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**VIA E-MAIL AND COURIER**

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Re: 2013/14 Consultation on the Canada Business Corporations Act (the "CBCA")

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We are pleased to respond to your request for public consultation with respect to the governance framework for CBCA corporations. We are extensively involved in assisting and advising issuers on corporate matters, including with respect to governance requirements and practices. Our submission is focused on certain matters we have experience with arising out of our practice on behalf of issuers, some of which matters were not explicitly covered by Industry Canada's public consultation document, but which we feel should be considered at this time in connection with any proposed amendments to the CBCA.

**One Size Does Not Fit All**

Our national law firm represents a large number of public and privately-held corporations of varying sizes, stages of development, ownership profiles and industry sectors, and it is our experience that no single corporate governance model is superior in all respects. The current governance regime under the CBCA provides for an adaptable, principled framework within which corporations can adopt the measures that are appropriate for their particular circumstances and which serve the best interests of the corporation. It is important that the CBCA not prescribe rigid rules that would impair both its principled operation and its demonstrated flexibility and ability to address issues in a changing environment. The introduction of a rigid, prescriptive approach containing "one-size-fits-all" governance measures and "check-the-box" rules (e.g., mandating "say-on-pay" votes or the separation of the roles of Chair of the Board of Directors and Chief Executive Officer) would be inappropriate. In the same vein, as the CBCA is the basic corporate statute for all corporations, we believe it is inappropriate in our view to have differing rules for distributing and

non-distributing corporations. The CBCA framework should apply to all corporations under it and so distinctions between distributing and non-distributing should be minimized.

### **Notice and Access**

The CBCA should facilitate “notice and access” for proxy solicitation. Although the benefits of “notice and access” have not proven to necessarily be universal, if in their best interests, CBCA corporations should be able to choose to adopt such a system for distribution of proxy-related materials and financial statements, as is currently provided for by Canadian securities laws and other Canadian corporate statutes, without having to inefficiently seek exemption orders from the Director on a case-by-case basis. This also would include permitting intermediaries to use notice-and-access for sending documents to beneficial owners where the CBCA corporation has chosen to do so for registered shareholders.

### **Shareholder Proposals**

Section 137 of the CBCA provides a mechanism whereby a shareholder of a corporation can submit a proposal and supporting statement to be included in a corporation’s management information circular and have the matter considered at the applicable shareholder meeting. The CBCA further provides that, under a number of circumstances, the corporation is not required to set out the proposal and the proposer’s supporting statement in its management proxy circular, including if substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident’s proxy circular relating to a meeting of shareholders held not more five years before the receipt of the proposal and did not receive the prescribed minimum amount of support at the prior meeting (“Prior Minimum Support”). Currently, while resolutions in respect of a shareholder proposal are passed or fail to be passed by reference to the number of votes cast by the shareholders who voted in respect of that resolution, Section 51(1) of the *Canada Business Corporations Regulations, 2001* (the “CBCA Regs”) provides that Prior Minimum Support is measured on the basis of “the total number of shares voted”. Read literally, this inconsistency can produce anomalous results in the context of an issuer of multi-voting shares. Section 51(1) of the CBCA Regs should be amended to measure Prior Minimum Support on the basis of votes cast by the shareholders who voted in respect of the prior, substantially similar shareholder proposal.

## Dematerialization

Pursuant to Section 49 of the CBCA, every security holder is entitled at their option to a security certificate that complies with the CBCA or a non-transferable written acknowledgment of their right to obtain such a security certificate. Publicly-traded securities are now generally held through the book-based system administered by CDS Clearing and Depository Services Inc. (“CDS”) pursuant to which a nominee of CDS is the registered holder of the securities while the public shareholder, through a series of intermediaries, is the beneficial holder of the securities. Through this indirect holdings system, share certificates are rarely delivered in settlement of trades. Reflecting the reality of the current environment and the favourable alternatives already available to companies incorporated under the laws of other Canadian jurisdictions, the CBCA should be amended to permit uncertificated securities to be instituted by companies themselves. In the alternative, the CBCA should be amended to thoroughly reflect the concept of the “non-transferable written acknowledgment of [a shareholder] to obtain such a security certificate”, which currently appears in Section 49, but is not consistently contemplated throughout the rest of the CBCA.

## Consideration of the New QBCA

In February 2011, the *Business Corporations Act* (Québec) (the “QBCA”) came into force. The new QBCA was designed not only to bring the Québec legislation up to the level of the CBCA, but also to make improvements to that model whenever possible, based on original innovations or on more progressive provisions found in the statutes of provinces, such as Ontario, Alberta, British Columbia and New Brunswick, or, in certain instances, of Delaware and the American Model Business Corporations Act. Differences between the CBCA and the newly modernized QBCA should be considered (e.g., provisions concerning implementing corrections to the articles of a corporation without the necessity for Court authorization and, as noted below, provisions concerning access to financial statements of subsidiaries) and amendments considered for the CBCA as appropriate.

## Distributing Corporations and Private Companies

While this submission largely focuses on public companies, we also advise private companies incorporated under the CBCA and believe that certain of the proposals in the consultation paper would be particularly inappropriate for non-distributing corporations (e.g., “say-on-pay”).

### Access to Financial Statements of Subsidiaries

Section 157 of the CBCA requires each corporation to keep at its registered office a copy of the financial statements of all of its subsidiaries and of each body corporate the accounts of which are consolidated in the financial statements of such corporation, and to permit the corporation's shareholders and their personal representatives to examine, and make extracts of, such financial statements free of charge.

Section 157 should contain similar protections for corporations as those provided in respect of access to the corporation's own records in Section 21 of the CBCA. Section 157 should be amended to require, among other things, that a requesting shareholder provide an affidavit, similar to the requirement of Section 21(1.1), confirming that the requesting shareholder does not intend to use the information contained in the corporation's subsidiaries' financial statements for an improper purpose, similar to the regime established under Section 21(7)(c) and Section 21(9).

Further, a CBCA corporation should also be protected from having to provide a shareholder with access to a subsidiary's financial statements if the value of the assets, the revenues and the income before taxes of the subsidiary is not material, in comparison to the value of the assets, the revenues and the income of the parent corporation (e.g., Section 228 of the QBCA, which provides a 10% threshold).

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Thank you for this opportunity to make this submission regarding proposed amendments to the CBCA. You may contact John Tuzyk ([john.tuzyk@blakes.com](mailto:john.tuzyk@blakes.com)) and Matthew Merkley ([matthew.merkley@blakes.com](mailto:matthew.merkley@blakes.com)) if you require further clarification or additional submissions on this topic.