THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Loi canadienne sur les sociétés par actions

SECTIONS DU DROIT DES ORGANISMES DE BIENFAISANCE ET À BUT NON LUCRATIF, DU DROIT DES AFFAIRES ET DU DROIT INTERNATIONAL, COMITÉ SUR L'ÉGALITÉ ET ASSOCIATION CANADIENNE DES CONSEILLERS ET CONSEILLÈRES JURIDIQUES D'ENTREPRISES DE L'ASSOCIATION DU BARREAU CANADIEN

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AVANT-PROPOS

L'Association du Barreau canadien est une association nationale qui regroupe 37 500 juristes, avocats, notaires du Québec, professeurs de droit et étudiants en droit dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice.

Le présent mémoire a été préparé par les sections du droit des organismes de bienfaisance et à but non lucratif, du droit des affaires et du droit international ainsi que le Comité sur l'égalité et l'Association canadienne des conseillers et conseillères juridiques d'entreprises de l'Association du Barreau canadien, avec l'aide de la Direction de la législation et de la réforme du droit du bureau national. Ce mémoire a été examiné par le Comité de la législation et de la réforme du droit et approuvé à titre de déclaration publique des groupes susmentionnés de l'Association du Barreau canadien.

TABLE DES MATIÈRES

Loi canadienne sur les sociétés par actions

Loi canadienne sur les sociétés par actions

SOMMAIRE EXÉCUTIF

L'Association du Barreau canadien (ABC) est heureuse de pouvoir présenter ses commentaires dans le cadre des consultations qu'Industrie Canada a lancées le 11 décembre 2013 au sujet de la *Loi canadienne sur les sociétés par actions* (LCSA). L'ABC est une association nationale qui regroupe plus de 37 500 juristes, avocats, notaires du Québec, professeurs de droit et étudiants en droit dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice.

Ces commentaires sont le résultat d'un travail commun des sections nationales du droit des organismes de bienfaisance et à but non lucratif, du droit des affaires et du droit international ainsi que du Comité sur l'égalité et de l'Association canadienne des conseillers et conseillères juridiques d'entreprises (ACCJE) de l'ABC.

L'ABC appuie les efforts qu'Industrie Canada a consacrés à ces consultations pour s'assurer que le cadre de gouvernance des sociétés visées par la LCSA demeure efficace, favorise la compétitivité, appuie l'investissement et l'activité entrepreneuriale, et inspire la confiance des investisseurs et des entreprises. Cependant, l'ABC incite Industrie Canada à entreprendre un examen approfondi de la Loi, ce qui devrait à notre avis se faire tous les cinq ans. C'est en 2001 que la LCSA a été la dernière fois soumise à un examen complet. De nombreuses provinces ont depuis lors mis à jour leurs lois sur les sociétés, et il est vital que la législation fédérale soit actualisée en conséquence.

Les enjeux indiqués dans le document de consultation sont des éléments importants d'un examen complet. Par souci de commodité, nous présentons nos commentaires en suivant les rubriques du document de consultation.

Partie I – Rémunération des cadres

Les avis sont partagés, au sein de l'ABC, quant à l'opportunité de prévoir un vote exécutoire ou consultatif des actionnaires sur la rémunération des cadres, dans une réforme de la LCSA. Le principe en a été adopté dans divers pays récemment, mais le Canada ne l'a pas encore retenu comme norme en matière de gouvernance des sociétés. D'une part, des actionnaires même bien renseignés n'ont pas nécessairement de mécanisme efficace pour responsabiliser les conseils d'administration en l'absence d'une disposition prévoyant un vote sur la rémunération. D'autre part, les administrateurs d'une société sont souvent mieux à même que les actionnaires de contrôler les ententes sur la rémunération, compte tenu de leur complexité et des nombreuses formes qu'elles peuvent prendre. Élus par les actionnaires eux-mêmes, les administrateurs ont le devoir de surveiller la gestion de l'entreprise et sont tenus de prendre des décisions en fonction de leur obligation fiduciaire d'exercer la diligence voulue dans l'intérêt de la société. Il ne convient donc peut-être pas que la loi prévoie des votes des actionnaires sur la rémunération. Cela étant dit, de grands partenaires commerciaux du Canada sont en voie d'adopter des dispositions en ce sens dans leurs lois, et le principe suscite un intérêt croissant à l'échelle mondiale. Nous incitons le gouvernement à agir avec prudence en cette matière, et à consulter un vaste éventail de parties intéressées.

En outre, nous recommandons une modification aux dispositions de la LCSA, en particulier à l'article 125 traitant de la rémunération des administrateurs, pour y ajouter le mot « raisonnable ». Toute disposition sur une rémunération équitable devrait s'appliquer à toutes les sociétés n'ayant pas fait appel au public, et il y aurait lieu d'envisager que soient visées aussi les sociétés ayant fait appel au public. Une telle disposition devrait du reste s'appliquer aux « personnes liées » aux actionnaires, administrateurs ou dirigeants des sociétés n'ayant pas fait appel au public.

Partie II – Droits des actionnaires

Nous recommandons le vote obligatoire par bulletin de vote lors des réunions des actionnaires et la divulgation des résultats par les sociétés ouvertes. Nous sommes aussi généralement en faveur de l'élection individuelle des administrateurs, sous réserve d'une divergence possible entre sociétés privées et ouvertes. Nous sommes aussi généralement en faveur de l'élection des administrateurs par vote majoritaire.

Nous ne recommandons pas d'instituer des mandats maximums d'un an et des élections annuelles pour les administrateurs. Une telle exigence pourrait être source d'instabilité pour les sociétés visées par la LCSA, par suite d'une perte rapide des connaissances de l'entreprise.

Dans le cadre des dispositions envisagées sur les communications du conseil d'administration, nous recommandons de supprimer les dispositions de la LCSA qui vont à l'encontre du recours à des dispositions sur « l'avis et l'accès » sous le régime de lois sur les valeurs mobilières. Nous sommes aussi favorables à l'élimination de toute exigence que des documents soient remis sous forme imprimée quand ils sont disponibles sous forme électronique. Nous nous inquiétons de ce que des mesures législatives exigeant l'accès aux circulaires de sollicitation de procurations par les actionnaires importants puissent manquer au respect des renseignements personnels des actionnaires.

Quant à la responsabilisation du conseil d'administration, ce n'est pas toutes les situations qui justifieraient la séparation des rôles de président-directeur général et de président du conseil d'administration. Pour ce qui concerne les sociétés privées, les décisions à ce sujet devraient être laissées au conseil d'administration.

Nous mettons en garde contre des modifications à la LCSA qui exigeraient l'approbation des actionnaires pour les acquisitions qui entraîneraient une forte dilution des intérêts dans la société des actionnaires existants (intérêts supérieurs à 25 %). La protection des actionnaires contre les transactions considérablement dilutives est peut-être un but louable, mais le conseil d'administration élu par les actionnaires pour diriger les affaires de la société devrait avoir la latitude et la discrétion d'y voir.

Enfin, il y a lieu de craindre que la modification de la disposition de la LCSA sur le recours par les actionnaires en cas d'abus risque de rendre le recours encore plus difficile et plus coûteux. Dans certains cas, la codification de l'arbitrage peut exiger plus de temps et de frais que des procédures judiciaires.

Partie III – Transferts de valeurs mobilières

Les dispositions sur le transfert de valeurs mobilières de la partie VII de la LCSA devraient être abrogées, pour diverses raisons. Le droit du transfert des valeurs mobilières relève du droit des biens commerciaux, et ne devrait pas être régi par le droit des sociétés du ressort de la société émettrice. Les valeurs mobilières de sociétés ayant fait appel au public sont en général détenues dans le système de détention indirecte et sont régies par les lois provinciales / territoriales sur le transfert de valeurs mobilières (LTVM). En outre, les dispositions actuelles de la LCSA sur le transfert direct font double emploi avec celles des LTVM provinciales.

La LCSA a encore un rôle important à jouer en offrant aux actionnaires de sociétés privées la possibilité d'exercer un recours civil à l'égard de transactions d'initiés. Cependant, nous recommandons que les dispositions sur la responsabilité et les recours civils à l'égard de transactions d'initiés soient actualisées et harmonisées dans la mesure du possible avec les lois provinciales sur les valeurs mobilières.

Nous recommandons de supprimer l'obligation de résidence au Canada pour les administrateurs en vertu de la LCSA, sauf dans le cas des sociétés ayant fait appel au public. Cependant, il y aurait lieu d'envisager une disposition additionnelle pour garantir qu'un dirigeant ou un administrateur d'une société se présente comme répondant en cas de litige ou pour l'exécution d'un jugement.

La LCSA devrait être modifiée pour limiter la portée de la partie VIII aux actes de fiducie qui ne sont pas conformes à une loi donnée. Elle devrait aussi être modifiée pour prévoir qu'un administrateur peut dispenser un acte de la partie VIII s'il est convaincu que la dispense ne porte pas atteinte à l'intérêt public.

Le régime de la responsabilité proportionnelle de la LCSA devrait être abrogé.

Partie IV et partie IX – Entreprises socialement responsables et responsabilité sociale des entreprises

Pour déterminer ce qui est dans l'intérêt de la société quand ils prennent des décisions, les administrateurs devraient être autorisés à prendre en compte non seulement les intérêts des actionnaires, mais aussi ceux d'autres parties prenantes, y compris les employés, les créanciers, les consommateurs et les gouvernements ainsi que l'environnement. Dans le contexte d'une société à but lucratif, les administrateurs devraient être tenus de le faire. Nous recommandons aussi de préciser que les administrateurs ne sont pas tenus d'accorder la priorité à un intérêt particulier par rapport à tout autre intérêt ou facteur, à moins que la société n'ait déclaré dans ses statuts constitutifs son intention de le faire.

L'ABC recommande que le Canada adopte le modèle de société à but lucratif florissant aux États-Unis plutôt que les modèles hybrides restrictifs qu'on trouve en Colombie-Britannique, en Nouvelle-Écosse et au Royaume-Uni.

En réponse à la question spécifique sur l’utilité des entreprises socialement responsables (ESR) et la mesure dans laquelle la LCSA, dans sa forme actuelle, facilite leur mise sur pied, l’ABC note qu’un nombre important d’ESR existent déjà sous forme d’organismes de bienfaisance et sans but lucratif qui connaissent un grand succès et qui sont très productifs; leur potentiel pourrait être encore mieux exploité grâce à des réformes de la LCSA de concert avec des révisions du cadre réglementaire de la *Loi de l’impôt sur le revenu*. Nous recommandons d’aborder avec grand soin la rédaction de modifications en ce sens à la LCSA, pour limiter le risque d’abus de la part de ceux qui cherchent à doter leur image de marque d’une « auréole » alors que leur seul mobile est le profit.

Partie VI – Cadre de gouvernance organisationnel et lutte contre la corruption

Les dispositions à l’étude ne devraient pas porter exclusivement sur la corruption dans les transactions internationales, mais bien sur la lutte contre la corruption et la fraude dans les transactions publiques et privées au pays et à l’étranger. La modification de la LCSA présente une occasion de s’attaquer à la fraude et à la corruption, y compris la fraude au pays, de façon beaucoup plus générale.

Cela peut être accompli en renforçant et en clarifiant, dans la LCSA, la responsabilité personnelle des administrateurs et des dirigeants à l’égard de la fraude et de la corruption au titre de leurs obligations fiduciaires, de leur obligation de diligence et de leur obligation d’agir légalement, et le rôle du vérificateur pour aider à prévenir et à détecter toute fraude, qu’elle soit du fait d’un employé ou de la direction ou qu’elle soit une fraude externe, et qu’il s’agisse de subornation ou d’une autre forme de corruption.

Partie VII – Diversité au sein des conseils d’administration et de la direction

L’ABC accueille favorablement et soutient la décision du gouvernement d’envisager de promouvoir la diversité au sein des conseils d’administration des sociétés sous le régime de la LCSA. Nous estimons toutefois que des mesures législatives sur la diversité pourraient être plus pertinentes dans le cas des sociétés faisant appel au public que de petites entreprises exploitées par le propriétaire. Des mesures visant à accroître la diversité au sein des conseils d’administration des sociétés ne devraient pas être si contraignantes qu’elles entraveraient la capacité de fonctionnement des conseils d’administration, et elles devraient être semblables aux pratiques ayant cours au pays ou compatibles avec elles.

Partie VIII – Ententes en vertu de la LCSA
Les dispositions de la LCSA sur les arrangements devraient servir à des restructurations du bilan de sociétés insolvables. Des dispositions supplémentaires, semblables à celles qui se trouvent dans les lois sur l'insolvabilité, sont nécessaires dans la LCSA pour protéger les intérêts des parties prenantes. La proposition d'utiliser les arrangements en vertu de la LCSA pour restructurer des entreprises insolvables codifiera ce qui se fait déjà en pratique sur le marché, apportant ainsi de la certitude au processus.

Autre (réforme et examen d'ensemble de la LCSA)
Le dernier examen complet de la LCSA remonte à 2001. Nous encourageons Industrie Canada à entreprendre un examen complet de la Loi afin de procéder à une réforme et une modernisation d'ensemble.

I. INTRODUCTION

L'Association du Barreau canadien (ABC) est heureuse de pouvoir présenter ses commentaires dans le cadre des consultations qu'Industrie Canada a lancées le 11 décembre 2013 au sujet de révisions possibles à la *Loi canadienne sur les sociétés par actions* (LCSA). L'ABC est une association nationale qui regroupe plus de 37 500 avocats, notaires du Québec, professeurs de droit et étudiants en droit dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice. Ces commentaires sont le résultat d'un travail commun de divers groupes de l'ABC, y compris les sections nationales du droit des affaires, du droit des organismes de bienfaisance et à but non lucratif et du droit international ainsi que du Comité sur l'égalité et de l'Association canadienne des conseillers et conseillères juridiques d'entreprises (ACCJE) de l'ABC.

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II. EXECUTIVE COMPENSATION

One key responsibility of a company's board of directors is to assess the performance of senior executives and approve their compensation arrangements, with the objective of generating superior long-term performance. Executive compensation policies have become increasingly complex. Boards and compensation committees must consider a multitude of potential forms of compensation, including cash (e.g., salary, annual bonus, long-term non-equity plans and pensions) and equity-based compensation (e.g., stock options, restricted share units, performance share units and stock appreciation rights). Each compensation scheme has its own particular incentives and pay-out profile, which can be contingent on performance-based triggers (e.g., earnings per share, return on invested capital, stock price levels and any number of appropriately-crafted non-generally accepted accounting principles (GAAP) measures). These factors vary between industries, issuer growth profiles and even executive titles.

There are divergent views in the CBA on whether implementing a binding or advisory shareholder vote on executive compensation, or say-on-pay, should be included in the CBCA.

On the one hand, a corporation's directors are often in a better position than shareholders to oversee executive compensation arrangements. A corporation's board (or a board committee) has the benefit of full access to the necessary information, external professional guidance and the relevant experience of its members to make the appropriate decisions about executive compensation. The directors, who are elected by the shareholders, have a duty to supervise the management of the business and affairs of a corporation and are required to make decisions in accordance with their fiduciary duties to act with due care and with a view to the best interests of the corporation, including its shareholders as a whole.

On the other hand, say-on-pay has garnered traction internationally in recent years and many of Canada's trading partners have adopted say-on-pay votes, notably the United States (2010), the United Kingdom (2003), Australia (2004), the Netherlands (2005), Sweden (2006), Norway (2007), Denmark (2007), Belgium (2010) and Switzerland (2013). In April 2014, the European Commission proposed to revise its Shareholder Rights Directive—which sets out minimum standards for company meetings in the European Union—to provide for a binding compensation vote, noting the success of say-on-pay provisions.

Given these competing views, it is important to outline the arguments from both sides.

A. Against say-on-pay

Canadian courts have indicated that, in some cases, Director's fiduciary duties may extend to other stakeholders of the corporation. Individual shareholders have no fiduciary duties to other shareholders, the corporation or other stakeholders. It is important to maintain a clear distinction between the role of a board and the role of shareholders.

Directors are responsible for ensuring that a corporation can attract and retain high-caliber executives capable of steering the corporation towards long-term success. The threat of a negative vote by shareholders may gradually emphasize the achievement of short and medium-term financial measures while neglecting long-term value creation. In some cases, value protection, rather than growth, may be of strategic importance for a company. The successful management of threats to value protection and creation may be viewed positively by a company's board of directors, and negatively by shareholders focused on short-term growth and out-performance. The current approach to overseeing executive compensation recognizes the board's role and aligns the interests of a corporation's shareholders with the need for flexibility and certainty in structuring compensation arrangements. Therefore, there should be a limit on the ability of shareholders to supplant the role of the board.

Say-on-pay votes can be misleading and difficult to interpret. Shareholders may express a view about recent corporate performance rather than making a specific assessment of executive compensation. In addition, securities laws provide for comprehensive and detailed disclosure of compensation for senior executives. Fully-informed shareholders are free to choose whether or not to invest (or divest) in companies based on their views regarding such disclosures.

This is more problematic with controlled companies. Requiring shareholder votes on executive compensation at a controlled company would be neither effective nor efficient. The policy would not serve a concrete purpose since the controlling shareholder would cast a majority of the votes. A controlling shareholder would be expected to have an active dialogue with the controlled company through its board and compensation committee, and would unlikely choose voting at a shareholder meeting as the forum for raising its displeasure with executive compensation. Imposing a say-on-pay requirement on a controlled company would only increase the costs and complexity of the process for setting executive compensation.

Requiring all CBCA corporations to implement say-on-pay does not take into account the corporation's board, and could be imposed on corporations whose shareholders have not chosen to pursue the model. It may also disregard the realities of controlled corporations, and compromise the need for flexibility and certainty in structuring appropriate compensation arrangements. A mandatory requirement exposes the dangers of a "one size fits all" approach. Say-on-pay, particularly with mandatory aspects, fails to recognize the complexity of modern human resources and compensation practices. A mandatory say-on-pay regime could in practice drive entrepreneurs and others to consider any alternative other than the CBCA and engage in "forum shopping".

B. For say-on-pay

Those in favour of say-on-pay point to its traction as a 21st century governance norm, evidenced by the level of voluntary adoption of the practice in Canadian public companies: 80 per cent of the TSX's 60 largest companies have adopted the vote as of 2014.[1] However, policy, has not kept pace in the form of an affirmative ballot requirement. As a result, only three per cent of all Canadian public companies grant shareholders a formal say-on-pay.[2]

With its provincial counterparts, the CBCA is the historic site of corporate governance regulation for Canadian companies. While securities laws provide for executive compensation disclosure, there are limitations to the extent that disclosure can support a more equal balance of power between corporate managers and shareholders on this issue.

Some disclosure enhancements have actually been linked to *increases* in compensation through what scholars have termed the "ratcheting" effect: benchmarking tables guide companies to consistently pay executives at or above their sector's average, driving up average pay year after year.[3] Major improvements to U.S. executive compensation disclosure rules in 1992 straddled

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1 John Tuzyk & Jessica Hinman, "Say on Pay: Is the Canadian Future Voluntary?" (27 March 2014), online: Blakes, Cassels & Graydon LLP www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1914.

2 *Ibid.*

3 See e.g. Edward M. Iacobucci, "The Effects of Disclosure on Executive Compensation" (1998) U. Toronto L.J. 489.

the largest historical increases in the country's average-CEO to average-worker pay ratio: from 53-to-1 in 1989 to 137-to-1 in 1995 to a record 411-to-1 in 2000.[4]

Crucially, informed shareholders—absent a say-on-pay—lack an effective mechanism to hold boards to account over compensation beyond launching a campaign to remove the board, litigation or selling their shares. These are not practical solutions for most shareholders. Selling, in particular, is often an obstacle for major institutional investors such as pension funds, which may be bound by mandatory portfolio restrictions or cannot otherwise readily dispose of their large shareholdings. Successful oppression or derivative action cases based on pay decisions are also rare.

With both the US and Europe embracing say-on-pay, Canada's not following suit has consequences for the country's economic competiveness and reputation for prudent and fair business regulation. In particular, foreign investors will look more favourably on jurisdictions that offer a robust package of shareholder rights reflective of international best practice.

There is an ongoing debate about binding versus voluntary say-on-pay regimes. International experience suggests that while the negative publicity associated with "no" votes is often enough to drive companies to improve subsequent stakeholder consultations,[5] companies still occasionally flout the spirit of the law and dismiss the results altogether.[6] Companies should be required to revise their pay policies in the event of a failed vote—while keeping ultimate discretion over their content with the board—rather than leaving it to be determined by public censure alone. This ensures that the reform is taken seriously by companies that can more readily avoid media scrutiny over a failed vote.

There is also no consensus on whether say-on-pay should be included in corporate legislation like the CBCA or left to securities regulators. There are three compelling reasons to enact a

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4 Jeremy R. Delman, "Structuring Say-on-Pay: A Comparative Look at Global Variations in Shareholder Voting on Executive Compensation" (2010) 2 Colum. Bus. L. Rev. 583 at 588.

5 See e.g. Noam Noked, "Facts Behind 2013 'Turnaround' Success for Say on Pay Votes" (5 September 2013), online: The Harvard Law School Forum on Corporate Governance and Financial Regulation http://blogs.law.harvard.edu/corpgov/2013/09/05/facts-behind-2013-turnaround-success-for-say-on-pay-votes (noting that the 39 U.S. companies that failed say on pay votes in 2012 received, on average, a 48 per cent–higher level of shareholder support in their 2013 votes).

6 For example, one U.K. CEO responded to a 42 per cent vote result by remarking, "[t]his strikes me as a case of excessive micro-managing." See U.K. Department for Business Innovation & Skills, "Executive Pay: Shareholder voting rights consultation" (March 2012) at 15, online: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31372/12-639-executive-pay-shareholder-voting-rights-consultation.pdf. A rejection of Shell's 2008 pay report was also ignored.

binding or advisory shareholder vote on executive compensation in the CBCA rather than leaving the matter to provincial securities regulators.

First, all countries adopting say-on-pay to date have enacted the reform at a national level. This approach has the benefit of promulgating a consistent, easy-to-understand standard.

Second, say-on-pay is conceptually closer to the policy concerns of corporate law than those of securities law. While the mandate of US and Canadian securities commissions has expanded recently in substantive corporate governance matters, say-on-pay nevertheless lies outside of securities law's core focus on disclosure. Of course, investors making portfolio decisions will evaluate a company based, in part, on its pay practices. However, it is clearly of greatest importance to shareholders in their oversight of managerial decision-making. That relationship has historically been governed by corporate law—especially when substantive rules (such as voting), rather than disclosure rules, are at issue. The Ontario Securities Commission, having flagged say-on-pay as a "shareholder democracy" issue in 2011,[7] notably has since dropped mention of the reform. It is not clear that Canadian securities commissions view the matter as integrally linked to their mandates.

Third, if a binding pay vote was enacted provincially (by a commission rule or through legislation), the constitutionality of the requirement may be in question in light of the Supreme Court of Canada's division-of-powers holding in *Multiple Access Ltd. v. McCutcheon*.[8] Under *Multiple Access*, a provincial securities requirement applicable to a federal company is invalid if it impairs "the status and essential capacities of the company in a substantial degree." Corporate boards have historically had a largely-unconstrained capacity—subject to their fiduciary duty and duty of care—to determine executive compensation questions.

If say-on-pay votes are included in the CBCA, we recommend consultation with the provinces on the possibility of parallel amendments in provincial corporate statutes. This would reinforce a consistent, Canada-wide approach and minimize the potential for corporate-law "forum-shopping."

7 OSC Staff Notice 54-701, "Regulatory Developments Regarding Shareholder Democracy Issues" (10 January 2011), online: www.osc.gov.on.ca/en/SecuritiesLaw_rule_20110110_54-701_reg-proposal.htm.

8 [1982] 2 S.C.R. 161.

C. Reasonable Remuneration

Aside from say-on-pay, we recommend amendments in the CBCA dealing with the reasonable remuneration of directors. We suggest adding the word "reasonable" to section 125 to read:

> **125.** Subject to the articles, the by-laws or any unanimous shareholder agreement, the directors of a corporation may fix the *reasonable* remuneration of the directors, officers and employees of the corporation.

In addition, section 125 should be amended to cover any services rendered by a director or an officer and those services should also include reasonable remuneration.

The CBCA's fair remuneration provisions should be made for all non-distribution corporations and should be considered for distributing corporations. The reasonable remuneration provision should be extended to "related persons" of the shareholders, directors or officers of non-distributing corporations.

D. Recommendations

There are compelling reasons both for and against including say-on-pay in the CBCA. We caution the government to tread carefully and engage in widespread consultations before deciding to include say-on-pay in the CBCA. Although say-on-pay has gained popularity internationally, it must be considered in the context of Canadian corporate and securities law.

We recommend amending section 125 to address reasonable remuneration of directors.

III. SHAREHOLDER RIGHTS

In recent years Canadian securities commissions and stock exchanges have proactively addressed many of the shareholder rights issues in the current CBCA consultation. While these actions by the securities commissions and stock exchanges should not preclude amendments to shareholder rights under the CBCA, any amendments should proceed with caution to avoid conflicting obligations with existing regulatory provisions.

Given the broad range of corporations incorporated under the CBCA, any amendments to shareholder rights should avoid a "one size fits all" approach. In some circumstances, exemptions should apply for reporting issuers that comply with securities laws, as in some provincial corporate statutes.

Creating inhibitive obligations or restrictions in the CBCA could also provoke existing CBCA corporations to seek other regulatory jurisdictions or deter new business ventures from incorporating under the CBCA.

A. Voting

We recommend mandatory voting by ballot at shareholder meetings and disclosure of results by public companies. This would increase transparency of shareholder voting results and enhance confidence of shareholders in the results of shareholder meetings.

We generally support election of individual directors as opposed to slate voting. However, there may be divergence between private and public corporations on individual versus slate voting. Private corporation shareholders generally have more input into the corporation's governance structure through negotiating share provisions and contractual obligations in shareholder's agreement and other contracts, all of which limit concerns about slate voting.

The individual versus slate election of directors issue must also take into account advance notice of the nomination of directors. The concept of advance notice bylaws has been put forward in recent years with some publicly traded corporations. A comprehensive review is needed to determine whether requiring individual election of directors for all CBCA corporations is workable for the various private and public corporations incorporated under the CBCA.

We do not recommend changing the CBCA to require maximum one year terms and annual elections for directors. With many corporations, including in the not-for-profit sector, it is difficult to get directors with appropriate qualifications. Short terms would increase instability of CBCA corporations if frequent changes to the directors lead to a rapid loss of "business knowledge" resulting in a potential loss of shareholder value. We do not believe that concerns over director term limits are as significant in Canada as they may be in other jurisdictions since the majority of shareholders can replace the board of a CBCA corporation at any time. Investor confidence in the long-term outlook of directors should be considered and capping director terms to a maximum of one year may prove harmful.

We generally support director election by majority vote. However, this should be carefully considered as it is already addressed under different regulatory provisions (see recent changes to TSX requirements on majority voting). The risk of "failed elections" for public corporations is not generally an issue. However requiring majority voting for small, privately-held corporations could create issues with failed elections. The risk of low shareholder participation in a shareholder meeting is perhaps greater with private corporations, increasing the risk of failed elections.

While majority voting provisions may enhance the ability of minority shareholders to participate more meaningfully in the governance of CBCA corporations, the risk of failed elections and the resulting difficulty they create may diminish the benefit to minority shareholders. Any change to a majority voting regime should be carefully considered given the different concerns among the broad range of CBCA corporations, and any change should contain exceptions to majority voting rules such as for TSX corporations that must comply with TSX majority voting policy or private corporations with less than 50 shareholders.

Majority voting provisions are also a concern for all CBCA corporations as they may limit a healthy director turnover as new, unknown, nominees may find it difficult to obtain a majority of shareholder votes.

B. Shareholder and Board Communications.

We recommend removing CBCA provisions that conflict with the use of “Notice and Access” provisions under securities legislation. We support removing requirements for delivery of documents in paper format where the documents are available for distribution or electronic access.

Allowing access to proxy circular by “significant” shareholders should be considered with caution. Legislating access to proxy circulars to significant shareholders may too heavily favour activists and investors, which could be to the detriment of long term growth and benefit of CBCA corporations. While equal treatment of shareholders in the proxy process is generally beneficial, we are concerned about disregarding shareholder privacy.

We support changes on shareholder proposal provisions including filing deadline and reasonable time to speak to a proposal at annual meetings. We recommend changing the timing for proposals as of the date of the last annual meeting rather than the date of the notice of the last annual meeting. We also recommend providing a reasonable period of time to speak on a proposal but that “reasonable period of time” have some scope and parameters.

C. Board Accountability

While some circumstances warrant separating the roles of Chief Executive Officer and Chair of the Board, it may not be appropriate in all circumstances. In some circumstances, combining the roles is a bad governance model. However, in other circumstances, particularly with private companies, decisions about the roles of CEO and Chair of the Board should be left to the flexibility and discretion of the board of directors. In some circumstances, such as with public companies, securities regulations are advancing to address this corporate governance concern and any amendments to the CBCA should not conflict with other existing regulations.

Any changes to require shareholder approval of significantly dilutive acquisitions could make transaction negotiations more uncertain and could hamper investment opportunities. We caution against amendments to the CBCA that would require shareholder approval of acquisitions that would result in the dilution of existing shareholders interests in the corporation in excess of 25 percent. Comparing CBCA requirements for shareholder approval of transactions involving the disposition of substantially all the property of the corporation with transactions that result in a dilution of existing shareholders interests is misguided. In the former, the nature of the transaction involves a corporation selling its assets so the corporation would have limited ability to produce future revenue to advance shareholder value. On the other hand, the focus and purpose of a dilutive transaction is to enhance shareholder value via acquisition of assets or growth potential. The concerns in a dilutive transaction are not the same as with the sale of substantially all of the assets of a corporation. While protecting shareholders from significantly dilutive transactions may be a laudable goal, the board of directors elected by the shareholders should have the flexibility and discretion to direct the affairs of the corporation.

If some form of shareholder approval is thought to be required for significantly dilutive acquisitions, a threshold for shareholder approval should be initiated by a value-based threshold as opposed to a percentage of shareholder's interests. This would align shareholder interests with the purpose of the transaction and avoid creating potential issues such as unequal treatment of shareholders in corporations with multiple classes of issued and outstanding shares.

We are concerned about proposed changes to the shareholder oppression remedy provisions. In most instances an oppression remedy is prohibitively expensive. Changes to the CBCA to resolve oppression claims may make the oppression remedy even more difficult and expensive to obtain. For example, codifying arbitration will not, practically speaking, give rise to an expedited and less expensive resolution of oppression claims. In some instances, arbitration can be lengthier and more expensive than court proceedings.

IV. SECURITIES TRANSFERS AND OTHER CORPORATE GOVERNANCE ISSUES

A. Removal of CBCA Securities Transfers Provisions

Since 2006 all provinces and territories, except PEI, have adopted uniform modern securities transfer legislation with complementary integrated provisions in their Personal Property Security Acts (PPSAs). The legislation is based on and harmonized with Article 9 of the American Uniform Commercial Code. It provides a sound legal framework for the current market in debt and equity securities regardless of the issuer. These statutes apply now to federal corporations. Provincial and territorial Securities Transfer Acts (STAs) facilitate cross-border transactions and create legal certainty for these types of transactions.

In contrast, the securities transfer provisions in Part 7 of the CBCA have not been kept up to date. The CBCA provisions apply only to the direct holding system and therefore do not accommodate the indirect holding system with the minor exception of the constructive delivery provisions in section 70 of the Act.

In response to a 2007 federal government consultation on Part 7 of the CBCA, the CBA Business Law Section recommended[9] repeal of the securities transfer provisions in the CBCA.

The securities transfer provisions in Part 7 of the CBCA should be repealed for the following reasons:

- Securities transfer law is commercial property law and should therefore not be a matter of corporate law governed by the jurisdiction of the corporate issuer. Corporate law governs the respective rights and obligations of the issuer and registered holder. In contrast, securities transfer law governs voluntary transfers of property interests in securities. This boundary between corporate law and securities transfer law should be uniformly and consistently respected. Securities, as an intangible bundle of rights that can be traded or pledged, should not be

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9 CBA National Business Law Section Submission to Finance Canada and Industry Canada, *Modernizing Securities Transfer Rules in Federal Statutes,* November 2007. Available at: www.cba.org/CBA/submissions/pdf/07-53-eng.pdf

confused with the rights of the holder of those intangibles to enforce its remedies against the issuer or the issuer's property.

- The CBCA contains no rules equivalent to those in the provincial STAs in respect of the indirect holding systems. Securities of distributing corporations are generally held in the indirect holding system and governed by the provincial STAs. Federal law in this area is therefore unnecessary.
- It is essential that securities transfer law be closely integrated with comprehensive personal property security legislation. Since there is no federal Personal Property Security Act, federal law is incomplete and therefore does not provide the necessary legal certainty.
- The current direct transfer provisions in Part 7 duplicate a number of the rules in provincial STAs and are therefore unnecessary. In some cases, Part 7's rules conflict with the rules in the provincial STAs. For example, the CBCA and some STAs define "adverse claim" differently. The CBCA defines an "adverse claim" broadly to include a wrongful transfer, which could include knowledge of restrictions on transfer under a unanimous shareholder agreement. These are issues that go beyond the property rights of a rival claimant to the securities as reflected in the transferred security certificate. In contrast, some STAs define an "adverse claim" more narrowly by focusing exclusively on competing property rights.

The concurrent provisions in the *Canada Not-for-Profit Corporations Act* (CNCA) should also be repealed.

B. Liability and Civil Remedies for Insider Trading

Although provincial securities legislation may be better suited to deal with the regulation of insider trading, the CBCA provides an important venue for shareholders of private companies to obtain a civil remedy against insiders who use material undisclosed information to the detriment of others.

Statutory restrictions on insider trading were implemented in Canada primarily as a result of the line of cases originating with *Percival v. Wright*[10] , which declared that a director (typically an insider) would not ordinarily stand in a fiduciary relationship to shareholders. This principle was reiterated in *Roberts v. Pelling.*[11] The fiduciary relationship might have otherwise been an avenue of liability for investors, at common law, at least against directors and officers of the

10 [1902] 2 Ch. 421.

11 (1981), 130 D.L.R. (3d) 761. See also: Borden Ladner Gervais LLP, *Securities Law and Practice*, 3rd ed., online: WestlawNext Canada, Thomson Reuters Canada A fiduciary relationship between an insider and a shareholder can arise when directors act in ways that brings them outside of the ambit of *Percival v. Wright.*

issuer.[12] More recent case law has emphasized that at common law there is no fiduciary obligations between shareholders.

Provincial securities legislation and the CBCA should therefore provide a statutory right of action for liability and civil remedies for insider trading to address this deficiency, and provide a right of action for those disadvantaged as a result of the use of material undisclosed information by insiders.

Liability and civil remedies under provincial securities legislation are similar across Canada but not identical. Some provincial securities legislation is more comprehensive and up to date.

There is one primary distinction for liability and civil remedies under provincial securities laws and the CBCA. Under the CBCA, provisions are not limited to trading securities of public companies. The CBCA also extends to the purchase and sale of shares of private companies where insider trading provisions of provincial securities laws apply only to public companies.

We recommend that liability and civil remedies for insider trading under the CBCA be updated and harmonized with provincial securities legislation to the extent possible. This will provide uniform statutory liability for federally incorporated companies where provincial securities legislation may be inconsistent (for example limitation periods for bringing civil action vary across Canada).

Alternatively, the CBCA provisions for public companies should be repealed, leaving provincial securities legislation to regulate insider trading for reporting issuers. The CBCA would regulate insider trading only for private companies.

C. Canadian residency requirements for CBCA directors

We recommend removing the residency requirement on directors in Subsection 105(3) of the CBCA, except for distributing corporations. This may require adding a provision to ensure companies present an officer or director for examination in the event of litigation or enforcement of judgments.

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12 *Ibid*.

There are numerous ways for corporations to circumvent the residency requirement imposed by the CBCA and in many cases it does not serve its purpose.

Often, unanimous shareholders' agreements are entered into, where the powers of the board of directors are transferred to the shareholders. As a result, Canadian directors no longer have the opportunity to present their views to influence the corporation's decisions. Since the director is not responsible for decision making, there is no greater accountability, limiting the impact of the residency requirement.

Several provinces (BC, Quebec, NS, NB and PEI) and all territories do not impose a residency requirement for Board directors. Businesses seeking to incorporate in Canada for which the residency requirement is a major consideration can opt to incorporate in a jurisdiction with no residency requirement. The concerns outlined in the consultation paper will not be addressed if the corporation chooses a jurisdiction without residency requirements.

A foreign parent corporation could elect a Canadian resident as director to meet the residency requirement, with the elected director acting as a nominee of the foreign parent corporation (a lawyer, accountant or employee of the parent corporation for example), who does not in fact influence decisions. Consequently, a Canadian perspective is not presented at Board meetings.

By removing the residency requirement, the shareholders will benefit from greater flexibility to select the best qualified persons to act as directors in the best interests of the corporation.

Some circumvention measures only concern non-distributing corporations (the unanimous shareholders' agreement and the nominee director). Maintaining the residency requirement to ensure a Canadian viewpoint on the Board may still be appropriate for distributing corporations, as they are more likely to make decisions that will impact their Canadian shareholders and other Canadian stakeholders.

We propose that the residency requirement of Subsection 105(3) of the CBCA be removed, except for distributing corporations. Subsections 105(3.1) to 105(4) should remain unchanged.

D. Trust Indentures

The CBCA currently regulates trust indentures where the issuer or the guarantor is a CBCA corporation. The CBCA also provides that the director may exempt a trust indenture from the requirements of Part VIII of the CBCA on trust indentures, "if the trust indenture, the debt obligations issued thereunder and the security interest effected thereby are subject to a law of a province or a country other than Canada that is substantially similar" to Part VIII (Subsection 83(3) of the CBCA).

The consultation paper notes that the consequence of this is that a CBCA corporation may have to meet the CBCA requirements when issuing debt in foreign jurisdictions, unless an exemption is granted by the director. Currently, some Canadian provinces (for example, Ontario and BC) regulate trust indentures offering protection comparable to that of the CBCA. Other Canadian jurisdictions do not have similar rules, or, alternatively, only have trust indenture provisions which apply for issuances of debt obligations by corporations governed by the applicable provincial corporate legislation.

The Report of the Working Group to the Uniform Law Conference of Canada, Civil Law Section tabled in August 2010 (2010 Report) recommended that the trust indenture regulations be retained so long as the US *Trust Indenture Act* of 1939 remains in force, as many Canadian bond issuers would be subject to the US legislation, even if Canada abandoned its CBCA rules on trust indentures. We agree with the conclusion of the 2010 Report.

The 2010 Report also recommended that the trust indenture rules be harmonized across Canada by the Canadian Securities Administrators adopting a National Instrument regulating trust indentures. We agree with the Working Group's conclusion that securities regulators should have jurisdiction over trust indentures, as they generally involve the distribution of securities. We also believe that adopting uniform regulations would be beneficial to avoid complexity and to accommodate and adequately protect investors operating on a national scale. Uniform rules would also eliminate duplicate provincial and federal regulation.

The Second Report of the Working Group of the Uniform Law Conference of Canada, Civil Law Section tabled in August 2011 (2011 Report) proposed a draft National Instrument to regulate trust indentures in Canada. The Working Group also proposed CBCA amendments to limit the scope of Part VIII to trust indentures "in respect of a distribution of debt obligations in respect of which a prospectus is filed or is required to be filed in Canada and the trust indenture does not comply with a prescribed law." The National Instrument would be recognized as a "prescribed law" so all trust indentures issued in accordance would not be required to comply with the CBCA rules. For the same reasons expressed for the 2010 Report, we agree with the conclusions of the 2011 Report.

Finally, the 2011 Report recommended giving the director discretion to grant exemptions from the application of relevant CBCA provisions on a case by case basis, where the exemption is not prejudicial to the public interest. We agree with the recommendation to maintain an exemption from the CBCA's trust indenture rules where the exemption would not prejudice the public.

For these reasons, we recommend that:

(i) trust indenture regulation be adopted by the Canadian Securities Administrators, as proposed in the 2010 Report and the 2011 Report;

(ii) the CBCA be amended to limit the scope of Part VIII to trust indentures that do not comply with a "prescribed law," as recommended in the 2011 Report; and

(iii) the CBCA be amended to give the Director a discretionary right to exempt a trust indenture from Part VIII, "if it is satisfied that the exemption would not be prejudicial to the public interest," as recommended in the 2011 Report.

E. Modified Proportionate Liability Regime

The complex proportionate liability regime in force under the CBCA since 2001 should be repealed. There are significant exceptions to the general rule of proportionate liability and it does not apply to:

- Certain plaintiffs such as Crown corporations and unsecured trade creditors;
- An individual plaintiff whose claim is less than $20,000;
- Cases of fraud or where a defendant is judgment proof such as an insolvent issuer. In the latter case, a court has authority to apportion that defendant's liability to the other co-defendants up to a maximum of 50 per cent of the amount originally awarded to each of the co-defendants; and
- A case where a court exercise residual discretion to award joint and several liability where it is just and reasonable to do so.

There does not appear to be any case law considering any provision in Part XIX.1 of the CBCA.

We recommend that all of Part XIX.1 of the CBCA be repealed for the following reasons:

- It conflicts with provincial negligence law that provides for joint and several liability of defendants in these circumstances.
- No provincial or territorial business corporate statute in Canada has an equivalent proportionate liability regime.

- The 2011 Ontario Law Commission report, "Joint and Several Liability under the Ontario Business Corporations Act (OBCA)" recommended against adoption of a proportionate liability regime in the OBCA. We agree with the reasons of the Ontario Law Commission.
- The common law tests for professional negligence sufficiently address concerns about excessive or unfair liability. For example, the Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 held on policy grounds that an individual shareholder could not sue an auditor (with some limited exceptions). Only the corporation itself could sue an auditor for negligent preparation of an audit report.
- The evidence of the alleged negative effect of joint and several liability on insurance premiums, insurance coverage, pricing of auditing services and entry into professions such as auditing does not justify a change.
- Trends in other jurisdictions toward proportionate liability, particularly the US, do not provide sufficient reason for reform, bearing in mind the more litigious environment in the US with its common practice of substantial punitive damages awards and the costs sanction in Canada for unsuccessful actions.

V. INCORPORATION STRUCTURE FOR SOCIALLY RESPONSIBLE ENTERPRISES AND CORPORATE SOCIAL RESPONSIBILITY

A. Socially Responsible Enterprises

Socially Responsible Enterprises (SREs) exist in many forms in Canada incorporated under the CBCA and provincial corporate legislation. These include charities, not-for-profits, cooperatives and for-profit corporations. Discussing the utility of new forms of SREs requires taking into account their potential for accomplishing valid corporate social responsibility (CSR) objectives. The goal should be not only creating new SREs but also enhancing the voluntary, socially responsible focus of hundreds of thousands of existing corporations incorporated under the CBCA that can leverage their proven for-profit capabilities to benefit CSR objectives.

The goal should also provide a mechanism for existing corporations with a CSR focus to adopt the mantle of the SRE on a voluntary basis and more robust governance provisions to enhance accountability and transparency. In this way corporations can embed CSR in their DNA and investors have a mechanism to review the corporate results in pursuit of the stated mission for which the investment was made.[13] Reform in the CBCA on the incorporation structure for SREs must balance principle-based framing with practical suggestions to promote CSR.

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13 In June 2013, the Ontario Securities Commission approved the non-profit Social Venture Connection (SVX), an MaRS online portal to help social ventures, impact funds, and impact investors connect.

The "business judgment rule", a rule of deference by the courts to business decisions of directors and officers, so long as the decisions were reasonable and defensible at the time they were made, is important to this discussion. Section 122(1) of the CBCA states that directors' and officers' decisions are constrained by a duty to act in the best interests of the corporation.[14]

Acting in the best interests of the corporation may include considering the impact of corporate decisions on different stakeholders. The scope of directors' and officers' decision-making was addressed by the Supreme Court of Canada[15] in 2004, in *Peoples Department Stores Inc. (Trustee of) v. Wise.*[16] The Court stated that a corporation's directors owe a fiduciary duty only to the corporation, not to outside stakeholders, including creditors. The Court explicitly upheld the business judgment rule, declining to second-guess directors' and officers' business decisions.

Four years later, in *BCE Inc. v. 1976 Debenture Holders*,[17] the Supreme Court of Canada upheld its decision in *Peoples*, stating that directors owe a fiduciary duty to act in the "best interests of the corporation, viewed as a good corporate citizen." When directors are resolving conflicting interests between various stakeholder groups, one set of interests should not automatically prevail – it depends on the particular situation and whether the directors exercise business judgment in a responsible way giving deference to directors' business decisions. The Court said it is "not mandatory" to consider the impact of corporate decisions on various stakeholders, but that there is a duty to treat individual shareholders "equitably and fairly."

The business judgment rule does not protect every decision the directors make. They will still be held to the standard in section 122 of acting "honestly and in good faith" and with "care, diligence and skill". Also, not every decision directors make is a "business decision". [18]

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14 *Canada Business Corporations Act*, RSC 1985, c C-44, s. 122(1).

15 Ed Waitzer and Johnny Jaswal, "Peoples, BCE and the Good Corporate Citizen," 2009, 47 OSGHLJ 429; Robert E. Milnes, "Acting in the Best Interests of the Corporation: To Whom is This Duty is Owed by Canadian Directors? The Supreme Court of Canada in the BCE Case Clarifies the Duty," 2009, 24 BFLR-CAN 601.

16 [2004] 3 SCR 461.

17 [2008] 3 SCR 560.

18 *Kerr v. Danier Leather Inc.* [2007] 2 S.C.R. 331, 2007 SCC 44 (S.C.C.) is an example of when the business judgment rule will not protect the directors. In that case, the court refused to accept that the business judgment rule protected directors who failed to make continuous disclosure as required under the *Securities Act* because the directors were interpreting a statute, not making a business decision. The court said that the interpretation of a statute is not a business decision, as it does not rely on business expertise and does not involve a range of options and considerations, where a business decision does. The court will defer to the latter but not the former.

We recommend an amendment to the business judgment rule in section 122 of the CBCA to incorporate the common law principles in the *BCE* decision. In considering what is in the best interest of the corporation, directors should be permitted to consider not only the interests of shareholders, but also other stakeholders, including employees, creditors, consumers, governments and the environment in their decision-making. In the context of benefit corporations, this should be required of directors. Directors should also be allowed to consider both short and long-term interests of the corporation, including benefits that may accrue to the benefit corporation from its long-term plans.

We also recommend that amendments state that directors need not give priority to a particular interest over any other interest or factor unless the corporation has stated in its articles of incorporation its intent to give priority to certain interests or factors.

The business judgment rule in the CBCA applies to all CBCA corporations. Clarifying the rule is separate from the recommendation to permit benefit corporations set out below.

B. Benefit Corporations

Unlike the traditional rationale of a for profit corporation, benefit corporations often have a triple bottom line: profit; people and planet.

Shareholders, consumers, companies, governments and investors have become increasingly concerned about facilitating positive impacts on society and protecting the environment. The benefit corporation provides a solution to the competing interests of shareholder wealth and societal benefit, and is a for-profit model which enables a corporation to pursue profit-generating activities while promoting positive effects on society and the environment. Benefit corporations allow for a broader definition of "shareholder value".[19]

The benefit corporation does not represent a change in corporations; it represents an evolution in the way people think about corporations and provides a modified but familiar structure.
To date, twenty US states and the District of Columbia have enacted legislation permitting the incorporation of benefit corporations.[20] There are over 500 registered benefit corporations in the US.[21] In July 2013, Delaware became the 19th state to enact benefit corporation legislation.

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19 Nic Frances & Maryrose Cuskelly, The End of Charity, 2008 (Crows Nest: Allen & Unwin).

20 http://benefitcorp.net/state-by-state-legislative-status

21 www.bcorporation.net/what-are-b-corps/legislation

This is significant as Delaware is home to most venture-backed businesses, 50% of all publicly-traded companies, and 64% of the Fortune 500. It is the most important state for businesses that seek access to venture capital, private equity and public capital markets.

In the US, benefit corporation legislation is a voluntary choice for businesses and provides an additional option for how companies can operate. Benefit corporation legislation has no impact on existing business forms. In most cases, benefit corporations are governed by the same legislation as for-profit corporations. Existing corporations have the choice to transition to or from benefit corporation status with the approval of a special majority of their shareholders. New companies can choose to be benefit corporations at the time of incorporation. A key feature of a benefit corporation is that it must have the purpose of creating a general public benefit. Additionally, benefit corporations may identify one or more specific public benefits, particular areas in which the corporation is devoted to facilitating a material positive impact. These purposes are in addition to the right to pursue any legal purpose.

Directors of a benefit corporation, when discharging their duties, shall consider effects on shareholders, employees, customers, community and the environment, but need not give priority to any interest above the others. Benefit corporations are also required to produce an annual benefit report describing how it pursued its general (and specific if applicable) public benefit during the year and the extent to which this benefit was created.

Some US benefit corporation legislation creates a benefit enforcement proceeding, a new right of action where certain stakeholders can bring a claim against the benefit corporation for failing to pursue its public benefit. We urge caution for a similar separate right of action in Canada.

We recommend that Canada adopt the benefit corporation model flourishing in the US rather than the other restrictive hybrid models available in BC, NS, and the UK. The market for benefit corporations is large, the potential impact significant, and they should be flexible and dynamic as they fundamentally operate as for-profit corporations. Companies that incorporate as benefit corporations, or amend their articles to become benefit corporations, provide their directors and officers with enhanced freedom to pursue goals in addition to profit-maximization without fear of potential liability for doing so, although the business judgment rule still applies. Concerns about marketing "phantom benefits", seeking "halo" or "green washing" advantages (which may not come to light if a company is not transparent in its reporting and its shareholders fail to take action) can be addressed by existing legislation aimed at the activities of traditional corporations (such as securities and consumer protection legislation that govern the activities of all corporations).

If, however, legislation permitting the incorporation of hybrid corporations is coupled with a tax incentive for investment in those entities, we are of the view that the need for hybrid corporations to be enshrined in the CBCA or stand-alone legislation is more obvious.

The extent to which current CBCA incorporation provisions and structures facilitate SREs is undeveloped. To completely facilitate SREs and the standard duties of directors, the CBCA incorporation provisions need to address the essential corporate governance features of benefit corporations, as well as highlight the Parts of the CBCA where SRE provisions will have to be incorporated or distinguished.

We recommend amending the CBCA to take into account and to enable benefit corporations. This will promote CSR objectives and protect shareholders, investors and directors by including some or all of the following requirements for benefit corporations:

- a special majority vote of shareholders to become a benefit corporation or revert to a regular corporation;
- a mission-driven specific benefit purpose or a general benefit purpose in the articles in addition to permitting any lawful activities a corporation may pursue;
- accountability and transparency by regular reporting requirements and disclosure;
- a limitation on liability of the benefit corporation for failing to succeed at its public benefit purpose;
- a name that clearly indicates a corporation is a benefit corporation; and
- a new liability shield for directors, except for self-dealing, willful misconduct, or a knowing violation of law.

If these recommendations are adopted, the following parts of the CBCA should be amended for the purpose of benefit corporations:

1. Part I – Interpretations & Application
2. Part II – Incorporation (s. 6. (1) –Articles of Incorporation & s. 10. (1) – Name of corporation)
    - S. 6. (1) include a provision to the effect that the corporation is an SRE.;
    - S. 10. (1) include a figurative or descriptive identifier and abbreviation for SREs
3. Part V – Corporate Finance & Part VII Security Certificates, Registers and Transfers
    - All SRE share certificates must clearly indicate that the corporation is an SRE.

4. Part XV Fundamental Changes
    - Relevant for existing corporations who elect to assume the SRE legal form.
5. Part XX Remedies, Offences and Punishment
    - Relevant because the definition of "complainant" in CBCA s. 238(d) includes "any other person who, in the discretion of a court, is a proper person to make an application under this Part." SRE provisions should expressly limit enforcement proceedings to enumerated persons.
6. For clarity in legal and corporate governance, SRE provisions should be in a separate part of the CBCA. For example, a Part XXII entitled SREs, starting with s. 269. (1) could be added. If a separate part is not viable, a new section should be added to s. 6. For example, a new s. 6(1)(c) can say: If the corporation is a SRE, a statement to that effect as follows "This corporation is a Socially Responsible Enterprise."
7. It would be prudent to avoid placing the reporting and disclosure requirements of SREs in s.155, under the Part that addresses the topic of corporate Financial Disclosure.
8. Although s. 122 (1) is valuable in that it codifies the standard of care that directors are to apply in the course of discharging their fiduciary duties, it is insufficient in addressing the substance of care (i.e. the factors that directors of benefit corporations are to consider when discharging their duties), which is the among the fundamental features of a viable benefit corporation.

C. Legislation Governing the Not-for-Profit Sector and Charities

Community based goals are currently pursued by governments at all levels, as well as the charitable and not-for-profit sectors, and the for-profit sector through CSR programs and charitable giving.

In response to the question on the utility of SREs, and the extent to which the CBCA facilitates their creation, many SREs already exist in the form of successful and productive charities and not-for-profits, the potential of which could be further unleashed with reforms to the CBCA in tandem with revisions to the regulatory framework of the *Income Tax Act.*

We recommend care in drafting any amendments to restrain the potential for abuse by those seeking a branding "halo" when the motive is strictly profit. Confusion in the market place between not-for-profits, charities and for profit entities should be avoided.

There is a concern in the not-for-profit and charity domain that benefit corporations will become unacceptable competitors. Benefit corporations are fundamentally different from charities and non-profits, the major distinguishing feature being their taxation status.

Registered charities in Canada are exempt from paying income tax, and may also issue official donation receipts to allow a donor to reduce their income tax. A non-profit organization is generally exempt from paying income tax though certain non-profits may be subject to tax on property income or on capital gains. A benefit corporation would be fully taxable as a for-profit corporation and geared to making a profit in a particular socially responsible way.

Benefit corporations would be more analogous to and would compete among traditional for-profit corporations. Benefit corporations would be created and governed by the same legislation as existing for-profit corporations with the key distinguishing feature of the requirement to declare a purpose that creates a general public benefit. Charities and not-for-profit organizations are constrained in the type of activity they may carry on. Charities must be established and operated exclusively for charitable purposes. Non-profit corporations must operate for social welfare, civic improvement, pleasure, sport, recreation or any other purpose except profit but cannot operate exclusively for charitable purposes.

Tax exempt organizations do not have shareholders and do not exist to benefit their shareholders. Instead, tax exempt organizations are governed by their members. A tax exempt organization wishing to maintain its tax exempt status must ensure that its income does not directly or indirectly benefit its members personally.

Conversely, benefit corporations will be owned by shareholders who invest with a view to receiving a financial benefit, through dividends or appreciation of their initial investment. But unlike traditional investors, receiving a financial benefit is not their sole objective. Instead, they look to receive a financial return from a corporation that is more socially responsible.

Current regulation constrains the ability of a tax exempt organization to engage in social enterprise. However, these constraints are arguably reasonable in exchange for special tax treatment. Public benefit corporations, which would not be eligible for special tax treatment, would be better suited to fill the void between traditional for-profit corporations and tax exempt organizations.

VI. CORPORATE TRANSPARENCY

We recommend maintaining the provisions in the CBCA on nominee shareholders. One cornerstone of corporate law is the privacy the corporate veil affords to shareholders. Shareholders are not publicly registered, and those who wish to remain anonymous from the board of directors own their shares through nominees. The use of nominees and trustees to maintain anonymity is commonplace in the common law world. Other legal systems have mimicked trust and agency relations to preserve anonymity in most commercial centers.

Implementing the suggested measures may give reason to jurisdiction shop, whether in Canada or abroad. We recommend a more targeted approach than what is suggested in the consultation paper.

VII. CORPORATE GOVERNANCE AND COMBATTING BRIBERY AND CORRUPTION

We see no compelling public policy reason to focus the additions under consideration only on bribery in international transactions rather than, more generally, on combatting bribery and fraud in domestic and international transactions, both public and private.

We question whether corporate legislation such as the CBCA is an effective or efficient place to impose additional records, accounting standards or audit provisions for the purpose of combating foreign bribery or foreign corruption only. Given the high percentage of closely-held private and single shareholder corporations, these requirements would add a layer of formality and cost that is unnecessary for the large majority of companies and serves a marginal benefit. If additional requirements were imposed, the extent to which they could be dispensed with should be clarified as, for example, audited statements can be by unanimous shareholder consent per s. 163 of the CBCA.

That said, despite the narrow focus of the consultation paper, the CBCA review is an opportunity to target fraud and corruption, including domestic fraud, more broadly. This can be done by strengthening and clarifying in the CBCA directors' and officers' personal liability for fraud and corruption as part of their fiduciary duties, duty of care, and duty to act lawfully, and the role of the auditor in assisting in the prevention and detection of fraud of any kind, be it employee, management or external fraud, bribery or other corruption. This would facilitate civil anti-fraud and anti-corruption enforcement actions through oppression and auditors' liability actions and would help redress the lack of effective criminal law enforcement in these areas. It would also be consistent with recommendation 4(e) of the OECD Working Group on Bribery's Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada (2011).

The consultation paper refers to the enactment of the *Corruption of Foreign Public Officials Act* (CFPOA) in 1998 but it does not mention the 2013 amendments to the CFPOA, which created a "books and records" offence. Under s. 4 of the CFPOA, it is now an indictable offence for companies, in their record keeping, to misrepresent or conceal the bribery of foreign public officials. Liability extends to directors, officers and employees as well as to companies themselves.

Moreover, as a result of the 2013 amendments, s. 5(1) of the CFPOA now applies jurisdiction on a "nationality" basis, rather than the territorial basis that is more typical under Canadian law. Companies incorporated under the laws of Canada or any province, as well as Canadian citizens and permanent residents, are subject to the s. 4 offence (as well as the bribery offence) regardless of where the acts constituting the offence took place, and even if there is no connection with Canada other than their nationality.

Because the CFPOA “books and records" offence relies on a criminal law approach, incorporating both *mens rea* requirements and a criminal burden of proof, its application is likely to pose more difficulties for enforcement agencies as compared to the books and records provisions of the US *Foreign Corrupt Practices Act* (FCPA), violations of which are enforced as a civil matter by the US Securities and Exchange Commission.

The contrast between the CFPOA and FCPA books and records offences highlights the importance, from an enforcement standpoint, of the burden of proof for regulatory offences. One possible benefit of additional records, accounting standards or audit provisions into the CBCA could be to create an offence with a lower burden of proof than that under the CFPOA.

On this topic, there were a number of views in our working group. Some are of the view that the criminal burden of proof under the CFPOA may not matter for day-to-day compliance as CFOs, corporate boards and executives are unlikely to take comfort in the heavier criminal evidentiary burden under Canadian law. They will likely require the same diligence in recording transactions or in facing red flags that raise concerns about potential unlawful payments or efforts to conceal them, as expected of corporate officials under the FCPA. Any additional records, accounting standards or audit provisions in the CBCA to address bribery in international transactions should take into account and avoid duplicating those in the CFPOA. Clarification is desired to better understand the content of those additional records, accounting standards and audit provisions or whether a parallel regulatory offence is being considered.

Another view expressed was that civil sanctions are a necessary compliment to criminal sanctions precisely because of the greater difficulty in prosecuting criminal "books and records" offences due to burden of proof and *mens rea* requirements. More stringent CBCA obligations that can be enforced through oppression remedy actions would help to redress this difficulty. This may be accomplished without imposing an additional regulatory burden on corporations by including in the CBCA an obligation for directors and officers to comply with applicable laws addressing foreign and domestic corruption.

The only laws and international instruments identified in the consultation paper are the *OECD Convention on Combatting Bribery of Foreign Public Officials* and the *CFPOA*. This implies a focus on official corruption in international business transactions. It does not mention that Canada is a party to the *United Nations Convention Against Corruption (UNCAC),* which applies to both public and private corruption. In particular, Article 12 of the UNCAC addresses private corruption, including books and records activities and auditing and accounting standards. Further, the consultation paper refers to "bribery in international transactions" generally, which could include purely private sector corruption.

We question whether the current consultations extend to records, accounting standards and audit provisions only for public corruption or also for private commercial corruption. While there is a *Criminal Code* offence for private commercial bribery (s. 426: "secret commissions") there is no equivalent to the CFPOA "books and records" offence, and jurisdiction over s. 426 offences is territorial. For public companies, a starting point would be to consider whether the issue is adequately addressed by disclosure requirements under Canadian securities law.

The consultation paper focuses exclusively on international transactions. We see no reason why any additional provisions should not apply equally to domestic transactions involving the corruption of public officials, and possibly to domestic private commercial transactions. There are various *Criminal Code* offences (ss. 119-125) addressing domestic bribery and corruption of public officials but no equivalent to the CFPOA "books and records" offence.

VIII. DIVERSITY OF CORPORATE BOARDS AND MANAGEMENT

The CBA welcomes and supports promoting diversity on corporate boards under the CBCA regime. Representation from different groups can bring fresh perspectives and improve the board's effectiveness with a diversity of backgrounds and problem solving approaches.

However, legislating diversity may be more applicable to distributing corporations than to small owner managed enterprises.

The TD Economics Special Report[22] states that Canada currently lags behind other nations in its efforts to ensure fair gender representation of women. It has become part of global corporate best practice to ensure boards have gender balance. Several domestic regulatory regimes have recommended including gender and cultural diversity in board composition. The Ontario Securities Commission, for example, recently published a new rule which includes disclosure of targets for women on boards and the existing number of women on boards.

However, measures to increase diversity on corporate boards should not be too heavy handed to obstruct the ability of boards to function and should be consistent with existing domestic practices. Increased reporting requirements and targets for board composition can and have been effective measures to encourage corporate boards to diversify their composition. The TD Economic Special Report notes that “comply or explain” policies have proven to be most effective in balancing gender representation. These measures should be favoured over more aggressive measures such as quotas and penalties for violation.

Many jurisdictions, most notably in Europe, have taken legislative or regulatory action to address gender diversity gaps on corporate boards. For example, Norway enacted legislation in December 2003 to establish a quota of 40% women on boards of directors and required compliance by state-owned enterprises by 2006 and publicly traded companies by 2008. Where a company fails to comply, the registry may refuse to register the board. Continued non-compliance can result in the dissolution of the company by court order.[23]

In Belgium, where a quota of 33% is mandated, post compliance date, failure to comply with the quota will result in any newly (re)appointed director of the majority gender being void. After an additional year of non-compliance, benefits and compensation for all board members are suspended until the company is in compliance.

Finland, France, Iceland, Israel, Italy, Kenya, the Netherlands and Spain have legislated quotas for gender representation on boards of publicly traded, privately held, or state owned

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22 Available at www.td.com/document/PDF/economics/special/GetOnBoardCorporateCanada.pdf

23 see Catalyst: Increasing Gender Diversity on Boards: Current Index of Formal Approaches: www.catalyst.org/knowledge/increasing-gender-diversity-boards-current-index-formal-approaches.

enterprises, with varying sanctions for non-compliance. Many jurisdictions do not have punitive measures for non-compliance.

Several jurisdictions, including Australia, Austria, Belgium, Denmark, Finland, Germany, Iceland, Ireland, Kenya, Luxembourg, Malawi, the Netherlands, South Africa, Spain, Sweden and the UK have adopted "comply or explain" policies. Such policies are generally in Corporate Governance Codes with recommendations on addressing diversity.

While many of these are relatively new, data suggests that jurisdictions which have legislated or regulated gender diversity have seen increases in gender representation. We assume that similar initiatives in Canada will result in a similar improvement in diversity.

We support Industry Canada conducting a balanced research and review of what measures work for other regulatory regimes and how they can be adopted in Canada. Regardless of which measures are used to promote diversity on corporate boards and management, oversight and resources must be available to corporations to achieve diversity goals, including assistance in searching for qualified board members from diversity groups and appropriate training to newly appointed board members.

IX. ARRANGEMENTS UNDER THE CBCA

A. OVERALL RECOMMENDATIONS

The CBCA arrangement provisions should be used to affect balance sheet restructurings of insolvent corporations. Additional CBCA provisions, similar to those in insolvency statutes, are necessary to protect the interests of stakeholders.

B. CONCEPTUAL AND TECHNICAL ISSUES

CBCA balance sheet restructurings are perceived by the marketplace as an attractive alternative to the *Companies' Creditors Arrangement Act* (CCAA) and the *Bankruptcy and Insolvency Act* (BIA). The CBCA restructuring process has advantages over a CCAA/BIA restructuring process in that it is generally cheaper (no court appointed officer, shorter process) faster (as little as 30 days), and does not involve all the creditors (just debt and equity). In addition, equity holders have a greater chance of preserving some value. The CBCA is used to implement strictly a financial restructuring.

The proposal to use CBCA arrangements to restructure insolvent corporations will codify what is already being implemented in practice in the marketplace, bringing certainty to the process. The courts have, in essence, already permitted insolvent companies to successfully effect pure balance sheet capital restructurings under section 192 of the CBCA. The consultation paper notes that courts have allowed companies to bypass the solvency requirement either in circumstances where the applicant corporation is insolvent at the interim hearing date, but solvent at the date of the final order approving the arrangement, or where there are two or more applicants, as long as one of them is solvent. Courts are already using discretionary powers under section 192(4) of the CBCA to award CCAA-type remedies to companies. In *Abitibi*[24], the court granted a stay of proceedings order, a no default order and a continued supply order recognizing that the orders were necessary for the corporation's continued existence. The court in *Abitibi* drew parallels between the CCAA and section 192(4) and how they share similar goals.

Case law has evolved to explicitly recognize the legitimacy of using section 192 as a means for insolvent companies to restructure debt. Such cases are limited to securities that are debt obligations, not generally trade debt or other liabilities. Courts have conclusively determined that section 192 is an appropriate way to restructure debt[25] and have allowed insolvent companies to avail themselves of section 192 where one or more parties applying for court approval were solvent or where the insolvent applicant would be solvent after completing the arrangement.[26] Finally, courts have shown the same level of pragmatic flexibility in applying discretion similar to the exercise of CCAA discretion to enable companies to obtain CCAA-like remedies, such as a stay of proceedings, no default orders and continued supply orders.[27]

For these reasons, we recommend that the CBCA apply to insolvent corporations. However, if the solvency requirement is removed, subsidiary technical questions must be addressed:

- Should there be a test for insolvency and if so which one should be used?

  The test for insolvency should be the one in section 192(2) of the CBCA: A corporation is insolvent (a) where it is unable to pay its liabilities as they

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24 In the Matter of a Proposed Arrangement by: 45133541 Canada Inc., 45133550 Canada Inc. and Abitibi-Consolidated Inc., [2009] QJ No 18337 ("Abitibi").

25 See e.g. Abitibi; In the Matter of the Proposed Arrangement by Mega Brands et al, [2010] QJ No 1377 ("Mega Brands"); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.

26 See e.g. Abitibi; Mega Brands; In the Matter of a Proposed Arrangement by Yellow Media Inc. and 8254320 Canada Inc., July 23, 2012, No. 500-11-043034-129 (QSC) ("Yellow Media"); Re St. Lawrence & Hudson Railway Co., [1998] OJ No 3934.

27 See e.g. Abitibi; Re Trizec, [1994] AJ No 577; In the Matter of a Proposed Plan of Arrangement of Tembec Arrangement Inc., Tembec Industries Inc. and Tembec Enterprises Inc., January 24, 2008, No. 08-CL-7367 (Ont. S.C.)("Tembec").

become due; or (b) where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes.

- What thresholds to using section 192 should there be (any company size threshold whether defined by debt assets or employees?)

  No additional eligibility requirements should be added to the CBCA in order to access section 192 beyond codifying that it should apply to insolvent companies in addition to solvent companies.

- Should the application of section 192 be to corporate groups and other business ventures?

  Plans of arrangement have been approved for groups of companies, as was the case in the Abitibi-Consolidated Inc. line of cases in 2009. No change is required for insolvency.

- Should there be an initial stay and if so, what should the scope of the initial stay be?

  Section 192(4) of the CBCA gives courts a general discretion to "make any interim or final order it thinks fit". Courts have discretion to issue a stay of proceedings against creditors' actions. We propose that this be expressly stipulated in section 192(4). The scope of the initial stay should cover all creditors exercising remedies against the debtor or the debtor's assets or the commencement or continuation of any actions, execution or other proceedings against the debtor for 30 days at a time unless the court orders otherwise.

  Recent case law under the CBCA maintains this rationale for a balance sheet restructuring. In *Abitibi* and *Tembec*, the interim orders contained stays of proceedings to avoid any disruption of business during the approval process. The court noted in *Abitibi* that in the context of a debt restructuring, subsection 192(4) of the CBCA and the CCAA share similar goals, namely to provide a broad procedure aimed at facilitating the restructuring of corporations.

- Should Debtor-In-Possession (DIP) financing be available to the debtor?

  For the same reasons noted above, to facilitate the balance sheet restructuring of corporations, section 192(4) of the CBCA should also be amended to expressly permit an order for DIP financing, aligning the CBCA more with the CCAA.

- Should interim asset and division sales be permitted?

  We recommend that the plan of arrangement provisions of the CBCA be used as a vehicle for insolvent corporations to affect balance sheet capital restructurings. However, while using these provisions to achieve a purchase and sale could be a good idea in principle, determining whether statutory language should be added to this effect would have to be worked through in greater detail to ensure that the appropriate safeguards were in place. In the interim, the court can accomplish this via its broad discretion in section 192(4); otherwise the applicant may choose to initiate a parallel CCAA proceeding for the purchase and sale.

- What cross border provisions should be included?

  CBCA plans of arrangement have been recognized under Chapter 15 of the US Bankruptcy Code.[28] Because Chapter 15 is a codification of the UNCITRAL Model Law on Cross Border Insolvency, any other jurisdiction that has codified the UNCITRAL Model Law will likely be able to recognize a CBCA plan of arrangement. To ensure that proceedings under the CBCA and foreign insolvency proceedings are coordinated, the CBCA should have cross border provisions similar to those in the CCAA to give courts wide discretion to facilitate, approve, or implement arrangements under the foreign proceedings.

X. ADMINISTRATIVE AND TECHNICAL MATTERS

A. Should property of dissolved corporations that has vested in the Crown under the CBCA automatically be returned to revive CBCA corporations?

The escheat of property on dissolution is an antiquated artifact of another era. Dissolution can happen for many inadvertent reasons. There is no policy reason why the Crown should keep the property on the windfall of an escheat if there is a legal basis to revive the company. Doing otherwise will prejudice shareholders and creditors needlessly, and impose what amounts to a random arbitrary tax.

B. Should there be a time limit on the money held by the Receiver General for unknown claimants of dissolved corporations?

Any time limit should recognize modern methods to locate the owners. At present, the Receiver General does not advertise or otherwise locate owners. This may have been acceptable when it was hard to locate owners, but big data and electronic communications make it cheaper and easier.

Time limits need to be coupled with a process that advertises the existence of unclaimed funds, uses federal data to locate the owners, and provides an easy way to search the database of unclaimed monies. The privacy of related parties must be protected, but the law could exempt any privacy restrictions that unnecessarily impede people from reclaiming their funds.

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[28] See Mega Brands.

C. Should there be a time limit on the revival of a corporation that has been dissolved? Further, before returning property to a revived corporation, should the Crown be able to recover money spent on that property?

Yes and no. On the first issue, many provincial statutes have a time limit, for example five years in the OBCA. It might be wise to create an outlet valve beyond five years if special circumstances exist.

The second issue is an answer in search of a problem. It will be more costly to administer than it is worth because it doesn't happen often. If the Crown has a claim, it can sue in *quantum meruit* and like doctrines without an amendment.

G. Should the *Canada Business Corporations Act* more fully recognize beneficial owners of shares by giving them more of the rights of the registered shareholders (e.g. right to vote, right to dissent).

Throughout the consultation paper, Industry Canada has raised the issue of the treatment of beneficial owners of securities, including the ability to send proxy-related materials to beneficial owners and giving them more rights, such as the right to vote and dissent.

Issues such as "empty-voting" and disclosure by nominee shareholders of the identity of the beneficial holders for whom they are acting are related. We agree that, given the prevalence of shareholders who hold their shares through intermediaries, the issue of rights and obligations of beneficial owners needs to be addressed. However, we urge Industry Canada to undertake a thorough review of the issues, including the different ways in which interests in securities may be held, as well as the appropriate rights and obligations of those holding their interests other than in directly registered form. It is also important to harmonize the treatment of beneficial owners under applicable securities and securities transfer legislation and the CBCA and in the CBCA itself. For example, while beneficial owners do not have the right to dissent, they do have the right to requisition a meeting.

Whatever the policy rationale for granting or withholding rights to beneficial shareholders, the CBCA should be consistent and clear about the rights that apply to registered shareholders only or to both registered and beneficial shareholders.

Securities transfer legislation also has elements of the infrastructure necessary to protect the interests of beneficial holders by, among other things, imposing duties on intermediaries and others in the indirect holding system. Removing securities transfer provisions from the CBCA and applying provincial securities transfer legislation to CBCA corporations would better protect the interests of beneficial shareholders.

H. Should the requirement for non-distributing corporations to solicit proxies have a higher shareholder threshold or be removed altogether?

Currently the CBCA requires non-distributing corporations with more than 50 shareholders to solicit proxies. Most non-distributing corporations are small or medium sized corporations and the costs of soliciting proxies (e.g. to draft and mail the proxy circular) are significant. Typically, the shareholders are employees, consultants, directors and others actively involved in, or aware of the operations of the corporation. Many (if not all) of these shareholders may also be bound by agreements regulating the exercise of their rights as a shareholder, such as attending meetings, voting or consenting to an action of the corporation. The requirement to solicit proxies places a high cost on these corporations and does not necessarily provide any material additional benefit to shareholders. For distributing corporations, similar rules and requirements relating to proxy solicitation are replicated in securities laws.[29]

Given that proxy solicitation and meeting matters are well regulated by securities legislation for distributing corporations, and most CBCA corporations are small or medium sized non-distributing corporations[30] for whom the requirement to solicit proxies typically has a high cost and provides no material additional benefit to shareholders, we support removal of proxy related provisions in the CBCA and allowing non-distributing corporations to manage proxy solicitation and related processes through shareholder agreements or bylaws or as they otherwise see fit. Alternatively, we urge Industry Canada to consider whether this provision should exclude current and former employees from the determination of the number of shareholders to be consistent with the exemption from formal take-over bid requirements[31] and the "private issuer" exemption under securities legislation for the issuance of securities without a prospectus.[32] This should be done on the same principle that current and former employees, to the extent that they are shareholders, do not require the same protections (in the form of rights to information) as other shareholders given their close involvement with the corporation.

[29] See Part 9 of NI 51-102.

[30] Consultation Paper, Introduction, p. 1.

[31] Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids section 4.9 and OSC Rule 64-504 Take-Over Bids and Issuer Bids section 6.1

[32] National Instrument 45-106 *Prospectus and Registration Exemptions* s. 2.4(b)(ii) which excludes from the determination of the number of securityholders current and past employees of the issuer or its affiliates.

I. Should the threshold exception in the CBCA be raised so that a person is permitted to solicit proxies, other than by or on behalf of the management of the corporation, without sending a dissident's proxy circular if the total number of shareholders whose proxies are solicited is more than fifteen?

For the same reasons, we support the ability of non-distributing corporations to govern themselves as they see fit, since many shareholder protection concerns giving rise to the proxy solicitation provisions do not apply to non-distributing corporations, which tend to be closely held by one or a few shareholders who are actively involved and where shareholders can use other mechanisms to facilitate participation and protection (e.g. a shareholder's agreement with veto rights, approval thresholds for specified actions by the corporation and information rights or use of bylaws specifying quorum and meeting requirements).

We recommend provisions governing proxy solicitation allow non-distributing corporations to manage their own proxy solicitation and related processes through private agreements amongst shareholders or their by-laws or as they otherwise see fit.

XI. OTHER (COMPLETE REVIEW AND REFORM OF THE CBCA)

Although the subjects covered in the consultation paper are important, we believe a complete review and reform of the CBCA is required.

The CBCA last underwent reform in 2001. At that time leading Canadian corporate law authors declared that:

- "The CBCA is scheduled for a further examination in five years. (…) although Bill S-11 has gone far in modernizing and improving federal corporations law, it has left some work to be done."[33] and
- "We should not wait another 25 years for the CBCA to be modernized again. We hope that some of the technical details mentioned throughout this text which are still imperfect or unresolved will be corrected or completed in the near future".[34]

Many subjects were not finalized in the 2001 reform. Since 2001, many Canadian provinces have undergone major reviews and reforms of their corporate legislation: British Colombia in 2004; Alberta in 2005; Manitoba in 2006; Ontario and Saskatchewan in 2007; Nova Scotia in 2008 and Quebec in 2011.

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33 Wayne D. Gray and Casey W. Halladay, *Guide to CBCA Reform: Analysis and Precedents*, Carswell, 2002, at page 72

34 Paul Martel, *Reform of the Canada Business Corporations Act 2001*, Fasken Martineau, at page 94.

The CBCA should be examined regularly for constant improvements and a complete review be made every five years. Delaware, a popular incorporating jurisdiction, frequently updates its General Corporation Law, making it very attractive for new businesses. Delaware is not reluctant to modify its General Corporation Law when an interpretation by the courts does not correspond to the State vision of its law.

Annex A lists proposed modifications to the CBCA. The list is not exhaustive and many more amendments may be suggested by other corporate law experts and through further consultations. Imprecision and ambiguity of the CBCA can lead to loss of time and money and may increase the complexity of transactions.

Although reform of the CBCA is essential to maintain the federal jurisdiction's leadership in the corporate field, it is also important that services provided by Corporations Canada be maintained at the highest level. In recent years, the information reflected in the corporate profile of federal jurisdiction corporations has diminished to the extent that it is now necessary to pay to find out who the directors of a federal corporation are. This goes against the current practice of making the most information available to the public via the Internet. Instead of diminishing the information appearing in the corporate profile, additional information should be provided with no cost to the public. We hope Corporations Canada will restore this service promptly and that the Register of Corporation Canada will be more complete so that third parties may rely on the information contained in such Register.

XII. CONCLUSION

We thank Industry Canada for the opportunity to comment on the proposed changes to the CBCA. We encourage further consultations with the public and interested stakeholders on any specific proposed changes to the CBCA. We hope our comments will assist Industry Canada in amending and updating the legislation. The CBA would welcome the opportunity to be of further assistance through future consultations, reviews or development of proposed legislation, or through any future dialogue.

ANNEX A

PROPOSED MODIFICATIONS IN ADDITION TO THE CONSULTATION PAPER TO CANADA BUSINESS CORPORATIONS ACT ("CBCA")

	Proposed modification to the CBCA	Reasons for the proposed modification	Jurisdictions where the proposed measure exists
a.	**Certificate**		
1.	Possibility to timestamp all certificates issued by the Director (i.e. certificate of incorporation, certificate of amendment, certificate of amalgamation, certificate of continuance, certificate of arrangement, etc.).	Allows to specify the sequence of a series of transactions.	Quebec
2.	Pre-incorporation agreements should be extended to verbal agreements and not only to written agreements as specified in s. 14(2) CBCA.		
b.	**Capital**		
3.	Possibility to create par value and non-par value shares.	Par value shares are useful for tax purposes because the par value can be added to the stated capital account and the excess of the amount received for the issuance of the shares can be added to the Contributed Surplus Account.	British Columbia Prince Edward Island New Brunswick Nova Scotia
4.	Possibility for a corporation to include in its articles that the shares of two or more classes or two or more series of the same class carry the same rights and restrictions.	Useful for corporate reorganizations (for tax purposes) because it allows for the creation of classes or series of shares subject to the same rights and restrictions, but with their own stated capital account.	Quebec Ontario British Columbia

	Proposed modification to the CBCA	Reasons for the proposed modification	Jurisdictions where the proposed measure exists
5.	Removal of the accounting tests in the CBCA.	Creditors are adequately protected by the solvency test, shareholders are adequately protected by the general duties of directors and the remedies available to shareholders.	Quebec British Columbia
6.	S. 43 CBCA should specifically provide the possibility for the board of directors to declare and the corporation to pay a dividend in options or rights to acquire fully paid shares of the corporation.	Gives more flexibility to corporations in the context of reorganizations.	
7.	Specify that the corporation may issue fractional shares and that the rights of fractional shareholders are proportionate to the fraction of the share held.	The express right to issue fractional shares should be clearly stated in the CBCA instead of having to assume said right exist because s. 49 CBCA allows the corporation to issue share certificates for fractional shares.	Quebec British Columbia
8.	Possibility for the board of directors to authorize the splitting or consolidation of the shares of the corporation by way of resolution and without amending its articles when the authorized share capital is unaffected.	Simplification of the formalities when the authorized share capital is unaffected.	Quebec Alberta Prince Edward Island
9.	Possibility to issue shares even if not fully paid.	Provides flexibility to the Corporation.	Quebec
10.	Specify at s. 27 CBCA that the number of shares to be issued in series may be unlimited.	Clarification is necessary because s. 27 CBCA states that the number of shares to be issued in series must be “FIXED”. It is unclear whether “an unlimited number” is “FIXING” the number of shares to be issued in series.	

	Proposed modification to the CBCA	Reasons for the proposed modification	Jurisdictions where the proposed measure exists
11.	S. 28 CBCA should also include the pre-emptive right provided for in a unanimous shareholder agreement.	It would clarify the obligations of the Corporation and the right of the existing shareholders when a pre-emptive right is established in a unanimous shareholder agreement.	
c.	**Shareholders**		
12.	Possibility for a corporation to hold shares of its parent corporation for a limited period of time (i.e. 30 days).	Facilitates the restructuring of corporate groups by giving the time required to perform certain transactions between corporations of the same group.	Quebec British Columbia Alberta
13.	Possibility to waive, by unanimous resolution of the shareholders, the requirement to hold an annual general meeting.	Simplification of the formalities.	British Columbia
14.	Possibility for the shareholders (or even the directors) to approve by ordinary resolution a contract or transaction when all of the directors are required to abstain from voting due to a conflict of interest.	The provisions of the CBCA regarding Disclosure of Interest must be clarified. Difficulties arise when inter-corporation agreements must be approved by the director(s) of affiliated corporations. Also, exceptions should be provided when dealing with one-person corporation.	Quebec Ontario British Columbia
15.	S. 146(6) CBCA only refers to shareholders. It should also include any person who is not a shareholder and to which the powers of the directors were transferred by the effect of a Unanimous Shareholder Agreement.		

	Proposed modification to the CBCA	Reasons for the proposed modification	Jurisdictions where the proposed measure exists
d.	**Directors**		
16.	A provision similar to s. 125(3) OBCA should be added to the CBCA with respect to the determination of the number of directors to be elected or appointed.	It would clarify how the shareholders or directors may decide of the number of directors to be elected or appointed.	Ontario
17.	Removal of the Canadian residency requirement for board of directors as mentioned previously and also for the managing director (with some exceptions).	Gives more flexibility to corporations regarding the composition of their board of directors. Allow corporations to include the best qualified people in their board of directors and thus help optimize returns for shareholders and income for Canada.	British Columbia Quebec New Brunswick Nova Scotia Prince Edward Island
18.	Possibility for the board of directors of a corporation that has no shareholders to make amendments to the articles that normally require shareholder authorization.	Gives the possibility to the board of directors to make amendments to the articles when the corporation has no shareholder, especially when the company is incorporated and no shares have been issued.	Quebec
19.	Possibility of not having a Board of Directors when a Unanimous Shareholders' Agreement has removed all powers of the directors in favour of the shareholders or any other person.		
20.	The directors should be allowed to resign by remitting their resignation to the legal representative (lawyer) of the Corporation.	It would give more flexibility to the directors.	British Columbia
21.	A specific provision should permit a sole director to resign and be able to appoint a replacement director when there is no shareholder.		

	Proposed modification to the CBCA	Reasons for the proposed modification	Jurisdictions where the proposed measure exists
22.	Specify at s. 106(3) CBCA that directors may be elected by resolution of shareholders without requiring that it be done at the annual meeting of shareholders.	Would give clarification.	N/A
23.	Clarify s. 109 CBCA to establish that a director may be removed by resolution in writing of the shareholders without the necessity of holding a shareholders meeting.	Clarification is necessary because it is unclear if s. 109 CBCA (the necessity to hold a meeting for removal of a director) overrides the right to use written resolutions of shareholders as established in s. 142 CBCA.	N/A
e.	**Financial disclosure**		
24.	Possibility for the corporation to choose not to send copy of the financial statements to the shareholders prior to an annual general meeting.	Simplification of the formalities and reduced costs for the corporation.	Quebec British Columbia Ontario Prince Edward Island
25.	Possibility to waive the preparation of financial statements for "private corporations".	Simplification of the formalities.	British Columbia
f.	**Amalgamation & Dissolution**		
26.	Possibility of amalgamation involving Canadian and provincial corporations.	Simplification of the procedure when amalgamating corporations of different Canadian or provincial jurisdictions in order to eliminate the obligation to continue the provincial corporation to a CBCA corporation before amalgamating.	British Columbia
27.	Allow short form horizontal amalgamation when the shareholder is an individual and not a holding body corporate	Simplification of the formalities.	Quebec

	Proposed modification to the CBCA	Reasons for the proposed modification	Jurisdictions where the proposed measure exists
28.	Change s. 210(3) CBCA in order to allow the corporation to make provisions for its liabilities rather than to discharge its liabilities.	Clarification is necessary because when a parent corporation dissolves its wholly-owned subsidiary the distribution agreement provides for the assumption of liabilities by the parent corporation and the liabilities of the dissolved corporation are not necessarily "discharged".	N/A
29.	Possibility for the sole shareholder of a corporation to dissolve it without any other requirement than a declaration to that effect.	Simplification of the formalities for one-person corporations.	Quebec
30.	Grant a specific power to the court to make any interim order without having to satisfy the traditional conditions of an interim injunction or safeguard order.	As a general rule, courts will not render an interim judgment if the plaintiff is not able to satisfy all conditions of the interim injunction or safeguard order.	
g.	**Others**		
31.	Possibility of incorporating Unlimited Liability Companies ("ULC").	ULC's attract U.S. investors and non-U.S. investors acquiring or restructuring businesses in Canada since ULC allows foreign investors beneficial tax treatments from the availability of foreign tax credits without incurring loss of tax revenue in Canada.	Nova Scotia Alberta British Columbia
32.	Update of the terminology used in the CBCA in general. For example, the French version of the CBCA refers to "vérificateur" when the Chartered Accountants Act (R.S.Q., chap. C-48.1), refers to "auditeur". S. 29 CBCA refers	Harmonize and update the terms used in French and English legislation to reflect the current terminology of corporate practice.	N/A

	Proposed modification to the CBCA	Reasons for the proposed modification	Jurisdictions where the proposed measure exists
	to "privilège de conversion" when the proper term should be "droit d'échange". Also, in s. 176(1)(b), CBCA, the term "reclassification" should be defined or a different term should be used. The term "Capital social" should be changed to "Capital-actions".		
33.	S. 265 CBCA and the policies related to correction of articles should be extended to allow the correction of all documents (Form 3 & 6, etc.) and the requirements and procedure should be simplified when the error was made by the legal expert.	Simplification of the procedures.	Quebec