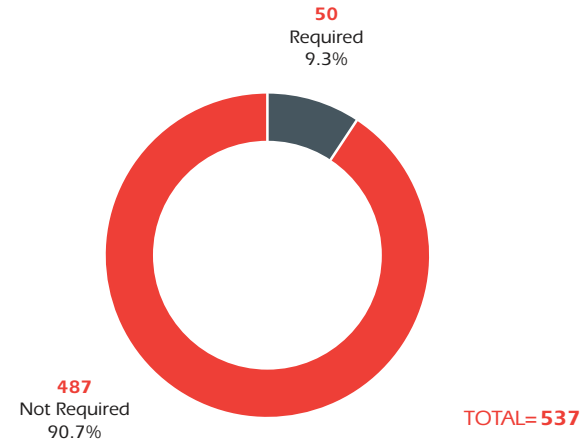

Figure 11 – Disclosure of residency of nominee

Occupation and employment

371 (or 69.1%) of the ANPs reviewed required disclosure only about the nominee's current principal occupation or employment. 155 (or 28.9%) of the ANPs reviewed went a step further requiring a five year history of the nominee's principal occupation or employment. However, this information would nonetheless be required to be disclosed under the vast majority of ANPs because the nominee's principal occupation and employment within the preceding five years is required to be disclosed in a dissident proxy circular (see Appendix B and the discussion below in "Information otherwise required in a dissident proxy circular").

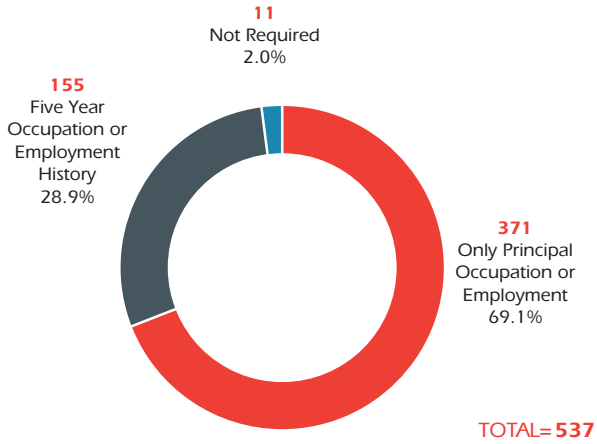

Figure 12 – Disclosure of occupation and employment of nominee

Personal information form

Figure 13 indicates that 53 (or 9.9%) of the ANPs reviewed required that a personal information form ("**PIF**") in respect of the nominee be provided to the issuer, usually in the form prescribed by the principal stock exchange on which the securities of the issuer are listed for trading. PIFs require individuals to provide detailed information relating to, among other things, residential history, education, employment history, citizenship, involvement with other public companies and other entities, criminal offences, bankruptcy, regulatory proceedings and civil proceedings.

The TSXV requires PIFs for any new director, officer or insider. The TSX does not require a PIF for new directors or officers unless it is in connection with an original listing or specifically requested by the TSX. However, TSX-listed companies are required to file a Form 3 for new directors and officers within 10 days of the election or appointment of a director or officer, which includes a 10 year residential history and citizenship information.

It is interesting to note that, of the 53 issuers that adopted ANPs requiring the delivery of PIFs, 28 are TSX-listed issuers even though nominees of such issuers would not otherwise be required to provide a PIF to the TSX upon being elected or appointed to the Board of the issuer. It is not clear why these issuers required PIFs, especially in light of the fact that the ANPs of these issuers usually required extensive disclosure that would provide most of the information required by PIFs.

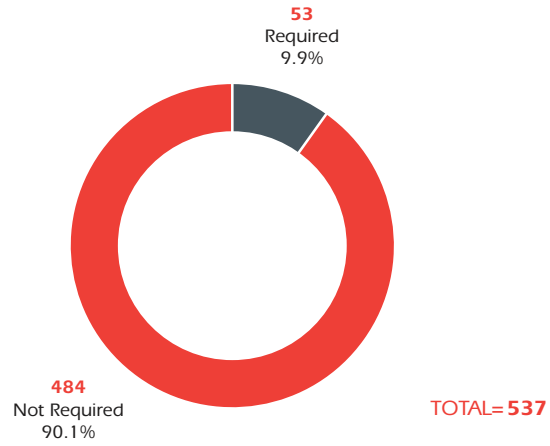

Figure 13 – Delivery of PIF for nominee

Beneficial ownership and control or direction

527 (or 98.1%) of the ANPs reviewed required disclosure of the beneficial ownership of securities of the issuer by the nominee. As noted in Figure 14, 489 of these ANPs did not include a definition of beneficial ownership, and 38 of these ANPs included a definition of beneficial ownership which extended beyond ownership of securities and included any right to acquire such securities and any right to vote or direct the voting of such securities. The disclosure of beneficial ownership would otherwise be required under the vast majority of ANPs because the voting securities beneficially owned by the nominee are required to be disclosed in a dissident proxy circular (see Appendix B and the discussion below in "Information otherwise required in a dissident proxy circular").

Of the ANPs reviewed, 526 (or 98.0%) also required disclosure of the number of securities over which the nominee had control or direction. This information would also otherwise be required to be disclosed under the vast majority of ANPs because the voting securities controlled or directed by the nominee are required to be disclosed in a dissident proxy circular (see Appendix B and the discussion below in "Information otherwise required in a dissident proxy circular").

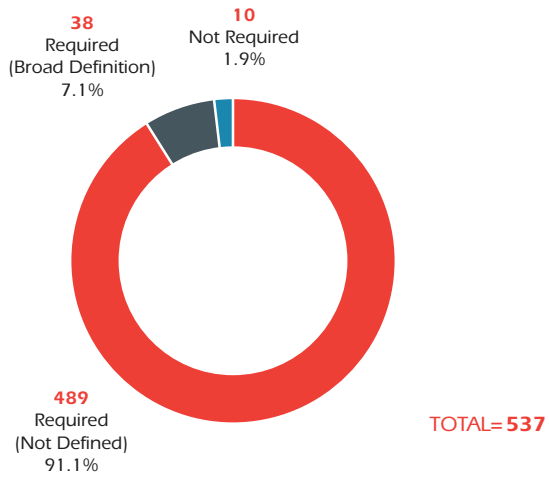

Figure 14 – Disclosure of beneficial ownership of shares of nominee

Derivatives or economic exposure/interest

Only 38 (or 7.1%) of the ANPs reviewed required the disclosure of shares in which a nominee had an economic interest or disclosure of shares held through derivatives. It is interesting to note that the Canadian Securities Administrators have proposed amendments[24] to the so-called "early warning system" whereby to calculate whether a person has acquired sufficient securities to trigger reporting requirements, such person would be required to include "equity equivalent derivatives." These are derivatives that provide the holder with an economic interest substantially equivalent to beneficial ownership of the security. We therefore expect that, in time, issuers will become more focused on holdings through derivatives and more ANPs will require disclosure of this information.

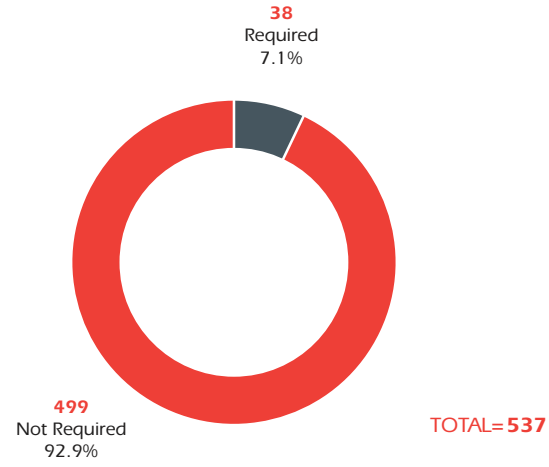

Figure 15 – Disclosure of shares held by nominee through derivatives

[24] *CSA Notice and Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 Take-over Bids and Issuer Bids and National Policy 62-203 Take-Over Bids and Issuer Bids and National Policy 62-103 Early Warning System and Related Take-Over Bid and Insider Reporting Issues,* CSA Notice, (13 March 2013).

Convertible securities

The requirement to disclose ownership of convertible securities such as options and warrants, if not explicitly requested, would otherwise be required to be disclosed pursuant to the broad definition of beneficial ownership included in certain ANPs as noted above in "Beneficial ownership and control or direction." Accordingly, the 11.7% of the ANPs reviewed that required disclosure of convertible securities also included the 7.1% of the ANPs that had a broad definition of beneficial ownership - see Figure 14.

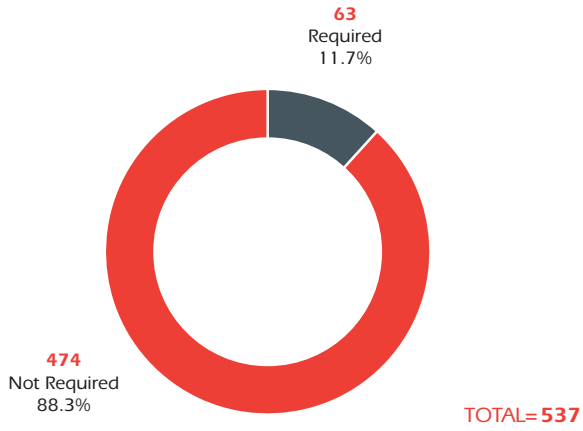

Figure 16 – Disclosure of convertible securities held by nominee

Holdings of affiliates/associates/persons acting jointly or in concert

38 (or 7.1%) of the ANPs reviewed required disclosure of the holdings of the nominee's affiliates and associates and persons acting jointly or in concert with the nominee.

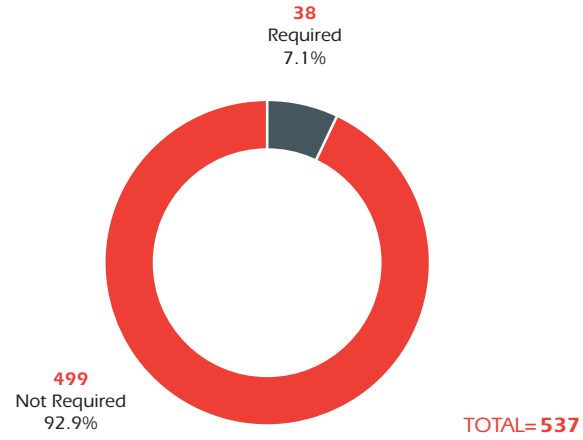

Figure 17 – Disclosure of shares held by affiliates and associates of, and persons acting jointly or in concert with, nominee

Right to vote securities

Figure 18 indicates that 499 (or 92.9%) of the ANPs reviewed did not require specific disclosure with respect to the number of voting securities of the issuer of which the nominee had a right to vote by proxy or any other arrangement, agreement or understanding. The 38 (or 7.1%) of the ANPs reviewed that did require this information did so as a result of a broad definition of beneficial ownership as noted above in "Beneficial ownership and control or direction."

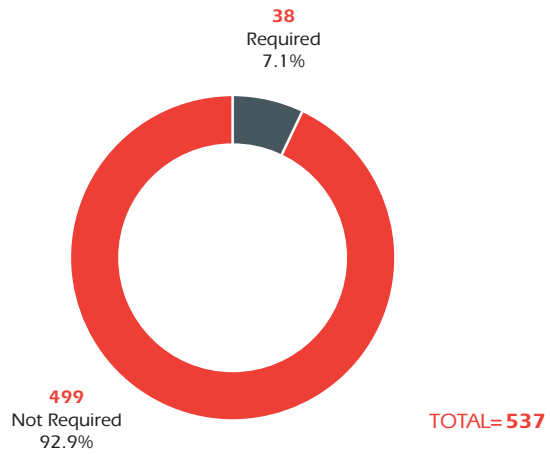

Figure 18 – Disclosure of right of nominee to vote securities

Other mandatory information

94 (or 17.5%) of the ANPs reviewed required additional mandatory disclosure to be provided with respect to the nominee in addition to the disclosure noted above. Of these ANPs, 84 (or 15.6%) required a statement regarding the nominee's independence, while 10 (or 1.9%) required disclosure regarding the nominee's independence, qualifications and background.

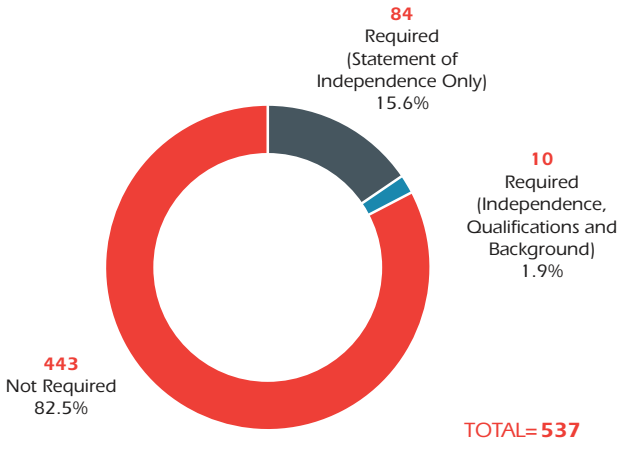

Figure 19 – Disclosure of other mandatory information related to nominee

Other information to be provided at the issuer's request

In addition to the mandatory disclosure required by ANPs described above, 452 (or 84.2%) of the ANPs reviewed also provided that the issuer could request certain other categories of information regarding the nominee. Of the ANPs reviewed, 450 (or 83.8%) allowed issuers to request additional information with respect to independence, 79 (or 14.7%) with respect to qualifications, and 44 (or 8.2%) with respect to eligibility. Figure 20 compares the incidences of the various categories mentioned above, as well as additional categories encountered. Many ANPs allowed the issuer to request more than one category of information.

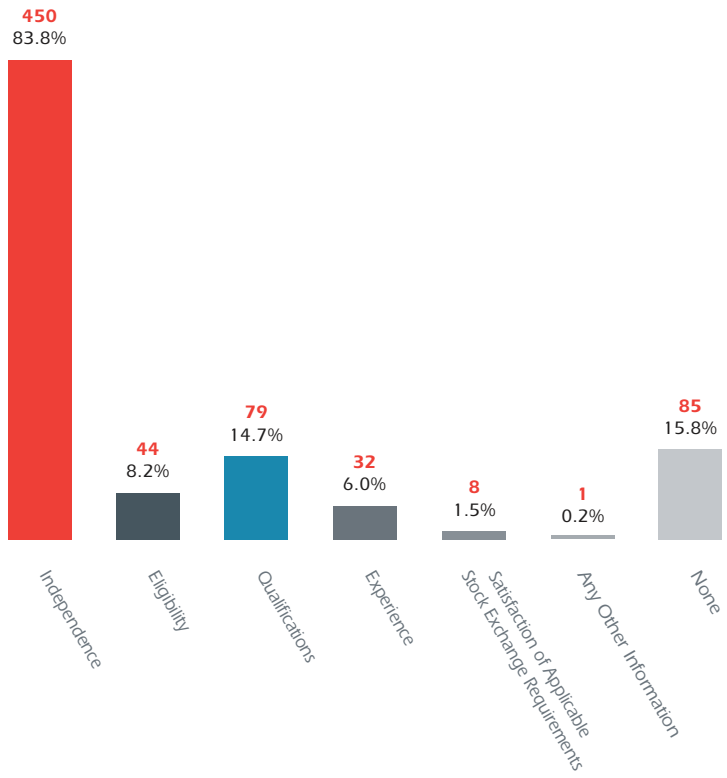

Figure 20 – Information to be provided at issuer's request related to nominee

Written consent to stand as nominee and serve as director

Pursuant to the *CBCA*, a nominee is required to either be present at the meeting at which he or she is elected or, if not present at the meeting, to consent to act as a director within 10 days of the conclusion of the meeting (unless he or she has acted as a director pursuant to the election).[25] Under the *OBCA*, a consent is valid even if granted after 10 days.[26] Under the *BCBCA*, consent is required before or after election, however, if the nominee acts as a director following the election, no consent is required.[27] Therefore, it may appear superfluous for 51 issuers to have included provisions in ANPs which require the delivery of a consent for each nominee, while 55 other issuers included a provision that allows the issuer to request such consent. We suspect these provisions have been inserted in 106 (or 19.7%) of the ANPs reviewed in order to avoid a situation in which a Nominating Shareholder appoints a person on its slate (such as a management nominee) who has no intention of sitting on a Board with the Nominating Shareholder's nominees.

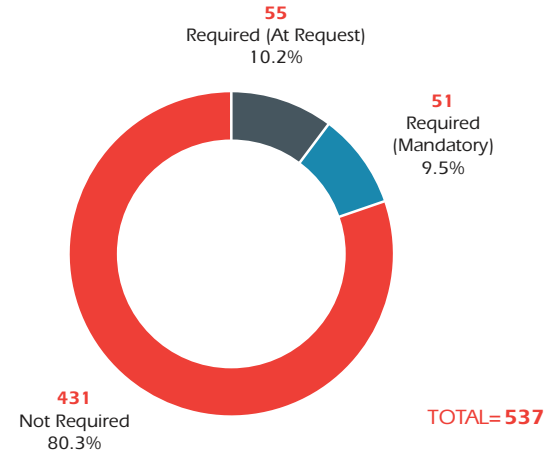

Figure 21 – Provision of written consent by nominee to serve as director

Information otherwise required in a dissident proxy circular

507 (or 94.4%) of the ANPs reviewed required that the notice include any other information with respect to the nominee that would be required to be disclosed in a dissident proxy circular. See Appendix B for a description of the information, with respect to a nominee, that is required to be included in a dissident proxy circular under Canadian securities laws and for corporations governed by the *CBCA*, *BCBCA*, *QBCA*, *OBCA and the Business Corporations Act* (Alberta) ("***ABCA***").[28]

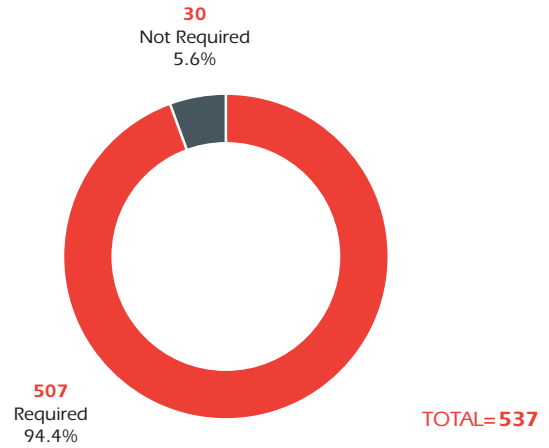

Figure 22 – Disclosure of information relating to nominee required in a dissident proxy circular

[25] *CBCA*, *supra* note 2, s 106(9).

[26] *OBCA*, *supra* note 7, s 118(9).

[27] *BCBCA*, *supra* note 8, s 123(1).

[28] *Business Corporations Act*, RSA 2000, c B-9.

Requirement to comply with policies and guidelines

32 (or 6.0%) of the ANPs reviewed required that nominees must agree to comply with all policies and guidelines applicable to directors from time to time (with one of these providing that compliance was not necessary if reasons were given for objecting to a policy or guideline). All but three of these ANPs imposed this requirement on all nominees, including those put forward by management. The remaining three imposed this obligation only on nominees put forward by the Nominating Shareholder, and not those put forward by management. See section 6.2 below for a discussion of the concerns ISS has expressed with respect to this provision.

It is interesting to note that three ANPs allowed the issuer to request that the Nominating Shareholder's nominees confirm their agreement with such policies and guidelines.

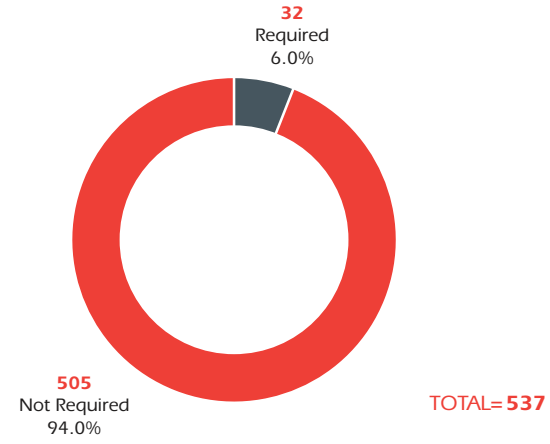

Figure 23 – Compliance by nominee with director policies and guidelines

Contract with competitors

One issuer adopted ANPs that required the nominee to disclose any contract with competitors of the issuer.

5.9.2 INFORMATION REQUIRED IN RESPECT OF NOMINATING SHAREHOLDER

Beneficial ownership and control or direction

111 (or 20.7%) of the ANPs reviewed required disclosure of beneficial ownership for Nominating Shareholders, in contrast to 527 (or 98.1%) of the ANPs reviewed that required this disclosure for nominees (see Figure 14 above). It is interesting to note that of the 38 (or 7.1%) ANPs reviewed that included a broad definition of beneficial ownership as noted in the discussion of beneficial ownership disclosure for nominees above, one did not request disclosure of beneficial ownership of voting securities by the Nominating Shareholder.

94 (or 17.5%) of the ANPs reviewed required disclosure of the number of securities over which the Nominating Shareholder had control or direction, versus 526 (or 98.0%) of the ANPs reviewed that required this disclosure for nominees (see section 5.9.1 – "Beneficial ownership and control or direction").

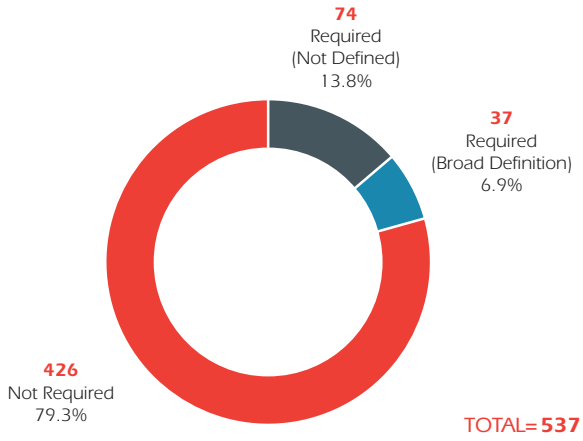

Figure 24 – Disclosure of beneficial ownership of shares of Nominating Shareholder

Derivatives or economic exposure/interest

Only 89 (or 16.6%) of the ANPs reviewed required the disclosure of shares in which a Nominating Shareholder had an economic interest or of shares held through derivatives. We expect that in time more issuers will require disclosure of this information in ANPs (see section 5.9.1 – "Derivatives or economic exposure/interest").

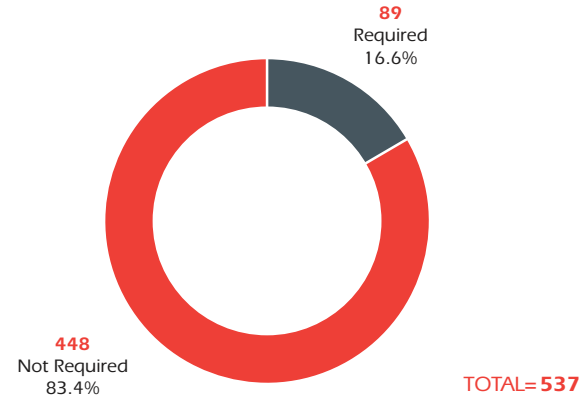

Figure 25 – Disclosure of shares held by Nominating Shareholder through derivatives

Convertible securities

The requirement to disclose ownership of convertible securities such as options and warrants, if not explicitly requested, would otherwise be required to be disclosed pursuant to the broad definition of beneficial ownership included in certain ANPs as noted above in "Beneficial ownership and control or direction." Accordingly, the 11.5% of ANPs reviewed that required disclosure of convertible securities included the 6.9% of ANPs that had a broad definition of beneficial ownership.

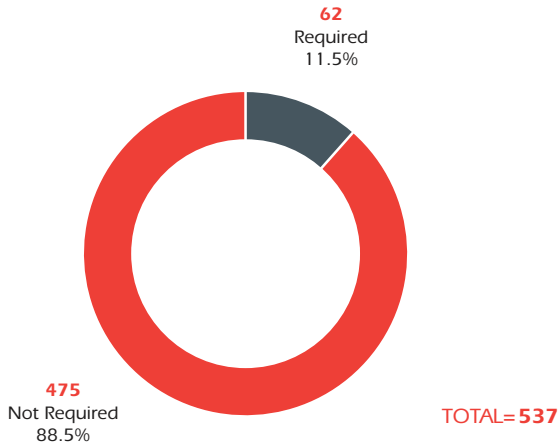

Figure 26 – Disclosure of convertible securities held by Nominating Shareholder

Holdings of affiliates/associates/persons acting jointly or in concert

45 (or 8.4%) of the ANPs reviewed required disclosure of the holdings of the Nominating Shareholder's affiliates and associates and persons acting jointly or in concert with the Nominating Shareholder.

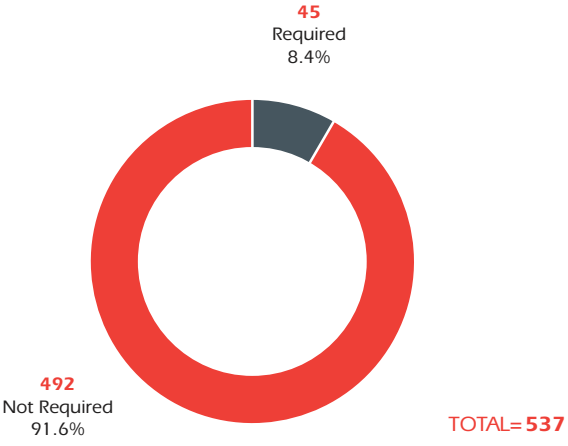

Figure 27 – Disclosure of shares held by affiliates and associates of, and persons acting jointly or in concert with, Nominating Shareholder

Right to vote securities

Figure 28 indicates that 476 (or 88.6%) of the ANPs reviewed required disclosure with respect to the number of securities of the issuer of which the Nominating Shareholder had a right to vote. Only 38 (or 7.1%) of the ANPs reviewed required this disclosure for nominees (see Figure 18 above).

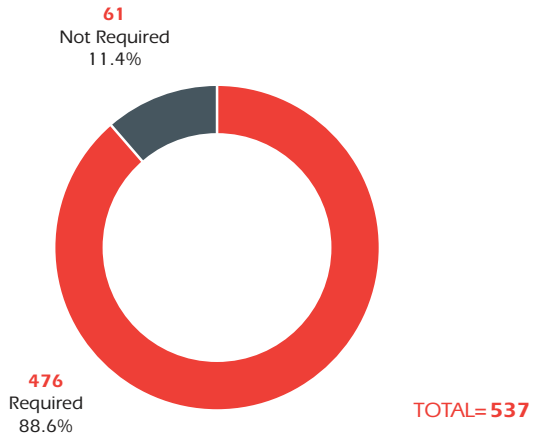

Figure 28 – Disclosure of right of Nominating Shareholder to vote securities

Information otherwise required in a dissident proxy circular

Of the ANPs reviewed, 536 (or 99.8%) required that the notice include any other information with respect to the Nominating Shareholder that would be required to be disclosed in a dissident proxy circular. See Appendix C for a description of the information, with respect to a Nominating Shareholder, that is required to be included in a dissident proxy circular under Canadian securities laws and for corporations governed by the *CBCA, ABCA, QBCA, BCBCA, and OBCA*.

Contracts with issuer

Of the ANPs reviewed, 16 (or 3.0%) required Nominating Shareholders to disclose any contracts they have with the issuer or an affiliate of the issuer.

Intention of delivering a proxy circular

Borrowing a provision from U.S. forms of ANPs, 28 (or 5.2%) of the ANPs reviewed required Nominating Shareholders to disclose whether they intended to deliver proxy circulars in connection with soliciting proxies in favour of their nominees.

Compensation or voting arrangement with nominee

Of the ANPs reviewed, 26 (or 4.8%) required Nominating Shareholders to disclose any arrangements between themselves and their nominees (and 10 of these 26 required a representation that each nominee had no arrangements with the Nominating Shareholder unless disclosed to the issuer). Five (or 0.9%) required disclosure as to any arrangements between the Nominating Shareholder and its nominees during the past three years relating to compensation and other material monetary agreements. 18 (or 3.4%) required disclosure as to the particulars of any arrangements between the Nominating Shareholder and its nominees relating to nominations. However, the information required by these 18 would nonetheless be required to be disclosed under the vast majority of ANPs, because in a dissident proxy circular, the nominees are required to describe any arrangements between themselves and any other person (including the Nominating Shareholder) under which they will be elected (see Appendix C and the discussion in this section 5.9.2 in "Information otherwise required in a dissident proxy circular").

Disclosure of interests in competitors

Interestingly, 12 issuers adopted ANPs that required Nominating Shareholders to disclose any contract with competitors of the issuer, while five of these issuers required additional disclosure related to equity interests in competitors.

5.10 Nomination disregarded if Nominating Shareholder does not attend meeting

Of the ANPs reviewed, 21 (or 3.9%) required the Nominating Shareholder or a qualified representative be present at the meeting or its nominations would be invalid. As noted under section 4.3.1 above, this provision has been adopted directly from U.S. forms of ANPs and there may well be questions as to its validity.

5.11 Waiver

Of the ANPs reviewed, 528 (or 98.3%) provided the Board or issuer with the ability to waive some or all of the provisions of the ANPs in its sole discretion.

Of those ANPs, 108 (or 20.1%) only allowed the Board or issuer to waive the timing restrictions that applied to the provision of notice by Nominating Shareholders. If such a waiver was granted, a Nominating Shareholder would still be required to provide the stipulated notice; however, the Board or issuer would be providing a Nominating Shareholder with more time to meet such requirements. Four (or 0.7%) only allowed the Board to waive timing restrictions and disclosure requirements and five (or 0.9%) only allowed the Board to waive timing provisions pertaining to special meetings.

The other 411 (or 76.5%) ANPs provided the Board or issuer with the ability to waive any or all of the provisions of the ANPs. As noted in section 6.1 below, in 2013, ISS recommended, in unpublished guidelines, that shareholders vote against ANPs that contain a provision allowing a Board or issuer to waive only the timing restrictions. If ISS continues to recommend voting against ANPs that include limited waivers, it is expected that the percentage of ANPs allowing a Board or issuer to waive any provision of ANPs in its sole discretion will increase.

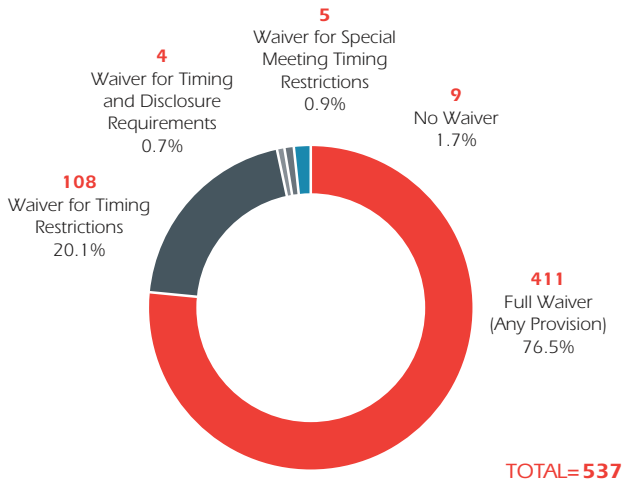

Figure 29 – Discretion to waive

5.12 Application to shareholder proposal or shareholders' requisition

One early adopter implemented a U.S. form of ANPs that applied to the nominations of directors regardless of how the nominations arose, including shareholders' requisitions and shareholder proposals. Six other issuers adopted advance notice bylaws that appear to apply to shareholder proposals; however, the wording of such ANPs is internally contradictory and its meaning is not clear.

As noted above in section 4.3.1, it is not clear to us how ANPs could seek to impose additional notice obligations on a shareholder that has put forward a valid shareholders' requisition, with the result that, if such obligations were not met, the very purpose of the requisitioned meeting (i.e. the election of nominated directors) could be invalidated. We also question the use of articles or bylaws (not to mention policies) to impose additional and inconsistent obligations on shareholders with respect to the statutory procedure relating to shareholder proposals.

5.13 Issuer required to publicly disclose notice

Of the ANPs reviewed, 28 (or 5.2%) required issuers to publicly disclose the details of a Nominating Shareholder's notice as soon as practicable following receipt thereof. It is not clear why an issuer's discretion to disclose such information should be eliminated.

6. ISS' CONCERNS

The ISS 2013 Guidelines and the Glass Lewis 2013 Guidelines support ANPs that provide for notice provisions of not less than 30 days nor more than 65 days prior to the date of the annual meeting.[29] These notice provisions were adopted in the first Canadian ANPs and continue to be used in more than 88% of all ANPs (see sections 4.3.2 and 5.8 above).

ISS also stated in the ISS 2013 Guidelines that it supported issuers making a reasonable request from dissidents for information additional to that required under applicable law in order to review any proposed nominee, and would recommend that shareholders vote to:

> support additional efforts by companies to ensure full disclosure of a dissident shareholder's economic and voting position in the company so long as the informational requirements are reasonable and aimed at providing shareholders with the necessary information to review any proposed nominees.[30]

In light of the significant number of ANPs adopted following the release of the ISS 2013 Guidelines and the Glass Lewis 2013 Guidelines, on November 16, 2012 and November 15, 2012, respectively, it is not surprising that ISS and Glass Lewis would have to respond on an interim basis to the numerous additional and novel provisions that were added to ANPs in 2013.

In the remaining part of this section of our Study, we discuss the position taken by ISS during the 2013 proxy season to recommend that shareholders vote against our standard form of ANPs as a result of two provisions found in these ANPs. One of these two provisions appeared in the first ANPs adopted in Canada – including ANPs that ISS had previously recommended. To our knowledge, Glass Lewis has not opposed either of these provisions. To the extent that ISS has recommended a no vote as a result of other provisions found in other forms of ANPs, we have not addressed those issues in this Study.

In our experience, it is difficult (particularly for issuers with a significant institutional shareholder base) to overcome a negative recommendation by ISS relating to ANPs.

The issues related to the objections of ISS can be summarized as follows:

- Our standard form of ANPs contains a provision allowing the Board of an issuer to waive the timing restrictions that apply to Nominating Shareholders providing notice of a proposed nominee – i.e. the Board may agree to give a Nominating Shareholder more time to provide the issuer with notice of nominees. ISS apparently believes that the Board should be allowed to waive, in its sole discretion, any and all provisions of ANPs, not just the timing requirements.
- Our standard form of ANPs introduced for the 2013 proxy season requires all nominees (including those put forward by management) to agree in writing to comply with all policies and guidelines applicable to directors from time to time. ISS finds this objectionable.

6.1 Waiver of the timing provisions

ISS' concerns relating to a limited right to waive provisions of ANPs by directors, is based on comments by the British Columbia Supreme Court in the *Mundoro* decision. ISS has stated that, in the *Mundoro* decision, the Court noted that the exercise of a waiver provision, which allowed the Board in its sole discretion to waive any requirement of an advance notice policy, could be reviewed by a court, and this was an indication of the policy's good faith and reasonableness. ISS concluded that as such, the absence of this provision could be deemed problematic by some shareholders.

In reviewing the legality of an advanced notice policy, the Court in *Mundoro* stated as follows:

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[29] *ISS 2013 Guidelines, supra* note 4 at 13; *Glass Lewis 2013 Guidelines, supra* note 5 at 11.

[30] *ISS 2013 Guidelines, supra* note 4 at 13.

> The Policy in this case leaves with the board the sole discretion to waive any requirement in the policy which discretion can be reviewed by a court. In addition the press release noted that the company intended to seek shareholder approval and confirmation of the Policy at the AGM. Both of these factors evidence good faith and the reasonableness of the Policy.[31]

We do not believe the case stands for the proposition that a Board that sets reasonable limits on the scope of its discretion is acting in bad faith.[32] In defending the limited waiver provisions in ANPs adopted by articles or bylaws, we noted the following to ISS:

- ANPs in Canada were derived from the U.S. practice, where they have been commonplace for over 20 years. However, U.S. advance notice bylaws do not generally allow Boards to waive the provisions.
- As previously discussed in section 4.3.4, the timing requirements to provide notice under ANPs could prove to be unfair in certain circumstances, such as those in which there has been a change of material circumstances or change of strategic direction after the notice period had elapsed, or a shortened notice period has deprived shareholders of the opportunity to nominate their own slate.[33] A response to this concern was a limited waiver right for directors, which was introduced in the first advance notice bylaws adopted in Canada.
- The waiver right was limited as much as possible for two reasons. First, it is unusual for directors to have the ability to waive provisions of constating documents, and we were, and remain, concerned that broad discretionary rights, if exercised, could subject directors to liability under the oppression remedy or for breach of fiduciary duty. Second, ISS and Glass Lewis had not yet opined on advance notice bylaws in Canada and, in light of their recommendation to vote against shareholder rights plans that provide Boards with discretion to amend the plans or waive the application thereof without shareholder approval, we were concerned that broad discretionary powers to waive would not be viewed positively by ISS or Glass Lewis.
- If a Board wishes to effectively waive any other provision of our form of ANPs (as set out in a bylaw or articles), then the Board would ultimately have to seek shareholder approval for an amendment of the ANPs to give effect to such waiver. This would appear to be more favourable to shareholders than allowing the Board to waive any provision at its discretion. We understood that there was some concern by ISS that if a Nominating Shareholder had not complied with a technical provision regarding the disclosure provisions, then the right to waive would be helpful. We note this could easily be resolved by providing the Nominating Shareholder with more time to deliver a proper notice – the right to waive the timing requirements allows a Board to provide a Nominating Shareholder with as much time as is reasonable.
- It is also important to note that the *Mundoro* decision considered a policy, not a bylaw or an amendment to a company's articles. It is not unusual for policies to provide broad discretion for directors to waive the provisions thereof, but it is, we would suggest, unusual for a Board to be able to waive requirements of their constating documents. It may therefore be prudent to make distinctions between policies and constating documents.

Nevertheless, we must acknowledge that most ANPs now provide waiver provisions applicable to all the provisions of the ANPs (see section 5.11 above).

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[31] *Mundoro, supra* note 18 at para 51.

[32] In fact, we are not certain as to the interpretation to be given to this section of the Court's decision. We would also note that 88.9% of policies put to shareholders for approval were done so on the basis that the policy would cease to be effective at the conclusion of the shareholders' meeting (and therefore after the election of directors) if not approved by shareholders at that meeting – see section 5.7.4. Therefore, it is not clear to us that seeking shareholder approval is actually an indication of good faith or reasonableness. Furthermore, Mundoro Capital Inc. actually sought shareholder approval of an amendment of its articles at its 2012 shareholders' meeting not of the policy.

[33] *Supra* note 17.

6.2 Written agreement to comply with the policies and guidelines of the Board

ISS has noted that a shareholder or group of shareholders wishing to nominate one or more directors to a Board may do so with the intent of affecting change, including changing policies or guidelines of the Board. Therefore, the view of ISS is that requiring such nominees to comply with the status quo in this regard may not be in the best interests of an issuer or its shareholders who support a change-mandate. ISS also argued that this provision goes beyond the stated purpose of ANPs.

We believe it is clear that ISS has misunderstood the intent and effect of the provision. The provision requires each nominee candidate (including management's nominees) to agree to comply with such policies and guidelines of the Board as are in place from time to time, but without improperly fettering their discretion. Accordingly, if a dissident shareholder is successful in changing a majority of directors, the new Board could change all director policies and guidelines, and in those circumstances all directors would have agreed to comply with the new policies and guidelines. The only restraint put on directors by the provisions we propose in our standard form of ANPs is in circumstances in which a minority of directors do not wish to comply with policies and guidelines adopted by a duly constituted Board. We would have thought that in those circumstances, ISS should support directors being required to adhere to good corporate governance practices and comply with guidelines and policies put in place by a majority decision of the Board. This provision may also assist issuers in preventing dissidents or other persons from providing "golden leash payments" or differential incentive pay to such persons' nominees on a Board.

Even if one supports ISS' view that this provision is tangential to the purpose of ANPs, it is not clear why that would in and of itself be objectionable.

6.3 Where we stand

It is clear that numerous issuers have successfully obtained shareholder approval with these provisions in place. However, issuers with a large institutional shareholder base have real obstacles to overcome in adopting ANPs contrary to an ISS recommendation. We are aware of a few issuers (including non-clients) that have amended their previously disclosed form of ANPs in order to obtain a favourable recommendation from ISS with respect to these two provisions. We are also aware of at least one issuer that did not have time to amend its ANPs and was forced to withdraw its resolution to approve an advance notice bylaw or have the resolution be defeated at the meeting. The one client with a large institutional shareholder base, of which we are aware, that decided to engage its shareholders on these issues was successful in obtaining overwhelming shareholder approval by amending its ANPs to provide that if a director objected to a policy or guideline, the director need not comply, provided the director notified the issuer that he or she did not intend to observe or comply with such policy or guideline and the reasons why. The issuer would then be able to publicly disclose such candidate's notification. The form of amended provision we would recommend to deal with this situation is set out below:

> To be eligible to be a candidate for election as a director of the Company and to be duly nominated, a candidate must be nominated in the manner prescribed in this Section ▪ and the candidate for nomination, whether nominated by the Board or otherwise, must have previously delivered to the Corporate Secretary of the Company at the principal executive offices of the Company, not less than 5 days prior to the date of the Meeting of Shareholders, a written representation and agreement (in the form set out at the Company's website under "▪") that such candidate for nomination, if elected as a director of the Company, will comply with all policies and guidelines of the Company applicable to directors set out in the Company's Corporate Governance Policies and Procedures Manual (as set out at the Company's website) in effect from time to time during such person's term in office as a director, or alternatively, such candidate shall notify the Company in writing with reasonable details as to which of such policies or guidelines (or provisions thereof) the candidate does not intend to observe and the reasons why. The Company may publicly disclose such candidate's notification in any manner it so determines.

We continue to believe these new unpublished guidelines from ISS are not in the best interests of shareholders. We will continue to discuss these matters with ISS in the hope these new unpublished guidelines will not form part of ISS' published 2014 voting guidelines.

7. LOOKING AHEAD

Over the past two years, Canadian issuers have embraced ANPs and there can be no doubt that ANPs are now commonplace in Canada. Looking forward, we believe it may be helpful to examine the history of ANPs in the United States. By the late 1980's, ANPs were commonplace in the United States, particularly in the form of bylaws for Delaware-incorporated companies. Initially, ANPs were challenged and Delaware courts regularly upheld ANPs, provided that the bylaws did not unduly restrict the "shareholder franchise," were not applied inequitably and were not put in place to entrench management. Notwithstanding holding that ANPs were usually valid, Delaware courts have repeatedly held that any ambiguous language in ANPs will be resolved in favour of dissidents.

We therefore expect that, notwithstanding the favourable court decisions in *Mundoro* and *Maudore*, we will be entering a phase of increased litigation in Canada relating not only to the validity of ANPs (particularly ANPs adopted by policy), but also the interpretation of ANPs. We expect that the oppression remedy will be the tool most often used by dissidents to attack ANPs. Nevertheless, we believe properly drafted ANPs will be effective and enforced by courts. Accordingly, we will continue to focus on preparing ANPs that are limited in their application, leave little doubt as to the disclosure required, and are clear as to the timing requirements.

We note that recently at least four issuers have adopted enhanced quorum requirements as part of ANPs or in bylaws that contain ANPs. These requirements apply in circumstances in which a majority of the Board is subject to a contested election, and in these circumstances increase the quorum for a shareholders' meeting to a majority of the issued and outstanding shares. The purported reason for this provision is to ensure that if there is to be a change to a Board, then a sizable number of shareholders should make such a decision. We would suggest that for an issuer with ANPs, an enhanced quorum requirement would have little utility since the issuer and its shareholders would have had adequate notice of a contested election and therefore shareholder turnout should not be an issue.

As we continue to look southward at developments relating to bylaws for an indication of future changes or challenges, we note that the Delaware Court of Chancery recently upheld the adoption of a "forum selection bylaw"[34] – being a bylaw that regulates the forum in which a shareholder may litigate, either directly or on behalf of the corporation in a derivative suit, to obtain redress for breaches of fiduciary duty by the Board and officers. More interestingly, a Maryland court has recently upheld a bylaw requiring shareholders to arbitrate their claims against the corporation.[35] Whether these developments will make their way north is a question we will leave for another day. What is beyond doubt, however, is that the evolution of articles and bylaws is not yet complete.

8. LEGAL DISCLAIMER

The results of our Study and our related analysis and discussion should not be taken as, nor do they constitute, legal advice with respect to ANPs or any other matter. Should further discussion or explanation of this Study or ANPs in general be required, please contact one of the authors of this Study or the McMillan LLP lawyer with whom you normally consult.

[34] *Boilermakers Local 154 Retirement Fund v Chevron Corp*, 2013 WL 3191981 (Del Ch).

[35] *Corvex Management LP et al v Commonwealth REIT et al*, No 24C13001111 (Md Cir Ct filed July 3, 2013).

9. APPENDICES

Appendix A

Issuers

49 NORTH RESOURCES INC.

ACASTI PHARMA INC.
ACTIVE CONTROL TECHNOLOGY INC.
ACTIVE GROWTH CAPITAL INC.
ADVANTAGE OIL & GAS LTD.
AETERNA ZENTARIS INC.
AFFERRO MINING INC.
AFRICA OIL CORP.
AFRICAN GOLD GROUP, INC.
AGELLAN COMMERCIAL REAL ESTATE INVESTMENT TRUST
AGNICO EAGLE MINES LIMITED
AIMIA INC.
AINSWORTH LUMBER CO. LTD.
ALARIS ROYALTY CORP.
ALARMFORCE INDUSTRIES INC.
ALBERTA STAR DEVELOPMENT CORP.
ALDER RESOURCES LTD.
ALDERSHOT RESOURCES LTD.
ALDRIDGE MINERALS INC.
ALEXANDER ENERGY LTD.
ALEXCO RESOURCE CORP.
ALLIANCE GRAIN TRADERS INC.
ALLIANCE MINING CORP.
ALMADEN MINERALS LTD.
ALPHA MINERALS INC.
ALTAI RESOURCES INC.
ALTAIR GOLD INC.
ALTER NRG CORP.
ALTIMA RESOURCES LTD.
ALTURAS MINERALS CORP.
AM GOLD INC.
AMAROK ENERGY INC.
AMATO EXPLORATION LTD.
AMERICAN BONANZA GOLD CORP.
AMERICAN CREEK RESOURCES LTD.
AMICA MATURE LIFESTYLES INC.
ANCONIA RESOURCES CORP.
ANFIELD NICKEL CORP.
ANTOFAGASTA GOLD INC.
ANTRIM ENERGY INC.
AQM COPPER INC.
ARCAN RESOURCES LTD.
ARCUS DEVELOPMENT GROUP INC.
ARGONAUT GOLD INC.
ARIUS3D CORP.
ARMADILLO RESOURCES LTD.
ARSENAL ENERGY INC.
ASANKO GOLD INC.
ASANTE GOLD CORPORATION
ASIA NOW RESOURCES CORP.
ATAC RESOURCES LTD.
ATHABASCA MINERALS INC.
ATHABASCA URANIUM INC.
ATLANTIC POWER CORPORATION
ATNA RESOURCES LTD.
AUGUSTA RESOURCE CORPORATION
AUGUSTINE VENTURES INC.
AUGYVA MINING RESOURCES INC.
AURCANA CORPORATION
AURION RESOURCES LTD.
AURIZON MINES LTD.
AUTOMODULAR CORPORATION
AVINO SILVER & GOLD MINES LTD.
AXE EXPLORATION INC.
AZIMUT EXPLORATION INC.

BADGER DAYLIGHTING LTD.
BAJA MINING CORP.
BALLARD POWER SYSTEMS INC.
BALMORAL RESOURCES LTD.
BANKERS PETROLEUM LTD.
BANRO CORPORATION
BARKERVILLE GOLD MINES LTD.
BAYFIELD VENTURES CORP.
BCGOLD CORP.
BEAR CREEK MINING CORPORATION
BELL COPPER CORPORATION
BELMONT RESOURCES INC.
BELO SUN MINING CORP.
BENEV CAPITAL INC.
BENTON CAPITAL CORP.
BENTON RESOURCES INC.
BIG NORTH GRAPHITE CORP.
BIG ROCK BREWERY INC.
BIG SKY PETROLEUM CORPORATION
BIOEXX SPECIALTY PROTEINS LTD.
BISON GOLD RESOURCES INC.
BLACK PANTHER MINING CORP.
BLUESTONE RESOURCES INC.
BNK PETROLEUM INC.
BOLD VENTURES INC.
BOMBARDIER INC.
BRALORNE GOLD MINES LTD.
BRAVADA GOLD CORPORATION
BRIXTON METALS CORPORATION
BROOKWATER VENTURES INC.
BROOME CAPITAL INC.
BRP INC.

C.A. BANCORP INC.
CADILLAC VENTURES INC.
CAE INC.
CALIBRE MINING CORP.
CALLINAN ROYALTIES CORPORATION
CANADIAN APARTMENT PROPERTIES REAL ESTATE INVESTMENT TRUST
CANADIAN ENERGY SERVICES & TECHNOLOGY CORP.
CANADIAN MINING COMPANY INC.

CANADIAN OIL SANDS LIMITED
CANADIAN OREBODIES INC.
CANADIAN OVERSEAS PETROLEUM LIMITED
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CANALASKA URANIUM LTD.
CANAMEX RESOURCES CORP.
CANARC RESOURCE CORP.
CANDENTE COPPER CORP.
CANDENTE GOLD CORP.
CAPITAL POWER CORPORATION
CAPSTONE MINING CORP.
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CARDERO RESOURCE CORP.
CARDIOME PHARMA CORP.
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CARTIER RESOURCES INC.
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CBM ASIA DEVELOPMENT CORP.
CENTRIC HEALTH CORPORATION
CERF INCORPORATED
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COASTAL GOLD CORP.
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COLUMBIA YUKON EXPLORATIONS INC.
COLUMBUS ENERGY LIMITED
COMPLIANCE ENERGY CORPORATION
CONDOR RESOURCES INC.
CONNACHER OIL AND GAS LIMITED
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CONTINENTAL PRECIOUS MINERALS INC.
COPPER MOUNTAIN MINING CORPORATION
COPPER ONE INC.
CORAL GOLD RESOURCES LTD.
CORO MINING CORP.
CORONA GOLD CORPORATION
CORPORATE CATALYST ACQUISITION INC.
CORTEX BUSINESS SOLUTIONS INC.
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CROWN POINT ENERGY INC.
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CURRIE ROSE RESOURCES INC.
CYPRESS DEVELOPMENT CORP.

DACHA STRATEGIC METALS INC.
DALRADIAN RESOURCES INC.
DAVIS + HENDERSON CORPORATION
D-BOX TECHNOLOGIES INC.
DECADE RESOURCES LTD.
DEER HORN METALS INC.
DENISON MINES CORP.
DETOUR GOLD CORPORATION
DEVERON RESOURCES LTD.
DIAGNOCURE INC.
DITEM EXPLORATIONS INC.
DIVESTCO INC.
DOLLY VARDEN SILVER CORPORATION
DOXA ENERGY LTD.
DUNCASTLE GOLD CORP.
DURAN VENTURES INC.
DYNACOR GOLD MINES INC.

EAGLE ENERGY TRUST
EAST AFRICA METALS INC.
EAST ASIA MINERALS CORPORATION
EAST WEST PETROLEUM CORP.
EASTERN PLATINUM LIMITED
EASTMAIN RESOURCES INC.
ECO ORO MINERALS CORP.
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NULEGACY GOLD CORPORATION

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OREFINDERS RESOURCES INC.
OREX MINERALS INC.
OROMIN EXPLORATIONS LTD.
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PACIFIC SAFETY PRODUCTS INC.
PACIFIC VECTOR HOLDINGS INC.
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PENN WEST PETROLEUM LTD.
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PINECREST RESOURCES LTD.
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RATHDOWNEY RESOURCES LTD.
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RESINCO CAPITAL PARTNERS INC.
REVETT MINERALS INC.
RIO ALTO MINING LIMITED
RIOCAN REAL ESTATE INVESTMENT TRUST
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ROCKEX MINING CORPORATION
ROCKHAVEN RESOURCES LTD.
ROCKLAND MINERALS CORP.
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ROTATION MINERALS LTD.
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ROYAL NICKEL CORPORATION
RUSSELL BREWERIES INC.
RYAN GOLD CORP.

SABINA GOLD & SILVER CORP.
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SAGRES ENERGY INC.
SAMA RESOURCES INC./RESSOURCES SAMA INC.
SAN ANTONIO VENTURES INC.
SAN GOLD CORPORATION
SAN MARCO RESOURCES INC.
SANDSPRING RESOURCES LTD.
SANDVINE CORPORATION
SANTA BARBARA RESOURCES LIMITED
SANTACRUZ SILVER MINING LTD.
SARAMA RESOURCES LTD.
SCHWABO CAPITAL CORPORATION
SCORPIO GOLD CORPORATION
SCORPIO MINING CORPORATION
SEAFIELD RESOURCES LTD.
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SEAWAY ENERGY SERVICES INC.
SECURE ENERGY SERVICES INC.
SERENIC CORPORATION
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SHAWCOR LTD.
SHOAL POINT ENERGY LTD.
SHORE GOLD INC.
SHORELINE ENERGY CORP.
SILVER RANGE RESOURCES LTD.
SILVERCREST MINES INC.
SINTANA ENERGY INC.
SIROCCO MINING INC.
SKYHARBOUR RESOURCES LTD.
SNC-LAVALIN GROUP INC.
SNIPGOLD CORP.

SOLIUM CAPITAL INC.
SONDE RESOURCES CORP.
SONORO METALS CORP.
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SOUTHERN SILVER EXPLORATION CORP.
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STERLING RESOURCES LTD.
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STRAIT MINERALS INC.
STRATEGIC METALS LTD.
STRATTON RESOURCES INC.
SUNRIDGE GOLD CORP.
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TALLGRASS ENERGY CORP.
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TEKMIRA PHARMACEUTICALS CORPORATION
TELUS CORPORATION
TEMEX RESOURCES CORP.
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TERRA NOVA ENERGY LTD.
TERRACE ENERGY CORP.
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TESLIN RIVER RESOURCES CORP.
THE CHURCHILL CORPORATION
THE DESCARTES SYSTEMS GROUP INC.
THE SECOND CUP LTD.
THE WESTAIM CORPORATION
THOR EXPLORATIONS LTD.
THREEGOLD RESOURCES INC.
THUNDERBIRD ENERGY CORPORATION
TIGRAY RESOURCES INC.
TIM HORTONS INC.
TOREX GOLD RESOURCES INC.
TRANSAT A.T. INC.
TREVALI MINING CORPORATION
TRICAN WELL SERVICE LTD.
TRICON CAPITAL GROUP INC.
TRILOGY ENERGY CORP.
TRINIDAD DRILLING LTD.
TRIOIL RESOURCES LTD.
TRUE GOLD MINING INC.

U3O8 CORP.
UEX CORPORATION
ULTRA LITHIUM INC.
URTHECAST CORP.

VALEANT PHARMACEUTICALS INTERNATIONAL INC.
VALGOLD RESOURCES LTD.
VALTERRA RESOURCE CORPORATION
VAST EXPLORATION INC.
VERIS GOLD CORP.
VICTORY NICKEL INC.
VIRGINIA MINES INC.
VISTA GOLD CORP.
VITRAN CORPORATION INC.

WAJAX CORPORATION
WATERFRONT CAPITAL CORPORATION
WAVEFRONT TECHNOLOGY SOLUTIONS INC.
WAYMAR RESOURCES LTD.
WEST MELVILLE METALS INC.
WESTERN COPPER AND GOLD CORPORATION
WESTERN LITHIUM USA CORPORATION
WESTERN POTASH CORP.
WESTERN TROY CAPITAL RESOURCES INC.
WESTERNZAGROS RESOURCES LTD.
WESTSHORE TERMINALS INVESTMENT CORPORATION
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WILDCAT EXPLORATION LTD.
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WOLFDEN RESOURCES CORPORATION
WOLFPACK GOLD CORP.
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WPT INDUSTRIAL REAL ESTATE INVESTMENT TRUST

XYLITOL CANADA INC.

YELLOW MEDIA LIMITED

ZCL COMPOSITES INC.
ZENN MOTOR COMPANY INC.
ZODIAC EXPLORATION INC.

Appendix B

Disclosure requirements relating to the nominee in a dissident proxy circular

Under National Instrument 51-102 – *Continuous Disclosure Obligations,* a Nominating Shareholder's proxy circular must disclose the following information, among other things:

- the nominee's name;
- the nominee's province or state and country of residence;
- the nominee's present principal occupation, business or employment and all the principal occupations, businesses or employments within the preceding five years;
- the number of voting securities of the corporation that the nominee owns beneficially or that the nominee controls or directs;
- whether the nominee is, or has been within the last 10 years, a director, chief executive officer or chief financial officer of any company that was subject to an order, the basis on which the order was made and whether the order is still in effect;
- whether the nominee is, or has been within the last 10 years, a director or executive officer of any company that became bankrupt or was subject to any bankruptcy proceedings while the nominee was acting in that capacity or within a year of the nominee ceasing to act in that capacity;
- whether the nominee has, within the last 10 years, become bankrupt or subject to any bankruptcy proceedings;
- any penalties or sanctions imposed on the nominee by a court relating to securities regulation or by a court or regulatory body that a reasonable securityholder would likely consider important in deciding whether to vote for the nominee;
- details of any arrangement or understanding between the nominee and any other person or company, except the directors and officers of the corporation acting solely in such capacity, pursuant to which the nominee is to be elected; and
- details of any material interest of the nominee, or any associate or affiliate of the nominee, in any transaction since the beginning of the corporation's last completed financial year or in any proposed transaction which has materially affected or will materially affect the corporation.

Under the Regulations to the *OBCA*, a Nominating Shareholder's proxy circular must disclose the following information, among other things:

- the nominee's name;
- the nominee's present and principal occupation and employment and all principals occupations or employments within the preceding five years;
- the number of voting securities of the corporation that the nominee owns beneficially or over which the nominee exercises control or direction;
- details of any contract, arrangement, or understanding between the nominee and any other person, except the directors and officers of the corporation acting solely in such capacity, pursuant to which the nominee is to be elected; and
- details of any material interest of the nominee in any transaction since the beginning of the corporation's last completed financial year or in any proposed transaction which has materially affected or will materially affect the corporation.

The *CBCA* and the *ABCA* provide that the form of a dissident proxy circular must comply with the form specified in National Instrument 51-102 – *Continuous Disclosure Obligation*s. The *BCBCA* and *QBCA* do not prescribe any requirements for a dissident proxy circular.

Appendix C

Disclosure requirements relating to the Nominating Shareholder in a dissident proxy circular

Under National Instrument 51-102 – *Continuous Disclosure Obligations,* a Nominating Shareholder's proxy circular must disclose the following information, among other things:

- the Nominating Shareholder's name; and
- details of any arrangement or understanding between the nominee and any other person or company (including the Nominating Shareholder), except the directors and officers of the corporation acting solely in such capacity, pursuant to which the nominee is to be elected.

Under the Regulations to the *OBCA*, a Nominating Shareholder's proxy circular must disclose the following information, among other things:

- the Nominating Shareholder's name and address;
- the Nominating Shareholder's present principal occupation or employment and all material occupations, offices or employments during the preceding five years;
- whether the Nominating Shareholder is or has been a Nominating Shareholder within the preceding 10 years and details regarding any such instances;
- the circumstances under which the Nominating Shareholder became involved in the solicitation and the nature and extent of activities as a Nominating Shareholder;
- the number of voting securities of the corporation that the Nominating Shareholder or its associates owns beneficially or over which it exercises control or direction;
- details regarding securities of the corporation purchased or sold by the Nominating Shareholder during the preceding two years;
- details regarding the borrowing of funds by the Nominating Shareholder in order to purchase securities of the corporation in the preceding two years;
- details of any contract, arrangement or understanding between the Nominating Shareholder and any person within the preceding year in respect of securities of the corporation;
- the number of voting securities of the corporation that each associate of the Nominating Shareholder owns beneficially or over which the Nominating Shareholder exercises control or direction;
- details of any contract, arrangement or understanding between the Nominating Shareholder or the Nominating Shareholder's associates and any person with respect to future employment by the corporation or future transactions to which the corporation may be a party; and
- details of any contract, arrangement, or understanding between the nominee and any other person (including the Nominating Shareholder), except the directors and officers of the corporation acting solely in such capacity, pursuant to which the nominee is to be elected.

The *CBCA* and the *ABCA* provide that the form of a dissident proxy circular must comply with the form specified in National Instrument 51-102 – *Continuous Disclosure Obligations*. The *BCBCA* and *QBCA* do not prescribe any requirements for a dissident proxy circular.

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