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Executive Compensation and the Right of Shareholders to Vote "Against" the Election of Directors

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"Majority voting policies" and "say on pay" non-binding votes are ineffective means for shareholders to express and voice their concerns on board decisions on executive compensation. To exert their relevant influence as owners, shareholders need the right to vote "Against" the election of directors, not simply to "Withhold" a vote, and to be granted more practical "proxy access" to nominate individuals for election as directors.

Shareholders and investors focus their spotlights on excessive executive pay each spring following proxy season compensation disclosures for the ritual of annual shareholder meetings. Agitated and angry, shareholders, proxy advisors and commentators complain against divulged disconnects between continually increasing compensation packages and median financial performance. While the words of the tune are "pay for performance", the melody is often composed for a different song. Shareholders who expected compensation practices for the 2014 year to be aligned with their interests were again aggrieved. CIBC, Barrick Gold Corporation, Onex Corporation, MDC Partners Inc., and Yamana Gold were some of the poster-challenged companies, and the reasons for their concerns are summarized below. At Quebecor Inc. (also discussed later), the board overruled a 71 percent shareholder "Withhold" vote against the re-election of a board nominated director and substituted its own judgment to elect its own nominee against the second consecutive year of decisive and overwhelming shareholder disapproval. Rejecting the concept of "shareholder democracy," the Quebecor board blew its own recently adopted "majority voting policy" into smithereens. The companies noted below and others were challenged by investors in the 2015 annual shareholder meeting season as a result of informed analysis of their compensation schemes and board decisions.

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Canadian Imperial Bank of Commerce

At its AGM held 23 April 2015, CIBC shareholders recorded an impactful 57 percent vote "Against" CIBC's executive compensation approach (the "say-on-pay" advisory vote[1]). The majority vote "Against" CIBC board's pay practices was lead by the Canada Pension Plan Investment Board, joined by Ontario Teachers' Pension Plan and other major pension funds. CIBC shareholders protested against the unusual and unnecessary 'post-retirement' benefits that the CIBC board had awarded in 2014 to former CEO Mr. Gerry McCaughey[2] and to former COO Mr. Richard Nesbitt,[3] stating that they were "unreasonable and inconsistent with the governance principle of pay for performance."[4] They were paid too much for doing nothing, for non-performance.

- CIBC's baffling series of awkward actions caused its shareholders grief and avoidable expense because of a clumsy CEO succession planning exercise. On April 24, 2014, CIBC announced Mr. McCaughey's resignation, effective a lenghty two years later on April 30, 2016, without naming a successor concurrently with the announcement of the resignation. (In the same time frame, The Toronto-Dominion Bank, Bank of Nova Scotia and Royal Bank of Canada all named a successor when they announced the resignations of their CEOs.)

- Within a few months (on July 31, 2014), CIBC reported that Mr. Victor Dodig,[5] an internal candidate, would be appointed CEO to succeed Mr. McCaughey on September 15, 2014. The CIBC board had to accelerate Mr. McCaughey's resignation to September 15, 2014 on terms that Mr. McCaughey would be paid $16.67 million as a 'post-employment' settlement. Such payment was in addition to $10.5 million remuneration Mr. McCaughey received for his 10.5 month service to September 15, 2014. Mr. McCaughey was also paid a further $43.3 million for settlement and payout of awards granted to him as an investment banker with CIBC World Markets in 1999 and

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[1] The vote was 111.2 million votes "Against" and 84.4 million votes "For" CIBC's executive compensation approach.

[2] Gerald T. McGaughey (b. 1956) joined CIBC's Wood Gundy Private Client division in 1990 from Merrill Lynch Canada when CIBC acquired its Canadian retail brokerage operations. Mr. McGaughey became President of Wood Gundy Private Client Investments and, in February 2004, CEO of CIBC World Markets, global investment banking. Mr. McCaughey was President and CEO of CIBC from August 1, 2005 to September 15, 2014.

[3] Richard Nesbitt joined CIBC as an executive in 2008 from the TSX Group, where he was CEO from 2004-2008. He became COO of CIBC and desired to succeed Mr. McGaughey as CEO at the bank. Mr. Nesbitt retired in September 2014. In May 2015, Mr. Nesbitt became CEO of Global Risk Institute in Financial Services.

[4] The chair of the compensation committee is often chosen as the target of protest. It must be remembered, however, that the board makes the final decision on CEO remuneration and all directors are responsible and accountable for the company's design and policies for executive compensation. Linda Hasenfratz, chair of CIBC's Compensation Committee since November 2014 and a member since 2004, had an usually high 15% of votes "Withheld" on her 2015 re-election as a director (2014 – 2.76% "Withheld"'). Brent Belzberg, previous chair of CIBC's Compensation Committee from 2009 to November 2014 during the period of fumbled CEO succession, remained under the radar and without rebuke.

[5] Victor G. Dodig (b. 1955) joined CIBC's Wealth Management group in 2005 from UBS Global Asset Management, becoming Group Head of that CIBC division (brokerage, private wealth and asset management) in 2011. As in the case of Mr McGaughey, Mr. Dodig was previously employed by Merrill Lynch (1997-2002).

2003. Mr. Nesbitt also received a "post-employment" settlement payout of $8.5 million on the acceleration of his previously announced resignation to September 15, 2014 to accommodate the appointment of Mr. Dodig as CEO on that day.

Barrick Gold

In the case of Barrick Gold Corp., its board approved the increase in Executive Chairman Mr. John Thornton's[6] compensation from U.S.$9.5 million in 2013 to U.S.$12.9 million for 2014. While not egregious as total compensation in the context of CEO remuneration, Barrick reported a net earnings loss of U.S.$2.9 billion for 2014 (the 2003 net earning loss was U.S.$10.4 billion). As the market price of Barrick's common shares had further declined dramatically in 2014, shareholders considered that the "pay for performance" metric had not been met and Mr. Thornton's substantial 36 percent year-over-year pay increase was not merited. The "say-on pay" shareholder advisory vote at Barrick's 28 April 2015 AGM was a whopping 73.4 percent "Against" Barrick's compensation policies and practices. The 2015 "Withhold" vote for election of the members of Barrick's compensation committee was a stunning 25 percent.

- Shareholders also remained aggrieved in 2015 for the Barrick board acquiescing to Mr. Peter Munk's decision to grant Mr. Thornton an unusually large sign-on bonus in 2012 to become Chairman. Mr. Thornton was appointed a Barrick director on February 15, 2012 and was appointed Co-Chairman with Mr. Munk on June 6, 2012. In December 2012, the Barrick board agreed to a "special sign-on payment" ('hello bonus') as part of the compensation package for Mr. Thornton to accept the position of Chairman on Mr. Munk's subsequent retirement. Mr. Thornton was appointed Chairman on April 30, 2014.
- The sign-on bonus grant was equal to the market value of 350,000 Barrick common shares as at 19 December 19, 2012. The cash value of Mr. Thornton's "hello bonus" to become Chairman was U.S.$11,899,500. Mr. Thornton used the bonus, net of tax and withholdings, to purchase 177,500 Barrick common shares in the market. He transferred the shares to a trust for his family subject to an agreement that they would not be sold until the termination of Mr. Thornton's employment with Barrick. To his credit, Mr. Thornton subsequently increased his commitment to Barrick and alignment with shareholders with the acquisition of additional Barrick common shares. At the 2015 AGM he beneficially owned or controlled a little over one million shares (including those in the family trust)[7].

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[6] John L. Thornton (b. 1954) has had a very successful career in business and public service. He retired in 2003 as President and co-chief operating officer and a member of the board of Goldman Sachs Group, when he realized that then Goldman Chairman and CEO, Henry M. Paulson Jr., was not going to retire soon. At the time of his resignation, Mr. Thornton held Goldman stock worth U.S.$200 million, having joined Goldman Sachs in 1980. His current and former directorships include Ford Motor Company, HSBC Holdings plc, News Corporation and Intel Corporation.

[7] Mr. Thornton held 554,400 common shares directly and exercised control over 240,600 common shares held in the names of his wife and children, with an additional 181,880 common shares held in a family trust for his children.

Onex Corporation

Gerald W. Schwartz founded and remains the controlling shareholder, Chairman, President and CEO of Onex Corporation.[8] He has become a very wealthy person as a result of his success in growing Onex's private equity businesses. Compensation policies for Onex executives include the generous reallocation of the majority of Onex's cash flows that it earns as manager of its private equity funds to remunerate management directly, including himself, the substantial reliance on 10-year stock option awards as an integral component of executive compensation, the right of co-investment on favourable terms in the businesses acquired by Onex managed private equity funds, and, in the past several years, a rising market price for Onex's shares.[9] Onex's multiple compensation practices are complex, and the total remuneration earned by its senior executives had not been well disclosed in the past. It was only with the Onex proxy circular for its 15 May 2014 AGM that relevant compensation disclosure was included for Onex's senior managing directors[10], in addition to the formal compensation disclosure for Mr. Schwartz as CEO.

- In 2013 the Onex board awarded Mr. Schwartz a 10-year option on 3,950,000 Subordinate Voting Shares with a grant date value of U.S.$59,583,828.[11] That stock option award, and a U.S.$24,433,577 cash incentive bonus, raised his formally reported compensation to U.S.$85,317,405 for 2013. With no stock options granted in 2014, Mr. Schwartz's formally reported compensation for 2014 was U.S.$19,138,291.
- In addition to the formally reported compensation, Mr. Schwartz realized, as did his senior managing directors, further payments from (i) economic interests in financially favourably

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[8] Mr. Schwartz (b. 1941) controls Onex through his 100% ownership of the class of Multiple Voting Shares which carry the right to exercise 60% of the aggregate votes of all Onex's shares and to elect 60% of the members of the board of directors of Onex. As at February 27, 2015, Mr. Schwartz also owned 19,108,018 or 17.6% of the outstanding Subordinate Voting Shares of Onex with a market value of $1.3 billion. As at February 27, 2015, Onex's management, other than Mr. Schwartz, held Subordinate Voting Shares and Management DSUs collectively having a value in excess of U.S.$338 million.

[9] At December 31, 2014, options outstanding on Subordinate Voting Shares represented 11.4% of the outstanding Subordinate Voting Shares (on an undiluted basis). The Onex Stock Option Plan has a performance condition, or "hurdle rate," before vested options can be exercised, which is generally not a requirement in the management option plans of other Canadian companies. The Onex Plan requires that vested options may be exercised only if the market value of an Onex Subordinate Voting Share (for the five prior business days) is at least 25% above the exercise price. While Onex relies heavily on "option-based awards," it does not use "share-based awards" in its compensation program.

[10] In January 2013, Mr. Schwartz formed a new Executive Committee with four long-tenured Senior Managing Directors, Ewout Heersink, Robert Le Blanc, Seth Mersky and Anthony Munk. Nigel Wright was then on a form of leave of absence from Onex as Chief of Staff of the Prime Minister's Office (PMO) under Prime Minister Stephen Harper. Mr. Wright was forced to resign by Prime Minister Harper as Chief of Staff of the PMO in May 2013 as a result of his participation in the scandal involving Senator Mike Duffy. Senator Duffy was subsequently indicted with 31 charges under the *Criminal Code*. Criminal charges were not laid against Mr. Wright and he rejoined Onex in June 2014.

[11] In December 2013, three of Onex's Senior Managing Directors, Messrs. Le Blanc, Mersky and Munk, each received a 10 year stock option award with a grant date value of U.S.$13,112,122.

structured "investment rights" in what Onex referred to as a "Management Investment Plan" ("MIP")[12], which entitles management to earn equity interests in the businesses acquired or invested in by Onex; and (ii) carried interests in Onex funds' investments. In 2014, Mr. Schwartz received, in addition to his formally reported compensation, a further U.S.$40 million from his economic interests in investment rights,[13] and a further U.S.$66.2 million in carried interest payments.[14]

- Mr. Schwartz also participates in related party transactions with Onex and its affiliates: In 2012, 2013 and 2014, Mr. Schwartz bought tax losses from Onex totalling U.S.$339 million for cash payments he made to Onex of U.S.$34 million.[15] In November 2013 and July 2014, in private transactions with Mr. Schwartz, Onex repurchased a total of 2 million Subordinate Voting Shares from him for an aggregate purchase price of U.S.$115 million, being at "slight discounts" to the trading prices of the shares at the time.

As in the case of Mr. Schwartz's control of Onex, Celestica Inc., a public company, is controlled by Onex through a dual-class share structure, in which Onex owns all Celestica's multiple voting shares. Onex owns 79 percent of Celestica's voting rights. Mr. Schwartz, the indirect controlling shareholder of Celestica, is also a board director of Celestica. Following Celestica's $350 million repurchase and cancellation of its Subordinate Voting Shares in June 2015, Onex's economic interest in Celestica increased to 13 percent.

In July 2015, Celestica agreed to sell its real property in Toronto, including its corporate headquarters and Toronto manufacturing operations, for U.S.$102 million to a special purpose entity formed by a consortium of three unnamed real estate developers. The proposed transaction includes an agreement by Celestica to enter into a long term lease with the purchaser for a new home of

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[12] Onex's MIP requires management to invest in each of the operating businesses acquired or invested in by Onex equal to 1.5% of Onex's investment in each acquisition or investment. Management is allocated 7.5% of Onex's realized gain, subject to Onex realizing its investment plus a net 15% internal rate of return. The form of the investment is, however, a cash purchase of 1/6th of the MIP's share of the aggregate investment, and "investment rights" for the remaining 5/6ths at the same price.

[13] In 2014, total payments to Onex management for their economic interests in investment rights, including to Mr. Schwartz, were U.S.$117.5 million; in 2013 management received U.S.$39 million under the MIP.

[14] As general partner of its managed third party private equity funds, Onex is entitled to receive a 20% carried interest of the realizable gains of third party investors in each fund, subject to an 8% compounded annual return to such limited partners. Onex has allocated 40% of its entitlement to carried interest to Onex, but has allocated 60% of the carried interest directly to Onex management who invest in the funds. In 2014, Onex management, including Mr. Schwartz, received a total of U.S.$256,2 million in carried interest resulting from transactions in the Onex managed funds (in 2013, Onex management received carried interest payments of U.S.$110 million). Based on values at 30 June 2015, managements of Onex and ONCAP have the potential to receive in the future U.S.$273 million of carried interest on businesses in Onex Partners and ONCAP Funds.

[15] Deloitte & Touche LLP, who are not the external auditors of Onex, said that the values received by Onex on the sale of the tax losses to Mr. Schwartz were fair.

Celestica's corporate headquarters "on commercially reasonable arm's length terms". As a result of the proposed sale of its Toronto real estate, Celestica noted it would incur "significant transition costs to transfer the manufacturing operations to an alternate location and to prepare and customize the new facility", and that the "costs, timing and execution of this relocation could have a material adverse impact" on its business, operating results and financial position.

In the opaque and minimal disclosure for this related party transaction, it was reported that approximately 30 percent of the interests in the property purchaser are to be held in a privately held company in which Mr. Schwartz "has a material interest". It was further stated that Mr. Schwartz "also has a non-voting interest in an entity which will have an approximate 25 percent interest" in the property purchaser. While the extent of Mr. Schwartz's interest in this related party transaction is 'material', the particulars of the controlling shareholder's involvement in the transaction is vague, ambiguous and unclear. Onex is not a participant in the proposed transaction.

MDC Partners Inc.

Miles S. Nadal[16] founded MDC Partners Inc. in 1980 and was its Chairman, CEO and controlling shareholder until his forced resignation in July 2015. Mr.. Nadal was richly compensated for his entrepreneurial role as founder and as the senior executive officer and controlling shareholder of his company. Similar to the compensation philosophy and a principle practice of Mr. Schwartz at Onex Corporation, Mr. Nadal relied on the substantial use of equity based awards. In Mr. Nadal's case, his remuneration included grants under a series of stock option plans with time-based ten year terms, full-value equity incentive awards (restricted stock units, "RSUs"), stock appreciation rights ("SARs") and equity value appreciation awards. As a result of shareholder concerns, in 2014 the Compensation Committee removed and eliminated time-based vesting requirements for new equity incentive awards. New awards were to contain financial-performance vesting requirements.

- For the four years ended 2014, Mr. Nadal received formally reported total compensation of U.S.$70,586,564 from MDC Partners. The equity awards in the years referred to were recorded at grant date fair value.[17]

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[16] Miles Spencer Nadal (b. 1958), originally from Toronto, is an entrepreneur and philanthropist. He now resides on Paradise Island in Nassau, Bahamas, with a home in Palm Beach, Florida. At 15 April 2014, Mr. Nadal owned 9,100, 573 Class A Subordinate Voting Shares (Class A shares) (18.1% of the class). In May 2014 Mr. Nadal sold 3.5 million Class A shares, and, at 15 April 2015, Mr. Nadal owned 5,692,383 Class A shares (11.3% of the class). In 2014 Mr. Nadal had pledged 7,196,365 of his Class A shares (in 2015 he had pledged 5,083,195 shares) as collateral for margin accounts maintained at various brokerage firms. In response to shareholder concerns, in June 2013, the board of MDC Partners adopted a policy to prohibit any new pledge or hedging of the company's stock by officers and directors.

[17] For 2014, (i) Mr. Nadal received a bonus of U.S.$11,741,820, (ii) stock awards of U.S.$2,314,530 (grant date value), and (iii) total "Other compensation" of U.S.$926,005. "Other compensation" consisted of a perquisite allowance of U.S.$500,000, the personal use of company aircraft from his residences in the Bahamas and Palm Beach, Florida, (U.S.$91,038), legal costs for the sale of his 3.5 million shares (U.S.$262,000) and the personal use of the corporate apartment in New York (U.S.$71,967).

- In November 2013, MDC Partners made a cash payment of U.S.$57,416,657 to Mr. Nadal when he exercised his SARs previously awarded to him by the board of directors. (The total value of SARs exercised by management and directors in 2013 was U.S.$80,323,000.) Such cash payments for previously awarded equity instruments that vest and are paid out in subsequent years are not required to be recorded as remuneration in the year of payment.

- MDC Partners has noted that the trading share price of its Class A shares has been "volatile." During the period from 1 January 2013 to May 12, 2014, the Class A shares fluctuated on NASDAQ from a low of U.S.$7.75 per share to a high of U.S.$26.32 per share. In May 2014, Mr. Nadal sold 3.5 million Class A shares at U.S$23.14 per share in a secondary offering to BMO Capital Markets for proceeds of U.S.$80,900,000.[18]

On 4 October 2014, MDC Partners began cooperating with the Securities and Exchange Commission (SEC) pursuant to a SEC subpoena. The SEC subpoena required information relating to (i) the reimbursement of expenses on behalf of Mr. Nadal, (ii) the company's goodwill and certain accounting practices, and (iii) trading in the company's securities by third parties.[19] An article in *The Globe and Mail* indicated that the SEC investigation was prompted by a whistleblower compliant by a former business associate of Mr. Nadal.[20] As a consequence of the SEC investigation, a Special Committee of the board was formed to review matters relating to the company's reimbursement of expenses incurred by Mr. Nadal during the six years from 2009 through 2014.

In April 2015, following a review of perquisites and expenses incurred by Mr. Nadal,[21] Mr. Nadal agreed to reimburse MDC Partners for U.S.$8.6 million for which the company sought reimbursement.[22] At its annual meeting of shareholders held June 4, 2015, 47 percent of the votes cast on the "say on pay" advisory vote were "Against" approval of MDC Partners compensation for its executive officers.[23]

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[18] The Class A share trading price on NASDAQ closed at U.S.$27.98 before the announcement that Mr. Nadal would reimburse the company for U.S.$8.6 million, and dropped to U.S.$20.20 on April 28, 2015. After Mr. Nadal's resignation on July 20, 2015, the stock traded down to U.S.$16.74 a week later. The shares closed on 30 October 2015 at U.S.$20.78.

[19] In the first nine months of 2015, MDC Partners incurred U.S.$12,366,000 in costs related to the SEC investigation.

[20] Jacquie McNish and Susan Krashinsky, "*MDC Partners CEO resigns following SEC investigation*," (The Globe and Mail, July 22, 2015).

[21] These expenses included travel expenses, charitable donations, medical expenses and undocumented expenses. The Special Committee subsequently recommended a new Private Aircraft Usage Policy and a new Travel & Entertainment Policy and the hire of two new senior executive for internal controls, compliance and risk management.

[22] At the same time, MDC Partners Chief Accounting Officer, Michael Sabatino, "was transitioned" to a new role to work on "special projects."

[23] The "say on pay" vote was 49.9% "Against" at the 2013 shareholders meeting and 32% "Against" at the 2014 meeting.

A few months later on 20 July 2015, Mr. Nadal "voluntarily resigned"[24] as Chairman and CEO and from his other offices and positions with MDC Partners. Mr. Nadal's resignation was without any compensation payments pursuant to the nine incentive retention agreements he had entered into since November 2012 and without payment for retirement or severance.[25]

Under his separation agreement, Mr. Nadal agreed to repay (in addition to the U.S.$8.6 million previous repaid by Mr. Nadal in April and May 2015) (i) U.S.$10,581,605 to the company for previously received cash bonus awards[26], and (ii) U.S.$1,877,000 in repayment of expense amounts that had been improperly paid by the company to or for his benefit.[27] (MDC Partners also recorded a charge of U.S.$5,338,000 in the third quarter of 2015 for the balance of prior cash bonus award amounts that will not be recovered.)

Following Mr. Nadal's resignation, the Special Committee reviewed third party payments and identified assets purchased by the company that were used exclusively by or may still have been in Mr.. Nadal's possession. In October 2015, Mr. Nadal repaid a further U.S.$808,001 for, among other things, travel related expenses paid on his behalf and for certain assets that the company determined had no ongoing business purpose, including computers and IT equipment.

- Mr. Nadal also engaged in related party transactions with MDC Partners. (i) Since 2000, Mr. Nadal and MDC Partners concurrently had acquired 54 percent and 18 percent, respectively, of the equity of Trapeze Media Limited, a Toronto advertising company. In July 2014, MDC Partners acquired 100 percent of Trapeze Media, including Mr. Nadal's controlling 54 percent interest, for U.S.$4,373,000 (which price did not include MDC Partner's 18 percent equity interest). (ii) In the years ended 2012 and 2013, in response to shareholder concerns, Mr. Nadal repaid legacy loans previously due to the company of U.S.$475,000 and U.S.$5,477,751. These non-interest bearing loans were made to Mr. Nadal prior to the *Sarbanes-Oxley Act of 2002,* legislation which prohibited company loans to executive officers. (iii) In 2014, MDC Partners paid Mr. Nadal U.S.$1,630,000 for business use of his airplane and helicopter.

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[24] The separation agreement provided that Mr. Nadal's "resignation shall be treated as a voluntary separation from service without Good Reason and shall be treated as a voluntary resignation (that does not qualify for "retirement" treatment) for purposes of any outstanding incentive compensation agreements, …." The former Chief Accounting Officer also resigned from the company at the same time, also without any compensation payments or severance, and repaid the company cash bonus payments of U.S.$218,535 he received between 2012 and 2014.

[25] Following his resignation from all positions in MDS Partners, Mr. Nadal has focussed on his private businesses, Peerage Capital Group, private equity, and Peerage Realty Partners, which he had started years earlier.

[26] For unstated reasons, the U.S.$10.582 million is to be repaid by Mr. Nadal in five installments, with the last to be made on 17 December 2017.

[27] By 30 September 2015, Mr. Nadal had repaid the company U.S.$9,539,000 for "perquisites and improper payments identified by the Special Committee and agreed to repay a further U.S.$939,000 before 31 December 2015. These amounts correspond to the U.S.$8.6 million he agreed to repay in April 2015 and the further U.S.$1.877 million he agreed to repay at the time of his resignation.

In October and November 2015, Mr.. Nadal sold substantially all his Class A shares of MDC Partners. He sold 1,842,000 shares on 29 October and a further 3.2 million shares on 18 November, leaving a residual holding of 620,043 shares or 1.2 percent of the outstanding Class A shares. Such sales were made at an average price of U.S.$20.50 (net of commissions) for proceeds of U.S.$103,361,000.

Yamana Gold Inc.

Peter Marrone, the Chairman and Chief Executive of Yamana Gold, has been fully remunerated for his services to the company. For the three years ended December 31, 2014, his formally reported compensation totaled U.S.$28,239,032. On June 16, 2014, Yamana Gold and Agnico Eagle Mines Limited jointed acquired 100 percent of Osisko Mining Corp. for an aggregate consideration of approximately C$3.33 billion paid in cash (C$1.0 billion) and shares of Yamana Gold and of Agnico Eagle (C$2.33 billion).[28] Yamana Gold[29] and Agnico Eagle each paid 50 percent of the purchase price, and own 50 percent of and jointly manage the acquired assets.

- Following the joint purchase of Osisko Mining, the board of Yamana Gold granted a discretionary "special one-time bonus" to four executives who contributed to the transaction. The cash portion of the special bonus totalled U.S.$3,900,000, of which Mr. Marrone's share was U.S.$2,700,000. In addition, the board created a new performance share-based incentive plan ("PSUs") tied directly to the future performance of the Osisko assets as part of the special bonus. Under this Osisko PSU Plan, the board awarded 800,000 PSUs to the same four executives, of which Mr. Marrone's share was 450,000. The final number of Osisko PSUs that vest at the end of the three-year performance period ending on 30 June 2017 is to be paid in cash to the holders of the PSUs based on the then market value of the Yamana Gold common shares.

- Angico Eagle's board did not report that it provided any additional remuneration to its officers in respect of the transaction.

- The Yamana Gold information about the 2014 discretionary special bonus awards was not included or referred to in the required main table setting out the compensation paid to Yamana Gold's five highest paid executives in its management proxy circular. All information about compensation paid or payable in 2014 is required to be included in that compensation table and shareholders and proxy advisors were upset that the special bonus awards were not included.

- At Yamana Gold's annual shareholder meeting held 29 April 2015, the advisory vote on "say on pay" was a resounding 63 percent "Against" its compensation policies and practices. Canada Pension Plan Investment Board and the British Columbia Investment Management Corp. were among the several shareholders who criticized the board of Yamana Gold for its practice of granting annual bonuses "on a largely discretionary basis" and who voted "Against" on the "say on pay" vote.

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[28] The shares issued by Yamana Gold and Agnico Eagle were valued at their closing prices on the Toronto Stock Exchange on the date of closing, June 16, 2014.

[29] Yamana Gold's initial fair value estimate of its 50% of the acquired assets was U.S.$1,462,754,000.

- As a result of the majority "say on pay" vote "Against" the 2014 executive compensation special bonus practice, Mr. Marrone decided to 'unilaterally waive' the 450,000 Osisko PSUs that were awarded to him, which were cancelled. Mr. Marrone accepted and retained the cash portion of the special bonus of U.S.$2,700,000.

(Yamana Gold is not the only company that has engaged in the practice of granting one-off discretionary bonuses. In its 2015 fiscal year, the board of Postmedia Network Canada Corp. granted a $400,000 discretionary cash bonus to its CEO, Paul Godfrey, "for extraordinary additional work" and the "integration of the properties acquired" with respect to the company's April 2015 purchase of Sun Media's English-language newspapers and the canoe.ca portal from Quebecor Media Inc. for $305 million. In that same year, Postmedia achieved only 83 percent of its Consolidated Operating Profit Target for 2015, and its net loss for the year was $263 million, including $153 million in goodwill and intangible asset writedowns (2014 net loss - $107.5 million; 2013 net loss: $160 million). Mr. Godrey also received "Other compensation" of $194,036 in fiscal 2015, of which $117,113 was for "entertainment expenses". Postmedia Network is a controlled company that does not provide minority shareholders with a "say on pay" advisory vote on its compensation practices.)

The Board, Not Shareholders, Are Responsible to Determine Executive Compensation

It is not the role of shareholders to exercise the business judgment that determines corporate wages. The board of directors has the duty and responsibility for compensation policies and practices. As the leader of the board and answerable for its culture and effectiveness, independent board chairmen need to emerge from behind their cloaks of invisibility and step up publicly to their obligations for governance leadership. Having accepted the obligation and responsibility to establish and implement compensation policies and practices, a board and its compensation committee must then be accountable for their actions. Responsibility requires accountability and accountability requires consequences for actions taken. Boards should be accountable to the stakeholders of the company for their governance practices, and especially to shareholders who are the only stakeholders that have the right to vote on the election of directors.

Equity-Based Compensation Awards are Not '*per se'* Equated With "Pay for Performance"

Executive management generally takes an assertive position, which is frequently supported by controlling shareholders who are not active managers of their companies, that equity-based incentive compensation aligns their interests with the shareholders. (I am "one of you," Barrick's Chairman John Thornton unabashedly proclaimed to Barrick shareholders at its annual meeting in 2015, with some merit as he had increased his ownership to over one million Barrick shares). Base salaries form a small percentage of executives total compensation. In the United States, the grant-date value of long-term equity incentive awards (stock awards and stock options) constituted 57.2 percent of the total CEO compensation reported in 2014 in the S&P 500. (The grant-date value, which is the amount reported in proxy circulars, is generally significantly less than the vest-date value of an equity award,

which occurs years later, and the ultimately realized and unreported payout amount of an equity award, in most cases, is significantly greater than the earlier reported grant-date value.)[30]

The advocates of a compensation policy dominated by "pay for performance", that is not based on financially conditioned performance equity awards, are undermined when the company's directors, who are essentially unaccountable to shareholders for so doing, award disproportionate time-based stock and equity incentives, "golden hellos" and "golden parachutes" to CEOs and executives. Many boards have distributed time-based equity rewards to CEOs and senior executives that vest and are cashed out on the (non-performance) condition that requires only that executives continue in the employ of the company. Such retention equity award practices do not link remuneration to company performance criteria, other than implicitly the company's stock market price, and belie the statements in proxy statements that the company believes that the major component of compensation is "at risk" and based on "pay for performance." Total shareholder return' ("TSR"), as an incentive long-term performance metric, has increased significantly in the United States and was used by almost 50 percent of the S&P 500 in 2013. TSR advocates refer to alignment with shareholder interests, that measuring TSR on a relative peer group basis levels the playing field by removing overall market, industry and economic cycles and that the use of TSR allows a company to avoid the use of hard-to-set multiyear financial goals. However, using TSR does not necessarily actually improve company financial performance nor improve future TSR. TSR also does not communicate to management how to improve company performance nor link executive actions to business goals.[31]

Boards Need to Exercise Increased Skepticism and Oversight

There is increasing skepticism among the informed shareholder community to the currently accepted corporate ideology which assumes that talent is rare and limited, that particular CEOs are indispensable, and that CEO skills are not transferable. The example of the expensive inducement to hire John Thornton at Barrick Corp. was based on the premise that outsized awards are needed to lure exceptional candidates and thereby insure stellar corporate performance. The risk of losing an indispensable CEO has been overstated and has resulted in a self-induced closed mindset among many boards: "you get what you pay for". The more you pay a CEO, the better CEO you have. Boards cannot predict with accuracy future CEO performance. The metric of "pay for performance" has also been exaggerated. In many cases, "pay for performance" remuneration is tied to criteria (such as the company's stock price) over which the CEO has limited direct ability to manage or control, due to the effects of a global economy, fiscal and monetary policies, tax incentives, stock markets, and commodity prices. Many CEOs accordingly encourage corporate stock repurchases to increase stock market prices in the short term. One explanation why managers advocate stock repurchases: "Stock-

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[30] "*Key Findings from CEO and Executive Compensation Practices: 2015 Edition*" (The Conference Board, in collaboration with Arthur J. Gallagher & Co.).

[31] David N. Swinford, "*The Limits of Using TSR as an Incentive Measure*", (Harvard Law School Forum on Corporate Governance and Financial Regulation, 13 October 2015).

based instruments make up the majority of their pay, and in the short-term buybacks drive up stock prices."[32] To ameliorate and insert more objectivity in "pay for performance" metrics for long term incentive plans, compensation consultants are advising to award restricted and performance share units that are settled, not in cash, but in shares issued from treasury, with the added requirement that the shares be held while the executive is in the company's employ.[33]

In fact, there are few transformative CEOs (Bill Gates (Microsoft), Steve Jobs (Apple), Elon Musk (Tesla), Garfield Weston (George Weston), Roy Thomson (Thomson Reuters), Ted Rogers (Rogers Communications)). It is difficult to establish criteria to assess that , in an established compnay, hiring one qualified CEO over another has a major impact on future corporate performance. Those CEOs that do move their companies from "good to great" have qualities that they share the credit for outperformance with their senior executive team and others and take the blame personally when outcomes are disappointing. They do not act as geniuses followed by a thousand helpers. Most of the best leaders exhibit personal humility, are moderate in lifestyle but are driven with an ambitious professional will for their company to succeed. They are passionate, relentless and disciplined in pursuing corporate performance with sustained results. For positive outcomes, they are well paid, as they should be. Corporate leaders whose companies succeed are plough horses, not show horses. A paramount critical issue is *who you pay*, not *how or how much* you pay them.[34]

> We found no systematic pattern linking executive compensation to the process of getting from good to great. The evidence simply does not support the idea that the specific structure of executive compensation acts as a key lever in taking a company from good to great.

Executive Compensation Is Not the Cause of Wealth-Income Inequality

Executive compensation is not the root cause of growing inequalities of wealth and income in society, although it is a telling symptom of this widening disparity. Stock-based pay, which rises with equity values, makes up the majority of the compensation for corporate executives. In comparison, the growth of workers cash wages has been slow and sporadic. In North America there has been a "growing gap between overall productivity growth and the pay of the vast majority of workers since the 1970s." "If the hourly pay of typical American workers had kept pace with productivity growth since the 1970s, then there would have been no rise in income inequality during that period. Instead,

[32] William Lazonick, "*Profits without Prosperity*" (Harvard Business Review, September 2014).

[33] This permits the RSUs and PSUs to be deferred for tax purposes beyond the three-year period that applies where the share units are settled in cash or by the purchase of shares in the market. Units settled in shares issued from treasury allows for the tax to be deferred until redemption or disposition of the share units, similar to the tax deferral available for options. Boards can then require that CEOs and executives retain those awards as long as they are officers of the company.

[34] Jim Collins, "*Good to Great*", (Harper Business, 2001), at 35-40 and 49.

productivity growth that did not accrue to typical workers' pay concentrated at the very top of the pay scale (in inflated CEO pay, for example) and boosted incomes accruing to owners of capital."[35]

Measuring CEO pay against average worker salaries or median incomes are metrics more appropriate for political, social and moral perspectives. Some investors, however do apply them to attempt to limit CEO compensation. NEI Investments, a mutual fund manager owned equally by Desjardins Group and Provincial Credit Union Controls, intends to vote against CEO pay that is more than 200 times the median household income in Canada. Most investors and boards believe, on the other hand, that CEO remuneration should be assessed in the context of its sphere of operation within a competitive, mixed market-based economy. Within the private sector, corporate pay is not subject to formulaic standards and knowledgeable investors do not prefer prescriptive checklists to judge or limit management remuneration. "Pay for performance" as a policy objective, even when it results in large rewards, is not opposed as a principle. Shareholders acknowledge that there is an acceptably broad range of reasonableness within which principled decisions may be made, varying upon the corporate strategy, financial aspirations and business plan objectives, the degree of achieving those goals, and the company's own operational results, among others. A Canadian academic study indicated that CEO pay and performance in the TSX 60 were "largely heading in the same direction" during 2004-2011. Even if accepted as directionally accurate, it does not mean that CEO pay increases were aligned with increases in "total shareholder value," or reflected "pay for performance". Too frequently cases of "pay without performance", oversized one-time and automatic annual stock grants and retiring "golden parachutes" bring into question those boards' commitments to act in the best interests of the company and its stakeholders.

Legal Recourse is Limited – Directors Are Entitled to Business Judgment Rule Protection

A serious impediment and limitation to the path of seeking accountability in the Canadian corporate system is that, at the present time, there are essentially no effective means for shareholders to hold directors responsible for their compensation decisions which shareholders consider inappropriate. Shareholder litigation is not an answer as virtually all directors' decisions, except very careless and flawed ones, are protected within the broad shield of the deferential business judgment rule. Compensation committees frequently pay large fees to independent consultants which provide the directors with the defences of reliance on expert opinion, and 'due diligence' and evidence that the directors made informed and reasonable business judgments. Some informed observers have referred to the results as the "pernicious effects of compensation consultants"[36].

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[35] Josh Bivens and Lawrence Mishel, "*Understanding the Historic Divergence between Productivity and a Typical Worker's Pay*" (Economic Policy Institute Briefing Paper, September 2, 2015). The Economic Policy Institute is a United States labour-supported think tank that conducts research on the economic status of working America. To the same effect, see, William Lazonick, *"Profits Without Prosperity*" (Harvard Business Review, September 2014).

[36] Edward Waitzer, "*Executive compensation - 'a system so perfect that no one needs to be good'*, (The Globe and Mail, 11 December 2015).

In an uncommon initiative of activism by an institutional shareholder, TD Asset Management Inc. brought litigation under the oppression remedy to oust the board of Repap Enterprises Inc., which had approved an inappropriate employment contract. In that atypical case, the trial judge held that directors involved in the approval of the employment contract were in breach of duties to the company, that the process by which the board came to approve the contract was seriously flawed, and that the board's decision fell outside the range of reasonableness. In light of the deficient and uninformed manner of their decision-making process, these directors were not entitled to the protection and defence of the business judgment rule.[37]

"Proxy Access" Is Currently Extremely Limited and Difficult

Another major reason for the lack of accountability for board decisions on executive compensation that are unacceptable to shareholders is that it is most impractical for shareholders to nominate and vote for directors of their choice ("proxy access"). "Proxy access", namely, the ability of shareholders to put nominees on the slate for the election of directors, has moved forward with endorsement from the SEC and with more assertiveness from shareholders in the United States than in Canada. The SEC adopted a "proxy access" rule in 2010, which was, however, subsequently vacated by a federal court decision in 2011. The key items in the SEC rule were that the nominating shareholders had to own at least 3 percent of the shares, with a 3 year minimum ownership period, and up to 25 percent of board members could be elected pursuant to proxy access ("3/3/25"). After the SEC rule was vacated, United States shareholders initiated their own proposals to force companies to adopt "proxy access bylaws". In the 2015 season over 100 companies received precatory "proxy access" shareholder proposals, which adopted the terms of the SEC "3/3/25" rule. Most of the companies (75) were targeted by the New York City Pension Funds under its "Boardroom Accountability Project".[38] In the first nine months of 2015, 42 United States companies adopted "proxy access bylaws". Following the adoption of "proxy access bylaws" by other major companies such as General Electric, United Technologies, Bank of America, Prudential, Merck, Microsoft and Monsanto, Coca-Cola, following a failed shareholder proposal, voluntarily announced in September 2015 that it will allow shareholders, or a group of shareholders of up to 20, owning 3 percent of company shares for at least three years to nominate up to two individuals or 20 percent of the board, whichever is greater.

In Canada, there has not been a robust endorsement by shareholders, including large pension funds, to alter the existing rules to create an expanded right for shareholders to nominate candidates for election as directors of Canadian public companies at regular annual meetings of shareholders. Those

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[37] *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, 2004 CanLII 9479 (ON CA). The Ontario Court of Appeal upheld the trial judgment (reported at 2002 CanLII 49507 (ON SC)).

[38] At the 76 companies where the shareholder proposal was put to a vote, 44 proposals passed with an average level of support of 54%, the proposals did not pass at 28 companies, and 4 companies had not voted on the proposals by mid-October 2015. See, Cleary Gottlieb, "*Proxy Access - What You Need to Know*", (13 October 2015).

arguing against "proxy access" in Canada point to the existing but essentially unused legal provisions that permit not more than 15 shareholders holding at least five percent of the shares for at least six months to submit a proposal that may include nominations for the election of directors.[39] These statutory rights are frequently used to requisition a special meeting of shareholders to reconstitute or replace the members of the board of directors. A recent example is the requisition filed by Oxford Park Group with Extendicare Inc. requesting a special meeting of shareholders to replace members of the incumbent nine member with seven new board members nominated by Oxford Park Group.[40]

Those arguing against increased "proxy access" in Canada include the Quebec-based Institute for the Governance of Private and Public Organizations ("IGOPP"). In a reently issued policy paper, IGOPP contended "that proxy access is ill advised and may result in negative effects on governance practices" and that it "is opposed to the process whereby shareholders may nominate director candidates".[41]

In contrast to the arguments by IGOPP against "proxy Access", the Toronto-based Canadian Coalition for Good Governance ("CCGG") earlier in 2015 published a tentative paper to draw attention to enhancing "proxy access" for Canadian companies. The CCGG proposal assumes that a "majority voting policy" is in place and operating effectively, which may be a questionable and unreliable premise.[42]

Proxy Contests to Elect Directors Are Expensive, Difficult and Risky

It is becoming recognized that it is virtually impossible, in the normal course, for shareholders to prevent the election of nominees put forward by an incumbent board and with whose policies or business judgment they disagree. Nominees for election as directors are selected by incumbent boards, and, without the right to vote "Against", such nominees are automatically elected with a single "Yes" vote. In light of the board of Canadian Pacific's seemingly arrogant and miscalculated dismissal of Pershing Square Capital's initial moderate proposal to have two of its nominees placed on the management slate for election as directors and to replace the CEO of Canadian Pacific for

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[39] *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, s. 137; *Canada Business Corporations Regulations 2001*, SOR/2001-512, para. 46(b).

[40] *Oxford Park Group Announces Requisition for the Calling of a Special Meeting of Shareholders of Extendicare Inc.*, (16 November 2015). See the comments in the text below concerning Sherritt International and the failed attempt by George Armoyan to gain membership on the board of Sherritt International through requisitioning a special meeting of shareholders to do so.

[41] IGOPP, "*Who should pick board members? Proxy Access by Shareholders to the Director Nomination Process*", (Policy Paper No. 8, Septebember 15, 2015), p. 35.

[42] The Canadian Coalition for Good Governance has published a tentative paper to focus Canadian companies on enhancing 'proxy access'. The CCGG proposal assumes that an effective 'majority voting policy' is in place, which is a questionable and unreliable premise. See, "*Shareholder Involvement in the Director Nomination Process: Enhanced Engagement and Proxy Access*", (May 2015).

underperformance, Pershing Square Capital was forced to launch a full scale proxy contest for control of the board of Canadian Pacific. Pershing Square Capital was supported by the Ontario Teachers' Pension Plan and other large Canadian institutional investors. The incumbent board at Canadian Pacific fought Pershing Square Capital "tooth and nail". Just before the shareholders' meeting, the board chairman (John Cleghorn[43]), CEO and four other directors recognized their ignominious defeat at the hands of the shareholders and withdrew their names for re-election. Pershing Square Capital's seven "dissident" nominees were all elected directors by Canadian Pacific's shareholders.

In the case of Sherritt International, Clarke Inc., controlled by George Armoyan, requisitioned a special meeting of Sherrit shareholders to replace three directors on the board. At the end of the ensuing contested proxy fight, all nine Sherritt incumbent directors were re-elected and Mr. Amoyan's three "dissident" nominees were easily defeated at the shareholders' meeting on 6 May 2014.

Clarke Inc. also put forward Shareholder Proposal #4 to eliminate special perquisite payments and benefits that were being made to all Sherritt directors. This proposal, which was strongly opposed by Sherritt's incumbent board, attracted significant shareholder support and was only barely defeated by a vote of 50.87 percent "Against" with 49.13 percent "For". As a result of Mr. Amoyan's pressure, the Sherritt board did amend its "Helms-Burton Allowance" perquisite. This special payment to directors provided them with an extra $150,000 annually for "actual or potential hardship, loss of opportunity and emotional distress suffered by the directors and their respective families" because of the Helms-Burton Act of the United States "which can prevent" them from traveling to the United States. This payment was in addition to the directors' annual retainer of $180,000 each. The Sherritt board, which does not consider the "Helms-Burton Allowance" to be director compensation, amended the policy to reduce the payments to only its three directors who are actually named in the Helms-Burton list.

Shareholders Are Not Entitled to Vote "Against" a Nominee for Election as a Director

Currently shareholders are not permitted to vote "Against" the election of an individual who is nominated for election as a director at an annual shareholders' meeting. Nominations for election of the company's directors at annual shareholder meetings are made by the incumbent directors. Where a shareholder does not favour the election of a person who has been nominated by the board, the shareholder is restricted to the ineffectual and superficial options of not voting at all, or of expressing dissatisfaction with the nominee by "Withholding" its vote. "Withholding" a vote on the election of directors is only a signal of protest and not a realistic alternative. Once nominated by the board, the individual will be elected in any event in uncontested director elections as long as one vote is cast in his or her favour. Without the right to vote "Against" the election of a board nominee, shareholders are denied fundamental shareholder rights and cannot act to prevent the election of complacent, compliant and cheerleader directors to the board in uncontested elections.

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[43] John E. Cleghorn (b. 1941), then one of Canada's establishment businessmen, was the former Chairman and CEO of the Royal Bank of Canada, the former Chairman of SNC-Lavalin Group Inc. and the former chair of the audit committee of Nortel Networks.

"Majority Voting Policies" Are Too Discretionary and Are Not Enforceable

"Majority voting policies"[44] for uncontested elections of directors cannot transform a "Withhold" vote into an effective "Against" vote. Such policies are currently structurally flawed, are not founded on enforceable legislation and do not insure compliance with expressed shareholder voting.

Where a board accepts an over-the-top compensation package based on the recommendation of its appointed compensation committee, the members of the board are then collectively responsible and accountable for the decision. Having endorsed an excessive award, it is difficult for the board to subsequently transfer accountability for the decision and to accept the resignation of one of their own, usually the chair of the compensation committee, under its "majority voting policy" when he or she receives more "Withhold" votes than "For" votes at the next shareholders meeting. Board members realize that, if shareholders' anger is ignited by overindulgent CEO or executive remuneration, they all share the responsibility and accountability for the decision. The board is involved in sanctioning the design of the company's compensation policies and plans for the CEO and its executives and approved awards made to them.

A report by Kingsdale Shareholder Services made the following observations:[45]

> "This year [2015] our analysis shows that vote results of twenty directors at eight different issuers triggered the majority voting policy. This is in stark contrast to just four directors at two companies who triggered the policy in 2014 and only eight directors at three companies in all years prior to 2014. Based on public disclosure, of the twenty directors triggering the policy in 2015 so far, boards have accepted the resignations of five directors and rejected the resignations of nine directors (the remaining are still in deliberation in accordance with the 90 days provided to companies to make their determination."

The failure of the effectiveness of "majority voting policies" is starkly reflected in the 2015 experience at Quebecor Inc. where the board, chaired by former Prime Minister Brian Mulroney, rejected the overwelming and unmistakeable shareholder wishes of two consecutive years on the re-election of a board nominated director. (Directors who receive more "Withhold" votes than "For" votes but who continue on the board are referred to as "zombie directors".)

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[44] A majority voting policy adopted by a public company in Canada basically provides that in an uncontested election for directors any nominee that does not receive the support of a majority (50% + 1) of the votes cast at an annual meeting of shareholders will immediately tender his or her resignation to the board, to be effective when accepted by the board. The Governance Committee will consider the resignation and recommend to the board action to be taken. The expectation is that the recommendation will be to accept the resignation "absent exceptional circumstances". The board is to make a decision within 90 days of the shareholders meeting. The board is to issue a press release with its decision. If the board decides not to accept the proffered resignation, it must "fully state the reasons for that decision." See, TSX Corporate Manual, s. 461.3.

[45] Kingsdale Shareholder Services, "*Creating Certainty in Uncertain Times*", (24 September 2015), p. 10.

Quebecor Inc.

Pierre Karl Péledeau[46] holds the controlling interest of Quebecor through ownership of Class A shares (10 votes per share), which carry about 74 percent of all voting rights and represent about 28 percent of the equity.[47] The Class B shares (one vote per share) are entitled as a class to elect 25 percent of the board of directors. There are eight directors of the company, all of whom are nominated by the board of Quebecor, including the two nominees who are to be elected by the Class B shareholders.

- On May 8, 2013, Mr. Péledeau was succeeded as President and CEO of Quebecor by Robert Dépatie, who since 2003 had been the very successful CEO of Quebecor's principal subsidiary, Videotron. On March 9, 2014, Mr. Péledeau resigned all his offices at Quebecor to enter politics. Mr. Dépatie was then appointed to the Quebecor board to fill Mr. Péledeau's vacancy on March 12, 2014.
- The next month, on April 28, 2014, Mr. Dépatie, who had been with Quebecor for 13 years but was CEO of Quebecor for less that a year, unexpectedly resigned his positions at Quebecor "for health reasons."[48] The press reported that Mr. Dépatie's resignation was the aftermath of a mishandled attempt by Quebecor's management to arrange a firewall between the company and its controlling shareholder, Mr. Péledeau, who angrily objected.[49]
- As part of his April 2014 retirement arrangements as CEO of Quebecor, Mr. Dépatie was awarded a $7.8 million payment, which was unanimously approved by the Quebecor board. This retirement payment was severely criticized by Quebecor's shareholders, including the British Columbia Investment Management Corp. and the Canada Pension Plan Investment Board.
- In the management information circular for Quebecor's following annual shareholders meeting held June 19, 2014, Michel Lavigne[50], a nominee for re-election by the Class B shareholders, was

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[46] Pierre Karl Péledeau (b. 1961) was elected head of the Parti Québécois in May 2015, and is currently the Leader of the Opposition in the Quebec National Assembly.

[47] In September 2015, Pierre Karl Péledeau granted a "Blind Management Agreement" for his shares in Quebecor to three individuals (Claude Béland, James A. Woods, André P. Brousseau) as administrators of a Quebec company that will act "as agent for the Blind Management Agreement." The mandate is subject to approval by the CRTC and Industry Canada. The terms of the mandate have not been disclosed, although commentators believe that they include instructions not to sell his shares of Quebecor. How and on what terms Quebecor is controlled as a result of the "Blind Management Agreement" are unclear and uncertain.

[48] Seven months after leaving as Quebecor's CEO, Mr. Dépatie was recruited to become CEO of St-Hubert, a 115 restaurant chicken barbecue chain. Mr. Dépatie resigned as CEO of St-Hubert after three months.

[49] Nicolas Van Praet. "*Robert Dépatie resigns as CEO of Quebec barbecue chicken chain St-Hubert*," (The Globe and Mail, published May 13, 2015; last updated May 15, 2015).

[50] Michel Lavigne, a chartered professional accountant, was President and CEO of Raymond Chabot Grant Thornton, Montreal, from 1986 to May 2005, and Chairman of Grant Thornton Canada to May 2005. He was a director and audit committee member of Caisse de dépot et placement du Québec from 2005 to 2013 and chair of the Caisse de dépot's audit

identified as a member of the Compensation Committee. Of the other two members of the Compensation Committee, one was retiring from the board and not standing for re-election, and the other was a nominee for election by the Class A shareholders, of which Mr. Péledeau held 90 percent of the shares. Mr. Lavigne was the only member of the Compensation Committee whose re-election was to be voted on by the non-controlling, public Class B shareholders.

- When first elected in 2013 by the Class B shareholders as a Quebecor director, Mr. Lavigne received 96.72 percent of "For" votes for his election and the "Withhold" was only 3.28 percent. At the June 2014 shareholders meeting, however, in angry reaction to the $7.8 million retirement payment made to Mr. Dépatie earlier in the year, Mr. Lavigne was handed a severe public rebuke from the Class B shareholders; he failed to receive a majority of "For" votes on his election: 61.87 percent were "Withhold" votes and he received only 38.13 percent "For" votes. He was re-elected as a Class B director, nevertheless.

- Quebecor did not have a majority voting policy in 2014. Mr. Lavigne was not required and did not tender his resignation as a director in 2014 following his failure to achieve a majority of "For" votes for his election. After the 2014 annual meeting of shareholders, in January 2015, the board adopted a standard "majority voting policy" for uncontested elections of its Class B shareholders.

- A year later in 2015, Mr. Lavigne, then the Chairman of the Human Resources and Compensation Committee, received an even more hostile reception from the public Class B shareholders on his re-nomination at Quebecor's annual shareholders meeting on May 7, 2015. His "Withhold" votes on this election as a director increased to a staggering 71.52 percent and he only received 28.48 percent of the votes "For" his election. (Mr. Lavigne's "Withhold" votes in fact increased in 2015 to 51,293,159 from 44,386,074 in 2014. There were about 83,920,000 Class B shares outstanding. A stunning defeat in both years!)

- Although the 2015 Quebecor AGM was held on May 7, the Quebecor board and Mr. Lavigne knew the proxy count against Mr. Lavigne beforehand. In anticipation, Mr. Lavigne advised that he would tender his resignation in accordance with the newly adopted "majority voting policy." The day before the AGM, the Quebecor board met on May 6, and decided not to accept Mr. Lavigne's proffered resignation because the board determined that the vote against him in 2015 related to the $7.8 million retirement payment to Mr. Dépatie in 2014 "which no later exists and which was discussed at the annual meeting held on June 19, 2014."[51] Brian Mulroney, the Chairman of

committee from 2009 to 2013. Following his appointment as a director of the Caisse de dépot in April 2005, Mr. Lavigne became a director of Quebecor's principal subsidiaries, Quebecor Media, Videotron and TVA Group, in June 2005, in which the Caisse de dépot had significant investments. He became a director of Quebecor in May 2013, and also served as a director and member of the audit committee of Canada Post Corp. and Laurentian Bank, and Chairman of TeraXion Inc.

[51] Quebecor's May 7, 2015 press release explaining why it rejected Mr. Lavigne's resignation stated in part that the board determined that acceptance of the resignation "would be related to a situation that arose in the spring of 2014 [the $7.8 million retirement payment to former CEO Mr. Dépatie] but which no longer exists and which was discussed at the annual meeting held on June 19, 2014" and that "the loss of a director of Mr. Lavigne's calibre would be unfortunate for all

Quebecor's board, told the shareholders at the annual meeting that Mr. Dépatie's pay issue rested "in the past" and was "no longer an issue". He also referred to board solidarity, advising shareholders that the decision on Mr. Dépatie's payment was unanimous, stating:[52]

> "This is why it seems totally inappropriate an unjust to me and to the board of directors that Mr. Lavigne should alone face an abstention vote when this was a unanimous decision of the board of directors and has no possible link to the 2015 meeting."

- In fact, the Class B shareholders did believe there was a direct link between the 2014 payment and vote and the 2015 vote on Mr. Lavigne's re-election as a director. That link was the fact that the Quebecor board ignored and neither acknowledged nor addressed the 2014 repudiation of Mr. Lavigne as a director of Quebecor. British Columbia Investment Management Corp., supported by the Canada Pension Plan Investment Board, explicitly so stated when it explained why it decided to exercise "Withhold" votes for Mr. Lavigne's election in 2015 as well as 2014. "This nominee failed to receive majority support last year [2014] so we are concerned with the lack of responsiveness to shareholders."[53]

Shareholders Need to Petition for the Right to Vote "Against" in the Election of Directors

The failure of "majority voting policies" to protect shareholder voting rights and the principle of shareholder democracy in the election of directors, with the resulting and concurrent failure to provide shareholders with the real and effective right to vote "Against" nominees for election of directors are exemplified in the Quebecor situation summarized above. The seriousness of these significant deficiencies to protect shareholder rights even caught the attention of the editorial board of *The Globe and Mail*, which wrote:[54]

> "But the Quebecor example highlights the weakness of the current system. Mr. Lavigne lost his vote last year and received just 28% support this year, but he remains on the board. Shareholders were powerless to remove him as their elected representative. They voted, but had their votes ignored by the board. The majority voting policy proved to be too indirect a tool.
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> "… The question today is not whether majority voting should be legislated – it should be - but why government's aren't going further to strengthen shareholder democracy, and give shareholders a real vote on their board representatives."

Concerned shareholders should not continue passively nor as critics pointing out the defects of a disfunctional system. If shareholders are seriously minded to rectify the corporate electoral flaws, they

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shareholders. For these reasons, the Corporation has refused to accept Mr. Lavigne's resignation and he has therefore been elected a Class 'B' director."

[52] Janet McFarland and Les Perreaux, "*Quebecor will keep Lavigne as director despite lack of support*", (The Globe and Mail, May 8, 2015).

[53] Nicolas Van Praet, "*Robert Dépatie resigns as CEO of Quebec barbecue chicken chain St-Hubert*" (The Globe and Mail, published May 13, 2015, last updated May 15, 2015) supra note 40.

[54] "*Boards of directors, meet democracy*", (The Globe and Mail, Editorial, July 16, 2015).

need to become "the man who is actually in the arena”, to quote Theodore Roosevelt, and move out of the spectator stands. Where compliant directors are prone to “group think” and to acquiesce to executive-suite influence, the common result is short term management value extraction over long term corporate value creation, which is not in the best interests of the company and its stakeholders.

Petitioning legislators and regulators for authentic and real shareholder rights to nominate and to elect directors is a path forward. “If you want change, you can’t continue doing the same thing.”