



# ICGN

International Corporate Governance Network

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Date: 15<sup>th</sup> May 2014

Dear Sir

## **Re: Consultation on the Canada Business Corporations Act**

The International Corporate Governance Network (ICGN) is an investor-led organisation of governance professionals with members including institutional investors responsible for assets under management in excess of US\$18 trillion. Our members are based in over 50 countries and, in addition to investors, represent all parties interested in the field of corporate governance including company directors and secretaries, professional advisors and academia.

Established in 1995, our mission is to inspire and promote effective standards of corporate governance to advance efficient markets and economies world-wide. This is achieved through influencing public policy on corporate governance issues by engaging with regulators and responding to public consultations, connecting peers around through international events, and informing members on emerging issues through guidance and education programmes. For more information about ICGN please visit [www.icgn.org](http://www.icgn.org).

The ICGN welcomes the opportunity to comment on Industry Canada's consultation on the 'Canada Business Corporations Act (the CBCA) and draws upon the experience of our members in providing our response. In addition, ICGN has adopted statements of principles and best practice guidance that bear on a number of the questions raised in the consultation and we address our comments on the following sections:

- I. Executive compensation
- II. Shareholder Rights
- VI. Corporate governance and combatting bribery and corruption
- VII. Diversity of corporate boards and management
- IX. Corporate social responsibility

Our detailed comments on issues for discussion in the consultation are as follows:

### **I. Executive compensation**

***Since the release of the Standing Committee on Industry, Science and Technology's report in June 2010, the issue of executive compensation has continued to attract***

***considerable interest from provincial regulators, investors and the public. Stakeholders and others are invited to provide input on whether the provisions of the CBCA reflect corporate best practices and the interests of shareholders in this area.***

The ICGN advocates that shareholders should have an opportunity to vote on the remuneration policies, particularly where significant change to remuneration structures is proposed or where significant numbers of shareholders have opposed a remuneration resolution. In particular, share-based remuneration plans should be subject to shareholder approval before being implemented.

The board should ensure that the development of remuneration structures for company employees reinforce, and do not undermine, sustained value creation. Performance-based remuneration for staff should incorporate risk, including measuring risk-adjusted returns, to help ensure that no inappropriate or unintended risks are being incentivised. While a major component of most employee remuneration is likely to be cash-based these programmes should be designed and implemented in a manner consistent with the company's long-term performance drivers.

Performance measurement should integrate risk considerations so that there are no rewards for taking inappropriate risks at the expense of the company and its shareholders. Performance related elements should be rigorous and be measured over timescales, and with methodologies, which help ensure that performance pay is directly correlated with sustained value creation. Companies should include provisions in their incentive plans that enable the company to withhold the payment of any sum, or recover sums paid ("clawback"), in the event of serious misconduct or a material misstatement in the company's financial statements.

The board should make substantive disclosure of all significant aspects of remuneration policies and structures. This should include how remuneration awards made in a given year were determined and deemed appropriate in the context of the company's underlying financial performance. This information should be reported for the CEO and each key individual or executive. Ultimately, remuneration should be proportionate to motivate sustained value creation and effectively align the interests of the CEO and senior management with those of shareholders.

## **II. Shareholder Rights**

### **II. A Voting**

***Shareholder voting rights are the foundation of corporate democracy, and a transparent, accurate, efficient and accountable shareholder voting process is fundamental to good corporate governance and the maintenance of market confidence. Stakeholders and others are invited to provide input on whether the shareholder voting provisions of the CBCA adequately facilitate shareholder democracy.***

#### **Mandatory voting by ballot at shareholder meetings and disclosure of results by public companies**

The ICGN would be generally supportive of the introduction of mandatory recorded votes as a requirement for public companies under the CBCA. In particular, it would be advantageous if the outcome of the vote and voting levels for each resolution were published promptly after the meeting on the company website.

In the event that a particular resolution was opposed by a significant proportion of votes, the ICGN encourages companies to explain subsequently what actions were taken to understand and respond to the concerns that led shareholders to vote against management.

#### Individual election of directors and “slate voting”

Shareholders should have a separate vote on the election of each director, with each candidate approved by a simple majority of shares voted. In this regard, we would be supportive of a prohibition on the practice of ‘slate’ voting.

#### Maximum one-year terms and annual elections for directors

Board members should be conscious of their accountability to shareholders. Accountability mechanisms may require directors to stand for election on an annual basis or to stand for election at least once every three years.

#### Director election by majority vote

We support the introduction of a majority voting standard for uncontested director elections. We believe it is basic shareholder protection to be able to elect and remove directors on the basis of a simple majority vote. There should be a requirement that any incumbent director not achieving a majority of the votes cast, resign promptly and with finality. Only in extreme circumstances, for example if the entire board was not elected, should a director not receiving a simple majority be able to be re-appointed, and then only for a defined and brief period during which a replacement board is appointed.

#### Over-voting of voting rights attached to corporate shares

Proxy voting infrastructures that are unable to determine with certainty, the number of votes that are eligible to be voted on a corporate matter, and do not have the right to exercise those votes, are unwelcome in our view. Vote entitlements in lists of beneficial shareholders must be fully reconciled, so that one individual can provide instructions for voting relating to each share. Confirmation forms should be received from issuers, fully reconciling vote entitlements in lists of beneficial shareholders, confirming that the voting instructions have been received and properly recorded at meetings. We further submit, that an independent, operational audit should be undertaken, of the proxy voting system on a regular basis, to confirm the integrity of the system, or identify any material deficiencies, so that corrective action may be taken. It is our view that federal regulations in this context would not be helpful and instead, provincial securities commissions ought to address such issues.

#### Empty voting by shareholders without an economic interest in the company

Disclosure requirements for empty voting would assist with the identification of areas where the problem is likely to arise, although they may not be sufficient to address the underlying issue. It is generally assumed that shareholders will vote by exercising rational and focus on their own economical interests. Empty voting has the potential to pervert the model of corporate decision-making and thus, compromise confidence in the capital markets.

Shareholder democracy rests on the premise that shareholders have a common interest: a desire to enhance the value of their investment. Empty voting can present some challenges for shareholder democracy as the right to vote may not be directly associated with the other incidents of equity ownership, resulting in governance decisions that may not benefit the entire class of equity holders.

When an empty voter is able to influence the outcome of a meeting, and a clear remedy is unavailable, than action to counter empty voting is appropriate. In our submission, securities

laws do not offer obvious solutions, although the public interest jurisdiction of the commissions could be invoked. Mandating the disclosure of empty positions is another option and public companies could include measures to combat empty voting concerns within their by-laws.

## **II. B Shareholder and board communication**

***The ability of shareholders to communicate effectively and efficiently with both corporate management and other shareholders is integral to maintaining investor confidence and facilitating good corporate governance. Stakeholders and others are invited to provide input on whether the provisions of the CBCA could enhance communication between shareholders and corporate management, and among shareholders themselves, and whether the provisions are consistent with technological advances.***

### Electronic meetings for public companies

The ICGN welcomes increased use of technology to enhance shareholder participation at general meetings. However we would not support public companies limiting shareholder meetings to electronic-only formats. The board should ensure that shareholders have the right to ask questions to the board, management and external auditor both before and during the general meeting.

### Facilitation of 'notice and access' provisions

We support the facilitation of corporate communication through the use of technology to allow companies to post documents on company websites for shareholder to download. The board should ensure that the general meeting agenda is posted on the company's website at least one month prior to the meeting taking place. This helps to ensure that shareholders receive sufficient information in a timely manner regarding the date, location and agenda of general meetings. The agenda should be clear and properly itemised and include information regarding the issues to be decided at the meeting.

### Access to proxy circular by 'significant' shareholders

We support the amendment of the CBCA to permit significant shareholders (holding more than 5% of the shares) to include their alternate nominees for directors in the management proxy circular at no cost or to allow for reimbursement of costs by the company. Shareholders should be able to nominate candidates for board appointment. Such candidacies should be proposed to the appropriate board committee and, subject to an appropriate nomination threshold (e.g. voting rights of 5%), on the company's proxy card.

### Equal treatment of shareholders in proxy process

The board should ensure that the company maintains a record of the registered owners of its shares or those holding voting rights over its shares. Shareholders should be able to review this record of registered owners of shares or those holding voting rights over shares.

The board should ensure that the general meeting agenda is posted on the company's website at least one month prior to the meeting taking place. This helps to ensure that shareholders receive sufficient information in a timely manner regarding the date, location and agenda of general meetings. The agenda should be clear and properly itemised and include information regarding the issues to be decided at the meeting.

### Shareholder proposal provisions

Shareholders should have the right to ask questions to the board, management and external auditor both before and during the general meeting and also the right to place items on the agenda of general meetings, and to propose resolutions subject to reasonable limitations. Any threshold associated with putting shareholder proposals forward should balance the need to ensure the matter under consideration is likely to be of importance to all shareholders and not only a small minority.

## **II. C Board accountability**

***The accountability of boards of directors is fundamental to good corporate governance. Directors are elected by shareholders to manage and supervise the business of the corporation in its best interest. Shareholders must have the ability to ensure board accountability and meaningfully evaluate board performance. Stakeholders and others are invited to provide input on whether the provisions of the CBCA adequately balance the respective roles of boards and shareholders and enable shareholders to require appropriate levels of accountability from boards.***

### Roles of CEO & Chair of the Board

The board should have independent leadership. There should be a clear division of responsibilities between the independent chairmanship of the board and the senior management of the company's business.

The chair should be independent on the date of appointment. If the chair is not independent, the company should adopt an appropriate structure to mitigate any potential challenges arising from this, such as the appointment of a Lead Independent Director. The board should explain the reasons why this leadership structure is appropriate and keep the structure under review. A Lead Independent Director also provides shareholders and directors with a valuable channel of communication should they wish to discuss concerns relating to the chair.

If the board decides that a CEO should succeed to become chair, the board should communicate appropriately with shareholders in advance setting out a convincing rationale and provide detailed explanation in the annual report. If unavoidable there should preferably be a break in service between the roles, (e.g. a period of two years).

The chair is responsible for leadership of the board and ensuring its effectiveness. The chair should ensure a culture of openness and constructive debate that allows a range of views to be expressed. This includes setting an appropriate board agenda and ensuring adequate time is available for discussion of all agenda items. There should also be opportunities for the board to hear from senior management.

### Shareholder approval of significantly dilutive acquisitions

The board should be mindful of share holding dilution when issuing new shares. Some markets provide for pre-emption rights whereby new shares are offered to existing shareholders in proportion to their shares held, unless shareholders have voted to waive the right. The waiver of pre-emption rights is customarily limited to five per cent of the issued share capital in some markets, and ten per cent in others. In other markets the board has the discretion to conduct new share issues without pre-emption rights (e.g. institutional placements) up to a limited level of dilution. In situations where the offer of pre-emptive rights is not optimal for the company, a full explanation of the board's rationale should be provided. In some countries investors expect all directors to stand for re-election where the board requests a large degree of authority over

the issue of new shares.

#### Access to oppression remedies by shareholders

Shareholders should be treated equally and be afforded protection against abusive or oppressive conduct of a company or its management, including market manipulation, false or misleading information, material omissions and insider trading. Proper remedies and procedural rules should be put in place to make the protection effective and affordable. Remedies should include private rights of action for the violation of regulatory rules such as injunctive and compensatory relief remedies which are readily accessible in order to redress misconduct of a company, defined as any conduct violating public market regulation rules and listing or trading rules. Collective and effective means of redress in the form of representative, group or class actions should be made available for the protection of particularly, minority shareholders.

#### Disclosure of the board's understanding of social and environmental matters

We support measures to enhance the board's understanding of the impact of social and environmental matters on the company's operations. Board members should know the business, its operations and senior management well enough to contribute effectively to board discussions and decisions around all aspects of company operations, including aspects relating to social and environmental matters.

Enhancing disclosure around non-financial reporting is one way to focus the board's attention on, and to build understanding around, social and environmental issues. In this regard, we applauded the adopted a new law governing corporate reporting of non-financial information by the European Parliament last month. Under the directive, large listed companies in the European Union will be required to report information on environmental, social and employee matters and issues relating to human rights and bribery in their annual reports. As a result, investors will be provided with a better understanding of the risk and return profile of the companies they invest in.

We also advocate that board directors would benefit from professional development / training around the incorporation of social and environmental factors throughout the company's operational decision-making. In 2011, the ICGN was awarded a mandate from the European Commission to develop a course for investors around how to integrate such factors into the investment decision-making process. Over 200 individuals have since participated in courses held in seven jurisdictions and we welcome participation from the corporate community who would also benefit from this experience.

The ICGN has advocated for many years that the provision of non-financial business information that helps put historical performance into context, and portrays the risks, opportunities and prospects for the company in the future, thereby mitigating short-termism and helping investors understand a company's strategic objectives and its progress towards meeting them. This is imperative for informed investment decision-making.

## **VI. Corporate governance and combatting bribery and corruption**

***Stakeholders and others are invited to provide input as to the adequacy of existing CBCA provisions on corporate records, accounting standards and audits to combat bribery in international transactions.***

Bribery and corruption are incompatible with good governance and harmful to the creation of value. The board should ensure that management has implemented appropriately stringent

policies and procedures to mitigate the risk of bribery and corruption or other malfeasance. This includes board level and staff training, due diligence and monitoring programmes, to avoid company involvement in any such behaviour.

The board should also ensure that the company has in place an independent, confidential mechanism whereby an employee, supplier or other stakeholder can (without fear of retribution) raise issues of particular concern with regard to potential or suspected breaches of a company's code of ethics or local law.

Whether or not corruption is detected and punished, a corporate culture that tolerates corrupt payments is also one that is much more likely to tolerate, or fail to prevent, financial fraud, theft of company assets and other actions that will directly harm shareholders. Corruption corrodes corporate culture and undermines the quality of management.

One challenge with fighting corruption is the "Prisoner's Dilemma", whereby companies which behave properly can in the short term have a competitive disadvantage, for example, if they lose contracts by refusing to pay bribes. To overcome this, it is necessary to have a market wide solution. This can be helped by a strong, independent legal and regulatory framework, along with strict enforcement. Too often such a framework is not, or is not seen to be, in place. In the absence of effective law, regulation and enforcement, companies are often called upon to engage voluntarily in collaborative transparency agreements. This requires a willingness on the part of companies to engage on a subject that some may not to acknowledge. The ICGN encourages companies in these initiatives and believes that such a reporting is positive and important.

## **VII. Diversity of corporate boards and management**

***Stakeholders and others are invited to comment as to whether new measures to promote diversity within corporate boards should be included in the CBCA and what such measures might entail.***

Diversity, broadly defined, is an important attribute of a highly functioning board. The nomination committee should disclose the company's policy on diversity which should include measurable targets for achieving appropriate diversity within its senior management and board (both executive and non-executive) and report on progress made in achieving such targets.

We applaud efforts to promote discussion around the importance of diversity on corporate boards and we canvassed our membership on the subject in November 2012 to contribute to the debate. In particular, our aim was to provide an investor viewpoint on the proposed European Commission policy option to *"implement a directive to introduce a binding objective of at least 40% of board members of each gender by 2020 for non-executive directors and a flexible objective for executive directors which would be set by the companies themselves."*

We received responses to our survey from approximately 15% of our membership, including responses from members in 21 different countries. More than half (57%) of the respondents were male, while 35% were female and 8% of respondents did not specify their gender. Based on the survey results, the ICGN does not support the implementation of binding quotas to improve gender diversity on corporate Boards. Our survey found that 66% of respondents were opposed to this idea, only 26% were in favour and 8% were uncertain.

The ICGN is supportive of a principles-based approach to gender diversity setting out a 'comply or explain' requirement for each company. A total of 93% of respondents asserted that it is the Board's role to oversee a human capital management strategy that sets out clearly how diversity (and inclusivity) are promoted within the company and embedded within the corporate culture. Furthermore, 76% of respondents thought that the Board should explain its approach to incorporating diversity within the company on a comply-or-explain basis.

We encourage more transparency around company selection procedures for board nomination and election. In this regard, besides supporting a more extensive 'comply or explain' approach for all listed companies, we would support a non-binding obligation for non-listed companies with more than 250 employees or with more than EUR50m in revenues to report annually on the number of male and female directors on their Boards. This is in line with the UK's Financial Reporting Council's amendment to the Corporate Governance Code to require listed companies to report annually on boardroom diversity policy, including gender, and on progress towards objectives.

### **IX. Corporate social responsibility**

***Stakeholders and others are invited to submit comments as to whether the existing provisions of the CBCA adequately promote CSR objectives and whether additional measures to promote CSR objectives are warranted in the CBCA.***

Last week, the European Parliament adopted a new law governing corporate reporting of non-financial information. Under the directive, large listed companies in the European Union will be required to report information on environmental, social and employee matters and issues relating to human rights and bribery in their annual reports. As a result, investors will be provided with a better understanding of the risk and return profile of the companies they invest in. ICGN is a long term supporter of enhanced transparency as described in the 2008 ICGN Statement on Non-financial Business Reporting

As discussed above in our response to the question around disclosure of the board's understanding of social and environmental matters, we welcome enhanced non-financial business reporting. Under new rules to come into force in 2017 in Europe, large companies (over 500 employees) in the EU will need to report on a comply-or-explain basis on their environmental and social performance. If they fail to report this information, they will need to specify the reasons for this failure. The companies in question will be required to disclose in their annual reports relevant and material information on policies, outcomes and risks, including due diligence that they implement, and relevant non-financial key performance indicators concerning environmental aspects, social and employee-related matters, respect for human rights, anti-corruption and bribery issues, and diversity on the boards of directors.

The board should provide financial and non-financial information in the form of an integrated reporting that helps put historical performance into context, and portrays the risks, opportunities and prospects for the company in the future, thereby mitigating short-termism and helping shareholders understand a company's strategic objectives and its progress towards meeting them. Such disclosures should:

- a) be linked to the company's business model;
- b) be genuinely informative and include forward-looking elements where this will enhance understanding;
- c) describe the company's strategy, and associated risks and opportunities, and explain the

- board's role in assessing and overseeing strategy and the management of risks and opportunities;
- d) be accessible and appropriately integrated with other information that enables shareholders to obtain a whole picture of the company;
  - e) use key performance indicators that are linked to strategy and facilitate comparisons;
  - f) use objective metrics where they apply and evidence-based estimates where they do not; and
  - g) be strengthened where possible by independent assurance that is carried out annually having regard to established disclosure standards.

We are grateful for the opportunity to comment on the CBCA Consultation Paper. Should you wish to discuss any of the points that we have raised, please feel free to contact Kerrie Waring, ICGN's Managing Director, by email at [kerrie.waring@icgn.org](mailto:kerrie.waring@icgn.org) or by telephone on +44 (0) 207 612 7079.

Yours faithfully,

**Michelle Edkins**  
**ICGN Board Chair**

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