

May 15, 2014

Director General  
Marketplace Framework Policy Branch  
Industry Canada  
235 Queen Street, 10th Floor  
Ottawa, Ontario K1A 0H5

Via Email: cbca-consultations-lcsa@ic.gc.ca

**Re: Industry Canada Consultation on the Canada Business Corporations Act (the  
“Consultation Paper”)**

Dear Sir/Madame,

BC Investment Management Corporation (bcIMC) is one of the largest Canadian institutional investors and manages a C\$110 billion portfolio of globally diversified investments on behalf of the public sector pension plans of British Columbia and publicly-administered trust funds, as well as other public sector bodies.

bcIMC is also a member of the Canadian Coalition for Good Governance (CCGG) and supports the submission made to Industry Canada by that organization. In particular, we agree with the CCGG’s position that the recommendations made below should only apply to public companies covered by the CBCA and not the thousands of smaller private companies that are also governed by it. It is our view that these requirements would be onerous for smaller companies that should not be expected to implement the same provisions as large, publicly-traded companies with very different shareholder structures.

We would also note from the outset that there are particular jurisdictional complexities in Canada with federal corporate statutes alongside multiple provincial securities regulators. Many of the issues brought forward in the CBCA could arguably be dealt with at the provincial securities level. However, given the rather complicated nature of doing so as well as securities regulators being slow to act on several of these issues, it is our view that the CBCA can show governance leadership where the provinces have not. It is our assumption that if the CBCA illustrates this kind of leadership, it will be easier for the provincial regulators to follow suit.

**I. Executive Compensation**

bcIMC does not see the CBCA as reflecting best practice in this area as shareholders are not able to voice concerns directly through an advisory vote on compensation.

This is something provided to shareholders in several other jurisdictions including the United States, France, Britain, the Netherlands, Australia, Germany, Sweden, Norway, Denmark and Switzerland. Some of these jurisdictions have gone even further than an advisory vote to binding votes; separate votes on compensation policy and implementation; or the two strikes rule in Australia that can lead to the removal of directors.

As a global shareholder that votes proxies at international meetings, we are continually frustrated by the lack of opportunity in Canada to vote directly on executive compensation structure as approved by the Board of Directors. The CBCA would be more aligned with international best practice if it explicitly identified an advisory vote on compensation (say on pay) as something to be presented at each annual general meeting.

Including an advisory vote on compensation would also align Canada with the OECD Principles on Corporate Governance which state:

Although board and executive contracts are not an appropriate subject for approval by the general meeting of shareholders, there should be a means by which they can express their views. Several countries have introduced an advisory vote which conveys the strength and tone of shareholder sentiment to the board without endangering employment contracts.

The OECD Principles were drafted in 2004 and since that time, the acceptance of say on pay votes has only accelerated. This suggests that Canada is seriously lagging in this area.

## **II. Shareholder Rights**

As noted in the Consultation Paper, the CBCA currently provides for show-of-hands voting. As most shareholders now vote electronically, this mechanism seems outdated and not reflective of current practices. bcIMC spends a great deal of time voting all of our North American holdings as well as our most valuable global holdings and we expect to be able to find detailed voting results for each of those meetings. This allows us to assess overall support levels year over year and identify trends over time. Eliminating voting by show-of-hands would not be onerous and would be beneficial to shareholders.

bcIMC is also a strong proponent of individual director elections and believes that prohibiting slate ballots within the CBCA would be a progressive step. The TSX has already addressed this issue requiring individual director elections but bcIMC considers that enshrining this into law would ensure that this requirement does not change in the future. Similarly, the TSX has recently amended its listing standards to require a majority vote standard so that all directors receive more than 50 percent of shareholder support rather than the plurality standard currently applied in Canada. bcIMC requests that the CBCA be amended to also require a majority voting standard consistent with that brought forward by the TSX.

Most S&P/TSX Composite Index companies have voluntarily instituted majority voting policies and the concern over failed elections has so far not materialized.

Another important element in exercising our shareholder rights is the ability to vote on directors each and every year to ensure accountability. It is our view that the CBCA should eliminate staggered terms and terms beyond one year as this is more consistent with current practice - at least among publicly-traded companies.

The Consultation Paper also raises matters relating to over-voting and empty voting. Since the statutory review of the CBCA in 2009-10 much effort has gone into fixing the proxy infrastructure in Canada which is ultimately what is required to address these problems. bcIMC has been heavily involved on consultations with the Canadian Securities Administrators (CSA) on voting infrastructure and would encourage Industry Canada to work with the CSA to ensure a consistent approach.

Although the Consultation Paper does not specifically raise it, we would see the CBCA revision as an opportunity to lead by eliminating the ability of corporations to issue multiple classes of common shares with either no voting rights or limited voting rights. Where dual class shares exist, our ability as shareholders to have influence and hold board directors accountable is severely restricted if not non-existent due to the disproportionate influence of the holders of shares possessing multiple votes. bcIMC firmly holds the belief that one share should equal one vote. At a minimum, the CBCA should eliminate the ability to issue non-voting shares and ideally, eliminate all dual class share structures. These arrangements allow public companies to benefit from the capital provided by investors without offering the appropriate accountability mechanisms.

#### **i. Shareholder and Board Communication**

bcIMC would see proxy access as the key issue to be addressed in this area when updating the CBCA. We see the ability to nominate potential directors for election to the board as a fundamental right of shareholders where we have concerns about board composition and structure. While the CBCA currently permits a nomination that is signed by owners of five percent of outstanding shares, it is our view that this is too high a bar to meet. A more appropriate level of ownership would be three percent or even one percent for large companies with a diversified shareholder base. In fact, the one percent threshold would be more consistent with the current restrictions on submitting shareholder proposals. Whatever the threshold, bcIMC believes that no minimum holding period should be imposed; all shareholders should be on equal footing.

A key consideration regarding proxy access is that this right only provides shareholders with the ability to nominate. Shareholders still need to actually elect the nominee and would need to decide for themselves whether or not the nominee would be a compliment to the current board composition.

## **ii. Board Accountability**

bcIMC maintains the view that the Board Chair should be independent in order to carry out the board's primary duty of supervising management and the business affairs of the corporation. Combining the roles of Chair and CEO creates a conflict when one person is expected at the same time to manage and to exercise the fiduciary role of overseeing management. The latest figures from the Clarkson Centre for Business Ethics and Board Effectiveness indicate that the majority of S&P/TSX Composite companies already have split these roles and 61 percent have a fully independent chair.

Separating the roles of Chair and CEO is clearly the preferred structure in Canada and acknowledged as best practice in the OECD Principles of Corporate Governance:

Separation of the two posts may be regarded as good practice, as it can help to achieve an appropriate balance of power, increase accountability and improve the board's capacity for decision making independent of management.

In regards to the board's understanding of social and environmental matters, bcIMC feels that the CBCA could acknowledge that the board of directors does have responsibilities in this area. The CBCA currently has a focus on directors' responsibility for financial disclosure but it seems clear to us as investors that directors also have responsibility for understanding key environmental and social risks faced by the company in order to evaluate how management is mitigating these risks.

We recognize that any specific reporting standard on environmental and social risks is beyond the scope of the CBCA but it is within the current scope to explicitly indicate that reporting on risks outside of the financial statements ultimately rests with the Board. The identification and mitigation of such risk is generally part of any sound enterprise risk management process so we do not believe this to be onerous for companies. Given that detailed requirements fall in the realm of provincial securities regulators, this would merely be clarifying the responsibilities of directors.

## **III. Securities Transfers and Other Corporate Governance Issues**

bcIMC would like to take this opportunity to object to the 2001 changes to the CBCA's liability regime that introduced a modified proportionate liability regime. As we previously outlined to The Law Commission of Ontario when the Ontario Securities Commission (OSC) was considering a similar move, proportionate liability is a relatively weak system of accountability and governance, as it:

- reduces the incentive for those responsible for the preparation of financial information to be attentive to their duties;
- we feel that those involved with the preparation of corporate information are well compensated for their efforts by shareholders and should feel individually responsible for any errors, omissions or misstatements made in that regard;
- it places a significant burden on shareholders and other stakeholders to obtain full restitution for any harm suffered.

bcIMC encourages the CBCA to reverse these changes and revert back to joint and several liability for financial losses arising from negligence.

#### **IV. Incorporation Structure for Socially Responsible Enterprises**

bcIMC does not invest in such entities; therefore we have no specific recommendations to make.

#### **V. Corporate Transparency**

bcIMC does not have any specific recommendations in this area other than our interest in not compromising our status as an Objecting Beneficial Owner (OBO) in relation to an issuer that we invest in. However, this does not mean information should be kept from law enforcement and tax authorities when necessary to combat tax evasion, money laundering and terrorist financing.

#### **VI. Corporate Governance and Combating Bribery and Corruption**

bcIMC is aware that the Government of Canada is actively pursuing a mandatory revenue transparency disclosure framework for oil and gas, and mining companies. It seems prudent to await the results of that process before making change to the CBCA that could conflict with that framework.

#### **VII. Diversity of Corporate Boards and Management**

bcIMC is a strong proponent of diverse boards and senior management teams as illustrated by our multiple submissions to the OSC on this issue. As there seems to be movement at the provincial level on this matter in terms of mandatory disclosure requirements, we do not see the need for the CBCA to address diversity at this point in time.

#### **VIII. Arrangements Under the CBCA**

bcIMC has no specific comments to make on this matter.

#### **IX. Corporate Social Responsibility (CSR)**

The area of CSR reporting is one that bcIMC actively follows and participates in where relevant. We have a public commitment to integrate environment, social and governance risk into our investment decisions and are active owners when it comes to discussing these risks faced by our investee companies.

We would note that in some other markets, there are forms of mandatory CSR reporting such as the recent European Union (EU) legislative proposal requiring disclosure from large companies on CSR. Similar rules already exist in some EU countries such as Denmark and France. Domestically speaking, the federal government encourages reporting based on the Global Reporting Initiative (GRI) as part of its CSR Strategy aimed at extractive companies operating overseas.

However, we fail to see how the CBCA could address this issue given that specific disclosure requirements are in the domain of the provincial securities regulators. For this reason, we do not see the CBCA is the most appropriate mechanism for pursuing consistent CSR disclosure.

**X. Administrative and Technical Matters**

bcIMC does not have any specific comments on the questions raised in this section.

**Concluding Remarks**

bcIMC would like to once again thank Industry Canada for its commitment to reviewing the CBCA and providing an extensive consultation period to maximize the effectiveness of the review. As an institutional investor that takes governance seriously we see the CBCA review as an excellent opportunity to position Canada as a leader in corporate governance.

If you have any further questions about this submission please contact Jennifer Coulson at [jennifer.coulson@bcimc.com](mailto:jennifer.coulson@bcimc.com) or 778-410-7118.

Sincerely,



Doug Pearce  
Chief Executive Officer/Chief Investment Officer