

15 May 2014

Director General
Marketplace Framework Policy Branch
Industry Canada
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VIA EMAIL: cbca-consultations-lcsa@ic.gc.ca

Dear Director General,

Thank you for the opportunity to comment on the proposed amendments to the *Canada Business Corporations Act* (CBCA). Ensuring the CBCA remains effective, reflects and facilitates the best practices of Canadian corporations, and instills investor confidence is an important task. We applaud Industry Canada for undertaking these consultations and for its commitment to ensure Canada's corporate regulatory structure meets the challenges of the future.

SHARE is a national not-for-profit organization working with institutional investors to promote responsible investment practices through active ownership, research and education. Our clients have assets under management of more than \$14 billion. SHARE has been involved with previous consultations on the CBCA, including the 2009-2010 review by the House of Commons Standing Committee on Industry, Science and Technology. SHARE is dedicated to improving institutional investment practices that protect the long-term interests of investors, working people, communities and society in general.

General Comments

The CBCA is the corporate law bellwether for the Canadian marketplace. While certain matters may be best dealt with by provincial securities legislation or left to the courts to interpret, the CBCA, as Canada's main corporate law statute, has a critical role to play in setting corporate governance standards. In SHARE's view, this present review of the CBCA offers two important opportunities: 1) to improve the accountability of the board of directors to shareholders and 2) to codify the social and environmental obligations of corporations. Many issues relating to shareholder rights are not new and have been discussed previously in policy fora or already form the practice of many Canadian corporations. Our understanding of the social and environmental obligations of corporations is rapidly evolving and necessitates a clear and principled approach in Canada's leading corporate statute.

For ease of reference, we have used the numbering system set out in the consultation paper.

I. Executive Compensation

The board of directors' approach to executive compensation shows how it creates incentives and rewards its senior executives in relation to the strategic priorities of the company. As compensation can have a major impact on the company's long-term performance and shareholder value, the board should have regular and timely feedback from shareholders on its policies and methodology. An annual advisory "say on pay" vote, already the practice at many Canadian publicly listed companies, should be added to either the CBCA and/or securities regulations for Canadian public companies. We note that the current compensation disclosure requirements found in securities legislation provide a framework for the addition of such a "say on pay" requirement, and encourage Industry Canada to work with provincial securities regulators to coordinate efforts in this area.

Recommendation: If securities regulators do not adopt provisions for a "say on pay" vote within a reasonable period, the CBCA be amended to do so.

II. Shareholder Rights

A. Voting

A fair and transparent voting system is necessary for shareholders to effectively make their views known about how directors are overseeing the management of the corporation. The following amendments are recommended to improve the accountability of directors to shareholders at public companies.

Mandatory Voting by Ballot

The CBCA currently provides that votes at a meeting of shareholders shall be by show of hands unless a shareholder or proxyholder requests a vote be conducted by ballot. In a show of hands vote, each voter at the meeting raises a hand in favour of or in opposition to an item on the meeting agenda. No consideration is given to how many shares each voter holds. The proposal 'passes' if the majority of hands are raised in favour of an agenda item, and companies need only indicate that a resolution was approved by a show of hands. Show of hands voting thus obscures the true opinion of a majority of the shareholders and does not provide any meaningful disclosure regarding the vote results.

By contrast, when a vote is conducted by ballot, the number of votes attached to the shares held by each voter at the meeting is tabulated. A ballot vote accurately reflects the percentage of total votes in favour or against/withheld for each issue that is put to a vote, whereas a show of hands vote produces an unquantified result.

Amending the CBCA to remove voting by a show of hands at shareholders meetings entails a minimal administrative burden on publicly-listed corporations. Most shareholders in publicly-listed companies vote by proxy and these votes are tabulated ahead of the meeting. The relatively small percentage of votes cast at meetings would also be counted to produce numerical vote results for all matters voted by shareholders. Many shareholders devote significant resources to reviewing proxy materials in order to vote their shares. We believe these shareholders are entitled to vote result reports that contain the same detail that issuers have about the vote outcomes. This information helps investors assess the level of shareholder support for matters on the ballot and helps ascertain trends in levels of support.

Recommendation: The CBCA be amended to require that voting on all resolutions considered at a meeting of shareholders be conducted by ballot.

Individual Election of Directors and “Slate” Voting

The CBCA currently allows the presentation of all director nominees on the proxy as a single ballot item, which is commonly referred to as a slate election. If a shareholder has reason to withhold support from one or more nominees, that shareholder must either withhold their vote for the entire board, or vote for a slate that includes directors they deem to be unsuitable. A ban on slate voting will help shareowners vote in a more informed and precise manner.

Recommendation: The CBCA be amended to require the individual election of directors.

Maximum One Year Terms and Annual Elections for Directors

The CBCA currently provides that directors may serve 3 year terms, and that the directors’ terms do not have to be the same (“staggered”). As a result, shareholders may not be able to vote on the election of all directors annually. Staggered boards can make it unnecessarily difficult to give timely feedback on directors’ performance.

Recommendation: The CBCA be amended to eliminate the availability of terms of greater than one year for directors.

Director Election by Majority Vote

Current regulations require that shareholders be given two voting options in the election of directors: 'for' and 'withhold'. Under this voting standard, commonly referred to as plurality voting, a director is elected if he or she receives at least one vote 'for'. As directors often hold company shares, these directors may cast the required single vote 'for' their own election. Although a 'withhold' vote clearly indicates that a shareholder does not support a director's continued service on the board, such votes have no effect on the outcome of the election. Majority voting in the election of directors mandates that if shareholders cast more 'withhold' votes than 'for' votes on the candidacy of a director, that director is not elected.

Recommendation: The CBCA be amended to require majority voting in the election of directors.

B. Shareholder and Board Communication

Electronic Meetings

While we support using technology to enhance access to shareholder meetings, face-to-face encounters between shareowners and management remain critical for board accountability. Because the majority of shareholders do not attend shareholder meetings, a webcast provides a larger percentage of shareholders and other interested parties with the opportunity to observe these events. This is a very positive development. However, holding *only* virtual shareholder meetings could distance company representatives from shareholders, and thereby lessen the accountability of the board and the company to them. The CBCA should continue to allow for participation in shareholder meetings by electronic means, but not permit the boards of publicly-listed companies to limit participation to an electronic-only or virtual format.

Recommendation: The CBCA be amended to exclude publicly-listed companies from the rule permitting companies to hold electronic-only shareholder meetings.

Access to Proxy Circular

Under current rules, proposing alternate directors for election and actively soliciting other shareholders to vote for nominees is difficult and expensive for shareholders. Significant shareholders should have reasonable access to the proxy ballot as a matter of shareholder democracy. However, limits should be placed on the exercise of this right to ensure that it cannot be used to initiate a change of control.

Recommendation: The CBCA be amended to permit significant shareholders to be able to nominate candidates for up to 25% of the number of board vacancies for inclusion in the Management Proxy Circular.

Shareholder Proposal Provisions - Filing Deadline and Reasonable Time to Speak at Meeting

A corporation is not required to circulate a shareholder proposal if it is not submitted to the corporation at least 90 days prior to the date of the notice of meeting that was sent to shareholders in connection with the previous annual meeting of shareholders. This exemption to the requirement to include a shareholder proposal in the proxy materials for the next shareholders meeting is out of line with parallel provisions of provincial statutes, which generally establish the date of the most recently held annual meeting of shareholders (not the date of the notice of that meeting) as the reference point for calculating the filing deadline for the upcoming meeting. The date of the last annual meeting is a far less cumbersome way for a shareholder to determine the deadline for filing a proposal than the date of the notice of the last annual meeting. Amending the CBCA to require that a shareholder proposal be filed the proscribed number of days prior to the anniversary of the previous annual meeting of shareholders will simplify the exercise of determining the filing deadlines for shareholder proposals.

Given the importance of shareholder proposals in giving feedback and input to the company, we also support an amendment to the CBCA requiring that shareholders presenting proposals are given a reasonable period of time to speak.

Recommendations: The CBCA be amended to establish the reference date for determining the filing deadline for a shareholder proposal as the anniversary date of the previous annual meeting of shareholders. The CBCA be amended to require that shareholders presenting proposals are given a reasonable period of time to speak.

C. Board Accountability

Roles of CEO and Chair of the Board

It is the responsibility of the board of directors to protect shareholders' long-term interests by providing independent oversight of management. By setting agendas, priorities and procedures, the position of chair is critical in shaping the work of the board. In our view, a CEO who also serves as chair operates under a potential conflict of interest that can result in excessive management influence on the board and weaken the board's rigorous, independent oversight of management. We recommend that the roles be legislatively separated.

Recommendation: The CBCA be amended to require the separation of the roles of chair of the board and chief executive officer.

Disclosure of the Board's Understanding of Social and Environmental Matters on Corporate Operations

Environmental and social factors are directly relevant to a company's financial performance, operational stability, reputation and risk management, and therefore are critical for informed investment decision-making. In the case of the extractive sector, for example, environmental and social factors can include water management, engagement with local communities and indigenous peoples, and operational challenges in conflict-affected areas. Failing to take these issues into account may cause work stoppages, project delays and loss of shareholder confidence. Conversely, by considering these issues companies can reduce risk and achieve competitive returns for shareholders.

While there are voluntary standards for environmental and social reporting, some jurisdictions have moved to mandate disclosure: in 2013 the UK increased its reporting requirements for some companies to include human rights and other social and environmental matters,¹ and most recently, the EU has agreed to increase non-financial reporting for large companies.²

It is important for the board of directors to understand the impacts and potential impacts of environmental and social issues on corporate operations and for this to be transparent to shareholders. Mandatory social and environmental reporting, requiring the approval of the board, would make it clear to directors that they are expected to be knowledgeable about the impact of these issues and oversee how they are addressed by management.

Recommendation: The CBCA require environmental and social disclosure by publicly listed companies in a format that requires board approval.

IV. Incorporation Structures for Socially Responsible Enterprises

Enabling the creation of enterprises that have a specific social mandate encourages innovation in addressing social challenges. In recent years, several jurisdictions have created legislative vehicles for hybrid enterprises that blend both social and for-profit elements. These hybrids combine the flexibility of for-profit enterprise and ease of raising capital with a clear mandate to address a social purpose. Industry Canada should take advantage of the opportunity afforded by this review to enable a separate vehicle for hybrid profit/not-for-profit enterprises at the federal

¹ The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013.

² "Improving corporate governance: Europe's largest companies will have to be more transparent about how they operate", European Commission press release at http://europa.eu/rapid/press-release_STATEMENT-14-124_en.htm?locale=en

level. However, we would caution against sheltering for-profit companies from social and environmental obligations. A separate structure for social enterprises should not relieve for-profit companies from their environmental and social obligations, nor discourage for-profit companies from integrating environmental and social factors into their business planning, operations and reporting.

Recommendation: The CBCA be amended to create a hybrid structure blending profit and not-for-profit elements.

VI. Corporate Governance and Combating Bribery and Corruption

Corruption corrodes the rule of law, compromises economic development, creates significant risks for companies, and can undermine investor confidence and shareholder value. It is in the best interests of societies, governments, companies and shareholders that corruption be comprehensively addressed by governments. As a signatory to the OECD *Anti-Bribery Convention*, Canada has made strides to combat bribery by Canadian companies in international transactions through the passage of the *Corruption of Foreign Public Officials Act*. We also note that the Resource Revenue Transparency Working Group, a multi-stakeholder initiative made up of civil society and industry, has proposed enhanced disclosure of payments made by Canadian companies to foreign governments, although this would be limited to the extractive sector.

The OECD 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* recommends that signatories to the *Anti-Bribery Convention* take necessary steps to ensure company audit, accounting and compliance mechanisms are sufficiently robust to prevent and detect bribery.

Recommendation: Industry Canada consult with relevant departments and take appropriate steps to ensure that Canada is fulfilling the most recent OECD recommendations.

VII. Diversity of Corporate Boards and Management

Diversity on corporate boards and in senior management is important for the same reason that workplace diversity, and indeed diversity in society as a whole, is important: because diverse organizations benefit from a variety of opinions, perspectives and experiences. There is also a value to Canadian society in having Canadian public company boards reflect our country's diversity, which is currently not the case. We note that the Ontario Securities Commission (OSC) is currently considering amendments to National Instrument 58-101, which would encourage companies to increase gender diversity through a "comply or explain" mechanism. Although we disagree with the OSC's singular focus on gender, securities regulation is in our view a suitable forum for encouraging increased diversity. It allows companies flexibility to design their own approach but requires them to disclose that approach to shareholders and the public.

Recommendation: That diversity on corporate boards and management be addressed through securities legislation.

IX. Corporate Social Responsibility

Although corporate social responsibility (CSR) is defined in many ways, it essentially means a corporation's consideration of all of its stakeholders, including employees, suppliers, customers, and communities, and the environment. Since the last CBCA review in 2001, standards that set out the social and environmental responsibilities of companies have evolved and expanded in policy and in practice. (These standards are distinct from voluntary philanthropic activities companies may undertake.) While these standards vary in their emphasis, they demonstrate an increased expectation that companies integrate social and environmental considerations into their strategic direction, planning, operations and reporting. An example of such a standard is the UN Global Compact.

The increasing relevance of these issues for companies is clear. Even in the time between the 2009-2010 Industry Canada review of the CBCA and the present consultation, developments in the evolution of these standards have occurred, including the publication of the revised OECD Guidelines on Multinational Enterprises (2011) and IFC Performance Standards on Environmental and Social Sustainability (2012), and the release of the GRI G4 Sustainability Reporting Guidelines (2013). Of particular significance is the UN Human Rights Council's 2011 adoption of the Guiding Principles on Business and Human Rights, which set out expected practice for corporations to respect human rights in their business operations, and to develop human rights due diligence procedures.

Some jurisdictions have moved to reflect this trend in their domestic legislation, such as in the United Kingdom where the UK *Companies Act 2006* defines directors' duties to include consideration of long-term consequences, employees, suppliers, customers, community, and the environment.³ And as mentioned above, the EU has recently agreed to the increase non-financial reporting for large companies.

In Canada, recent case law from the Supreme Court of Canada has indicated that directors, as part of their fiduciary duty to the corporation, can consider a broad range of stakeholders. In the case of *BCE Inc v 1976 Debentureholders*, the Court found that directors are required to "act in the best interest of the corporation, viewed as a good corporate citizen"⁴ and that they may look to "the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions."⁵ However, the court did not set out in any detail the meaning of responsible corporate citizenship.⁶

³ *UK Companies Act 2006*, s.172

⁴ *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 81.

⁵ *Ibid* at para 40.

⁶ See for example, C. Liao, "A Canadian Model of Corporate Governance: Insights from Canada's Leading Legal Practitioners" 2013 Robert Bertram Doctoral Research Award Report, Canadian Foundation for

In light of the general nature of the BCE decision, developments in other jurisdictions and the unmistakable trajectory of the increasing importance of corporate responsibility, Industry Canada should take this opportunity to codify CSR objectives in the CBCA. In particular, the requirement that directors consider the interests of a broad range of stakeholders and the environment should be clarified.

Recommendation: The CBCA codify directors' responsibilities to consider stakeholders and the environment through a clear and expanded articulation of the duties of directors.

Thank you again for the opportunity to participate in the Government of Canada's review of the CBCA. SHARE would be pleased to elaborate on any of the arguments outlined above.

Sincerely,



Peter Chapman
Executive Director
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Governance Research (November 2013), pp-12-13; J. Bone, "The Supreme Court Revisiting Corporate Accountability: BCE Inc. in search of a legal construct known as the 'Good Corporate Citizen'" Alberta Law Review 2010, online supplement; E. Waitzer and J. Jaswal, "Peoples, BCE and the Good Corporate 'Citizen'" (2009) 47 Osgoode Hall Law Journal.