THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Bill C-25 – *Canada Business Corporations Act*, *Canada Cooperatives Act*, *Canada Not-for-profit Corporations Act* and *Competition Act* amendments

THE CANADIAN CORPORATE COUNSEL ASSOCIATION, THE EQUALITY COMMITTEE, THE WOMEN LAWYERS FORUM, AND THE BUSINESS, CHARITIES AND NOT-FOR-PROFIT, AND COMPETITION LAW SECTIONS OF THE CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Canadian Corporate Counsel Association, the Equality Committee, and the Women Lawyers Forum, as well as the Business, Charities and Not-for-Profit, and Competition Law Sections of the Canadian Bar Association with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Sections.

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I. INTRODUCTION

The Canadian Corporate Counsel Association, the Equality Committee, and the Women Lawyers Forum, as well as the Business, Charities and Not-for-profit, and Competition Law Sections of the Canadian Bar Association (the CBA Sections) appreciate the opportunity to comment on Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act*.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice.

The CBA Sections' comments focus on the *Canada Business Corporations Act* (CBCA) and the *Competition Act*. The proposed *Canada Not-for-profit Corporations Act* amendments are not of a substantive nature. We make no comments on the *Canada Cooperatives Act.*

II. CANADA BUSINESS CORPORATIONS ACT

The CBA Sections' comments on the CBCA amendments are limited to diversity, bearer certificates, security transfers, the definition of business combination, shareholder communication, financial disclosure and dissolution.

A. Diversity

The CBA Sections welcome the amendments in Bill C-25 as a first step to encourage greater diversity in Canada's corporate leadership, including boards and senior management. The Bill would require "*certain corporations to place before the shareholders, at every annual meeting, information respecting diversity among directors and the members of senior management*." The proposed regulations clarify that the required information addresses both gender and non-gender-related diversity measures. These diversity measures are limited to distributing (publicly-trading) CBCA corporations. They mirror those required by regulators in Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec, Saskatchewan and Yukon.

A flexible, principled and business-led approach

The CBA Sections' 2014 submission on the CBCA emphasized that, *"…oversight and resources must be available to corporations to achieve diversity goals, including assistance in searching for qualified board members from diverse groups and appropriate training…*"[1]

We recommend a flexible, principled approach to achieving both diversity and board renewal, which will allow distributing corporations to adopt strategies that meet their unique business realities while avoiding conflicts with other regulatory requirements. A comply-or-explain model, that takes a multipronged approach by providing the framework, tools and support required to address barriers to diversity would, in our view, be appropriate to meet both objectives. Examples include publishing guidelines and voluntary targets, preparing corporate governance codes, providing diversity training to boards and senior management, and incenting corporations to prioritize diversity in their recruitment strategies.

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1 *See* Canadian Bar Association, *Canada Business Corporations Act* (May 2014), available online: www.cba.org/CMSPages/GetFile.aspx?guid=43e98ecf-4da9-44a5-9166-736874d3f910

Definition of diversity

The CBA Sections recommend that a robust definition of diversity be included in Bill C-25 or the regulations. Vague requirements create uncertainty, making it difficult for corporations to comply, and hindering effective monitoring and oversight. Currently, Bill C-25 does not define diversity, while proposed regulation 10 divides diversity into "gender" and "other than gender." Given the objectives of Bill C-25, we caution against leaving the definition of diversity "other than gender" open to interpretation by distributing corporations. At a minimum, the definition of diversity should recognize the intersectional nature of identity, and encompass gender, disability, race, ethnicity, indigenous identity/Aboriginal status[2] and LGBTQ.

Director Selection

Board renewal promotes diversity by creating vacancies for non-traditional, board-ready talent, and is an influential factor for many investors.[3] Bill C-25 would adopt a majority voting regime for uncontested elections in distributing corporations. The CBA Sections generally support director election by majority vote. The risk of "failed elections" for public corporations is generally not an issue. However, the proposed regulations do not clarify the prescribed class of distributing corporations that would be exempt from the requirement in subsection 106(3.4). Care must be taken in any change to a majority voting regime to address requirements for corporations subject to majority voting rules in other regulatory regimes – such as the TSX – and avoid potential discrepancies. We generally support the proposal for individual voting for public corporations. Although TSX-listed companies have been required to conduct annual votes for directors since 2012, we continue to express concern over potential loss of shareholder value due to frequent changes to the directors. While the Bill provides exceptions for specified classes or circumstances, the proposed regulation does not identify these exceptions.

Disclosure requirements

Clear expectations about the type of information to be included in disclosures can help standardize reporting and promote greater consistency, making it easier for regulators to monitor progress and for corporations to comply. For gender diversity, Bill C-25 would require distributing corporations to explain how gender is taken into account in director identification and selection, as well as in the appointment of executive officers – and if not, why. In addition, corporations would need to disclose whether targets are in place and annual and cumulative achievements against those targets; where none are in place, reasons must be provided. For diversity other than gender, Bill C-25 would require disclosure of written policies and, where none exist, an explanation. The CBA Sections generally supports the disclosure requirements in Bill C-25, but sees no valid justification for distinguishing between disclosure requirements for gender and diversity factors other than gender.

Increased transparency

Corporate transparency and public reporting have long been recognized as playing an important role in promoting diversity by increasing accountability to shareholders, investors and the general public. In our 2014 submission, the CBA Sections recommended using the Corporations Canada website to make board composition information easily accessible. The amendments in Bill C-25 still limit the

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2 *See* Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada, Calls to Action* [Call to Action # 92], (2015) available online: http://nctr.ca/assets/reports/Calls_to_Action_English2.pdf

3 *See* Financial Reporting Council (UK), *Final Draft, The Corporate Governance Code* (April, 2016), available online: www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf. *See also*, Government Accountability Office (US), *Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements [GAO Report]* (December, 2015), available online: www.gao.gov/products/GAO-16-30. *See also*, Catalyst, *Gender Diversity on Boards in Canada: Recommendations for Accelerating Progress* (June 7, 2016), available online: www.catalyst.org/system/files/gender_diversity_on_boards_in_canada_final_pdf_version.pdf.

ability of individuals to acquire this information from the Director during ordinary business hours. There also appears to be no requirement to publish the content of diversity disclosures.

The CBA Sections recommend publishing board composition and the content of diversity disclosures on the Corporations Canada website. Making this information available to the public free of charge would greatly increase transparency and accountability. It would also be consistent with this government's "openness by default" approach and international best practices.

B. Bearer Certificates

In the interest of corporate transparency and reducing money laundering activities, Bill C-25 would add subsections 29.1(1) and (2) and 49(15.1) to the CBCA. This would prohibit the issuance of bearer certificates, warrants or other evidence of a conversion privilege, option or right to acquire shares (or fractions thereof). They also require corporations to replace bearer certificates issued prior to the prohibition coming into force with registered certificates.

This is inconsistent with other Canadian business corporation acts, which continue to permit the issuance of bearer certificates (e.g. Québec and Ontario). This proposed prohibition of bearer certificates will limit tax planning opportunities and may make incorporation under the CBCA less appealing, compared to other Canadian alternatives.

The CBA Sections' 2014 submission on the *Canada Business Corporations Act* recommended maintaining the provisions in the CBCA on nominee shareholders, to preserve the use of nominees and trustees to maintain the anonymity of shareholders[4]. It is Canadian practice (other than in Québec and Alberta) not to make the identity of shareholders publicly accessible.

Retaining CBCA provisions on beneficial ownership and ownership of shares by intermediaries is inconsistent with prohibiting bearer shares. The current rules on intermediaries adequately protect against the abuses which the prohibition against bearer shares purports to protect.

C. Security Transfers

The CBA Sections' 2014 submission recommended removing the security transfer provisions in CBCA Part VII (sections 48-81). These matters are adequately covered by more recently enacted and more modern uniform security transfer legislation in each province and territory. Keeping these rules in the CBCA creates inconsistency and confusion, and they should be removed in Bill C-25.

D. French Definition of Business Combination

In CBCA subsection 126(1), the English definition of a "business combination," used in the context of insider trading, is "an acquisition of <u>all or substantially all</u> the property of one body corporate by another, or an amalgamation of two or more bodies corporate, or any similar reorganization between or among two or more bodies corporate." The French equivalent, "*regroupement d'entreprises*" is defined as "*[l']acquisition de la <u>totalité ou d'une partie substantielle</u> des biens d'une personne morale par une autre, fusion de personnes morales ou réorganisation similaire mettant en cause de telles personnes.*"

Section 14 of Bill C-25 proposes to amend the French definition to replace "*une partie substantielle*" (a substantial part), which is a more direct translation of the English, by the words "*la quasi-totalité*". This would literally mean "all or almost all", which does not correspond to the English text, and appears to create a higher standard in French than English. The CBA Sections recommend that the current French text be retained.

4 *Ibid* 1

E. Shareholder Communication

While participation by electronic means is permitted under CBCA subsections 132(4) and (5) for publicly traded or distributing corporations, electronic communications with shareholders was not adopted for private corporations (CBCA Part XII) in Bill C-25. This amendment was recommended in the CBA Sections' 2014 submission, which supported removing requirements for delivery of paper documents where they are available for distribution or electronic access. Sending documents in electronic form to the Director and electronic signatures are already permitted under CBCA section 258.1.

F. Financial Disclosure

The notion of prescribed requirements (to be set by regulation) has been introduced in sections 155 and 159, replacing the current clear language in these sections. While it is presumably easier to amend the regulations than the CBCA itself, corporate advisors would have to consult another document to determine the required contents of financial statements, to whom they should be sent and the deadlines. The CBA Sections recommend that the current language be retained.

G. Dissolution

CBCA section 209 currently permits a "body corporate" to apply for revival under the CBCA. The proposed amendments to section 209, which replace "body corporate" with "the dissolved corporation or other body corporate," are unnecessary. The CBCA definition of "body corporate" means any body corporate, wherever or however incorporated, including under the CBCA. That term is wider than the CBCA definition of a "corporation", which is limited to a body corporate incorporated or continued (and not discontinued) under the CBCA. Since the definition of body corporate is broad enough to include a corporation, there is no reason to reference both terms.

III. COMPETITION ACT

The CBA Sections comment on the *Competition Act* amendments in Bill C-25 are limited to trusts, as well as subsections 110(3) to 110(6).

A. Proposed changes on trusts

Subsection 109(1) of Bill C-25 would add to the definition of "entity" in subsection 2(1) of the *Competition Act*, a "trust or other unincorporated organization capable of conducting business". While the reference to an unincorporated organization is appropriate, it is not clear why "trust" is included. A trust is not an "organization" but rather describes a fiduciary relationship.

While certain business arrangements are structured as trusts for a variety of reasons, we suggest that the provision be clarified. In particular, it should make clear that "trust" refers to the trust assets and businesses held by the trustee on behalf of the beneficiaries of the trust, and that "trust" does not include the trustee or the beneficiaries of the trust. An individual or entity that is a beneficiary of a trust, who is entitled to more than 50% of the trust, would likely be affiliated by virtue of the operation of subsections 2(2) through 2(4) of the Act.

B. Proposed changes to subsection 110(4)

The proposed amendments to subsection 110(4) of the *Competition Act* would extend the application of the amalgamation provision to "entities," not just corporations. It is unclear why this is necessary, since the concept of amalgamation applies only to corporations in Canada.

C. Changes that should be made in subsections 110(3) to 110(6)

In our view, "entity" should be substituted for "corporation" throughout subsections 110(3) to 110(6) of the *Competition Act*, to fill gaps in the notifiable transaction regime in Part IX:

> ***(3) Acquisition of shares –*** *Subject to sections 111 and 113, this Part applies in respect of a proposed acquisition of voting shares of a corporation that carries on an operating business or controls an entity ~~a corporation~~ that carries on an operating business*
>
> *(a) if*
>
> *(i) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that are owned by the corporation or entities ~~corporations~~ controlled by that corporation, other than assets that are shares of or interests in of any of those entities ~~corporations~~, would exceed the amount determined under subsection (7) or (8), as the case may be, or …..*
>
> ***(4) Amalgamation –*** *Subject to subsection (4.1) and section 113, this Part applies in respect of a proposed amalgamation of two or more corporations if one or more of those corporations carries on an operating business, or controls an entity ~~a corporation~~ that carries on an operating business, where*
>
> *(a) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that would be owned by the continuing corporation that would result from the amalgamation or by an entity ~~corporations~~ controlled by the continuing corporation, other than assets that are shares of ~~of any of those corporations~~ or interests in any of those entities, would exceed the amount determined under subsection (7) or (8), as the case may be; or …..*
>
> *(4.1) This Part does not apply in respect of a proposed amalgamation of two or more corporations if one or more of those corporations carries on an operating business or controls an entity ~~a corporation~~ that carries on an operating business, unless each of at least two of the amalgamating corporations, together with its affiliates, ….*
>
> ***(5) Combination –*** *Subject to sections 112 and 113, this Part applies in respect of a proposed combination of two or more persons to carry on business otherwise than through a corporation if one or more of those persons proposes to contribute to the combination assets that form all or part of an operating business carried on by those persons, or entities ~~corporations~~ controlled by those persons, and if …..*
>
> ***(6) Combination –*** *Subject to sections 111, 112 and 113, this Part applies in respect of a proposed acquisition of an interest in a combination that carries on an operating business otherwise than through a corporation or controls an entity that carries on an operating business*
>
> *(a) if*
>
> *(i) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that are the subject-matter of the combination and entities controlled by that corporation, other than assets that are shares or interests in of any of those entities, would exceed the amount determined under subsection (7) or (8), as the case may be, or ……*

By way of illustration, as subsection 110(3) is currently worded, the acquisition of a corporation that controls another corporation is potentially notifiable under Part IX, but if the target is a corporation that controls a major partnership in Canada, notification would not be required.

Similarly, subsection 110(6) is limited to the acquisition of a partnership that carries on an operating business. This creates a gap in the provision to the extent that if two or more persons acquire a partnership (that itself is not an operating business), but that partnership is the holding entity of and controls another entity (say another partnership) that is a major operating business in Canada, notification appears not be required.

We recommend that notification be triggered where a partnership controls an entity that carries on an operating business above the threshold.

IV. CONCLUSION

The CBA Sections appreciate the opportunity to share our views on Bill C-25. We welcome the amendments as a first step to encourage greater diversity in Canada's corporate leadership, but has some concerns with other provisions of the Bill related to the CBCA and the *Canada Corporations Act*. We trust that our comments will be of assistance, and would be pleased to provide any clarifications that the Committee requests.