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When can a company refuse a shareholder proposal?

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Canadian public companies are increasingly being asked to consider requests to include shareholder proposals for consideration at their annual meetings. Earlier this year, the decision of the Superior Court of Québec in *Fraser c. Canadian National Railway Company*, 2022 QCCS 1138 (*Fraser*), gave comfort that courts will take a practical approach to assessing whether a company may refuse to include a shareholder proposal in its proxy materials.

This Update outlines the rules for shareholder proposals under the *Canada Business Corporations Act* (the CBCA), including the circumstances when a company may refuse a proposal. It reflects the recent amendments to the shareholder proposal rules under the CBCA and related regulations that came into force on August 31, 2022, which are summarized in the Osler Update titled "Against votes for directors, new timing on shareholder proposals and other CBCA changes now in effect," published on September 28, 2022.

Although this Update reviews the rules for submitting shareholder proposals under the CBCA, similar provisions exist under provincial corporate statutes.

Submitting a shareholder proposal under the CBCA

- **Who** – A proposal may be submitted by one or more registered shareholder(s) or beneficial owner(s) collectively holding, for at least six months before submitting the proposal:
  - 1% or more of the voting shares as of the day on which the proposal is submitted; or[1]
  - voting shares worth at least CA$2,000, as determined at the close of business on the day before the shareholder submits the proposal.[2]
- **Proof** – If evidence supporting eligibility was not provided, the company can require proof of eligibility within 14 days of receiving the proposal, which the proponent must provide within 21 days after the company's request.[3]
- **When** – A proposal may be submitted during the 60-day period that begins on the 150th day before the anniversary of the previous annual meeting of shareholders (the Permitted Window).[4]
- **Proponent information** – A proposal must be accompanied by disclosure of (i) the proponent's name and address and (ii) the number of shares owned by the proponent and the dates of their purchase.[5]

- **Length** – The proposal and any supporting statement from the proponent together cannot exceed 500 words.[6]

Rules governing the company's response to a proposal

- **Management circular** – If a proposal meets the conditions for submitting a shareholder proposal noted above and the exemptions for refusal noted below are not available, the company needs to include the proposal in the circular.[7]
- **Supporting statement** – If the proponent so requests, the company needs to include a statement from the proponent in support of the proposal in the circular.[8]
- **Exemptions** – The company can refuse to include a proposal or a supporting statement in a circular for different reasons. The company does not need to get leave from a court to refuse a proposal. The company needs only to (i) notify the proponent of its intention to omit the proposal from the circular and (ii) provide reasons for the refusal within 21 days following receipt of the proposal.[9] However, the proponent whose proposal is refused can challenge the decision at court and ask the court, among other things, to restrain the shareholder meeting.[10]

The company may refuse to include a proposal for the following reasons:

- **Timing** – The proposal is submitted outside the Permitted Window.[11]
- **Proponent previously wasted company and shareholder time** – If, in the last two years, the proponent of the proposal asked the company to include a shareholder proposal in the circular but failed to present such proposal at the actual meeting, the company can refuse the current proposal submitted by the proponent.[12]
- **Proponent failed to maintain minimum ownership** – If, in the last two years, the proponent of the proposal submitted a shareholder proposal but failed to continue to maintain ownership in the company through to the date of the shareholder meeting at or above the minimum ownership level required to submit a shareholder proposal, the company can refuse the current proposal submitted by the proponent.[13]
- **Not relevant** – If it is clearly apparent that the proposal is not related in a significant way to the business and affairs of the company, the company can refuse it.[14] However, this exemption rarely arises.
- **Proposals related to personal claims or grievances**
- **Substantially similar proposals that failed in the last five years**
- **Abuse of proposal rules to secure publicity**

We explore the last three exemptions in more detail below.

Exemption – proposals related to personal claims or grievances

Section 137(5)(b) of the CBCA provides an exemption if

it clearly appears that the primary purpose of the proposal is to enforce a personal claim or

redress a personal grievance against the corporation or its directors, officers or security holders

Under this exemption, courts analyze the proposal as a whole and assess the proponent's behaviour and communications to determine the dominant purpose of the proposal itself.[15] In particular, courts assess the extent to which the proposal is primarily addressing or is rooted in a personal claim or grievance of the shareholder "as opposed to issues in the general interest of the shareholders".[16] The threshold for finding such a "clearly" apparent primary purpose is relatively high.[17] Courts have considered the following factors:

- **Subject matter** – The exemption applies to proposals that are primarily concerned with personal grievances and claims rather than corporate policy or operations. The Ontario Superior Court of Justice has emphasized that this exemption does not apply when the proposal simply contains some "element of personal interest".[18] For a proposal to be validly refused under this exemption, the proposal needs to bear "no real or direct relationship, nor [be] otherwise integral, to the business and affairs of the company, or, for that matter, to the [proponent]'s role as a shareholder".[19]
- **Number of supporters** – A proposal with fewer supporters is more likely to concern primarily a personal interest of a shareholder as opposed to the general interest of the shareholders and, hence, more likely to concern primarily a personal grievance or claim.[20]
- **Similar complaints** – Lack of evidence of similar complaints from other shareholders suggests that the proposal concerns primarily a personal grievance or claim.[21]
- **Parallel proceedings** – Proposals submitted by a shareholder that is involved in litigation proceedings against the company or other companies in the same industry on a related issue are more likely to be an attempt to enforce a personal grievance or claim.[22]
- **Vindictiveness** – Proposals that seek to embarrass, ridicule or draw attention to the company's errors that were subsequently remedied are more likely to be found to relate to a personal grievance or claim rather than a matter of corporate policy or general shareholder interest.[23]

Exemption – substantially similar proposals that failed in the last five years

Section 137(5)(d) of the CBCA provides an exemption if[24]

substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident's proxy circular relating to a meeting of shareholders held not more than the prescribed period before the receipt of the proposal and did not receive the prescribed minimum amount of support at the meeting

Courts consider whether proposals are "substantially the same" by considering their "pith and substance, core nature or essence, as opposed to their mere form, wording or to the precise relief sought."[25] More specifically, courts consider (i) the focus or emphasis of the proposing shareholder's presentation at the prior meeting;[26] (ii) the focus or emphasis of the proposing shareholder's behaviour prior to the upcoming meeting;[27] (iii) the content of the

supporting statement; and (iv) the focus and emphasis of websites or other communication made in connection with the proposals.[28] Following such analysis, proposals that are found to share the same "underlying premise and essential objective"[29] are more likely to be substantially the same and, hence, validly refused by the company.

Exemption – abuse of proposal rules to secure publicity

Section 137(5)(e) of the CBCA provides an exemption if

the rights conferred by this section are being abused to secure publicity

Courts recognize that proposals necessarily confer some degree of publicity on the shareholder and his or her objective.[30] Therefore, under this exemption, courts assess whether the shareholder used the proposal rules for unintended purposes or in an improper manner. Courts have considered the following factors:

- **Campaigns for legislative change or public inquiries** – Using the proposal process to gather public support for a campaign of legislative changes or public inquiries in a particular industry promoted by the shareholder or his or her legal counsel "is not appropriate".[31]
- **Parallel litigation** – Using the proposal process to draw attention to litigation proceedings between the shareholder and the company or other companies in the same industry likely amounts to abusive use of the proposal rules to secure publicity.[32]
- **Number of proposals** – Shareholders submitting many proposals are more likely to be found to be abusing the rules to secure publicity.[33]
- **Behaviour at meetings** – Shareholders with abusive or disruptive behaviour at shareholder meetings are more likely to be found to be abusing the rules to secure publicity.[34]
- **Using proposals for other unintended purposes** – Using proposals rules for other unrelated purposes, such as "as a discovery tool",[35] likely amounts to abuse of the proposal process.

Takeaway

Shareholder proposals can be a powerful tool to encourage companies to initiate governance and disclosure changes, but proponents need to be acutely aware of the requirements for submission of a valid proposal. Companies have a responsibility to scrutinize shareholder proposals which they receive for compliance with statutory requirements to ensure the statutory provisions are not being misused. In addition to satisfying technical requirements, activist shareholders using the shareholder proposal mechanism must assess the risk that their proposals and the related behaviour and communications could fall foul of the exemptions and result in the company refusing their proposal.

For any questions concerning shareholder proposals, please contact the members of our corporate law team.

[1] If the proposal includes nominations for the election of directors, as per CBCA, s. 137(4), the threshold increases to 5% of the voting shares.

[2] *Canada Business Corporations Regulations, 2001* (CBCR), s. 46(a).

[3] CBCA, s. 137(1.4); CBCR, s. 47.

[4] CBCA, s. 137(5)(a); CBCR, s. 49.

[5] CBCA, s. 137(1.2).

[6] CBCA, s. 137(3); CBCR, s. 48.

[7] CBCA, s. 137(2).

[8] CBCA, s. 137(3); CBCR, s. 48.

[9] *Fraser* at para 21.

[10] CBCA, s. 137(8).

[11] CBCA, s. 137(5)(a).

[12] CBCA, s. 137(5)(c).

[13] CBCA, s. 137(5.1).

[14] CBCA, s. 137(5)(b.1).

[15] *Fraser* at para 58. For another formulation of the test, see also *National Bank of Canada v Weir*, 2006 QCCS 278, para 28 (*Weir 2006*).

[16] *Fraser* at para 57; *Koh v Ellipsiz Communications Ltd.*, 2017 ONSC 3083, at paras 28 and 36–39 (*Koh 2017*).

[17] *Koh 2017*, para 47.

[18] *Koh 2017*, para 28.

[19] In *Koh 2017* at paras 37–38, the court suggests (i) that proposals rooted in "questions related to a wrongful dismissal action" or "questions designed to provide leverage in separate litigation involving the company" would likely be validly refused under this exemption, and (ii) that proposals related primarily to a shareholder's strategy "to replace the directors so that a dividend would be declared" or majority shareholders' intention "to seek to elect a Board of Directors that represented their views" would likely not fall under this exemption.

[20] *Koh v Ellipsiz Communications Ltd.*, 2016 ONSC 7345, para 30 (*Koh 2016*), "the extent to which the complainant acted alone or with the support of other like-minded individuals".

[21] *Koh 2016* at para 33, "any evidence of any complaints from any shareholders other than the applicant".

[22] *Fraser* at paras 61, 63 and 67; *Weir 2006* at para 23.

[23] *Weir 2006* at paras 13, 23, 35–36.

[24] For the prescribed period and the prescribed minimum amount of support, see CBCR, s. 51.

[25] *Fraser* at para 36.

[26] *Fraser* at para 44.

[27] *Fraser* at paras 45–47.

[28] *Fraser* at para 49.

[29] *Fraser* at para 42.

[30] *Michaud c Banque Nationale du Canada*, 1997 CanLII 8814, at para 79.

[31] *Fraser* at para 72.

[32] *National Bank of Canada c Weir*, 2009 QCCS 5688, at para 50 (*Weir 2009*).

[33] *Weir 2009* at para 55. In that case, the shareholder submitted 38 proposals.

[34] *Weir 2009* at para 50.

[35] *Fraser* at paras 67 and 72.