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May 15, 2014

Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
Ottawa, ON
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Re: Consultation on the *Canada Business Corporations Act*

We are pleased to provide Industry Canada with comments regarding Industry Canada's recent consultation paper (the "Consultation Paper") regarding potential amendments to the *Canada Business Corporations Act* (the "CBCA"). The comments reflected herein are those of individual lawyers of Borden Ladner Gervais LLP and do not necessarily represent the views of BLG, other BLG lawyers or our clients.

We have reproduced below the issues raised in the in the Consultation Paper and our commentary relating thereto.

I. Executive Compensation

Since the release of the 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.

- **Shareholder advisory votes on compensation packages**

In 2011, the Ontario Securities Commission ("OSC") requested comments regarding the appropriateness of adopting shareholder advisory votes in respect of executive compensation matters. To date, the OSC has not indicated whether it will regulate shareholder advisory votes regarding executive compensation. Provincial securities regulation prescribes detailed disclosure requirements relating to executive compensation. Accordingly, we believe that any requirements to mandate shareholder advisory votes on executive compensation and the disclosure pertaining to such advisory votes in proxy materials are best left to provincial securities regulators. As advisory votes on executive compensation matters apply solely to distributing corporations, such matters are more appropriately dealt with by provincial securities regulators. This will avoid jurisdiction shopping within Canada.

II. Shareholder Rights

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.**

Generally speaking we support requiring voting by ballot at shareholder meetings for distributing corporations. Increasing importance is being placed on the results of shareholder meetings as a proxy for shareholder sentiment. That being noted however, the current proxy voting system in Canada also needs to be addressed to ensure that each beneficial shareholder that has a voting entitlement is able to complete and cast a ballot in respect of a shareholder meeting.

The CSA Consultation Paper and Request for Comment 54-101 – Review of the Proxy Voting Infrastructure and the January 2014 OSC Roundtable Discussion regarding Canada’s Proxy Voting Infrastructure evidence the provincial securities regulators’ concerns with the current proxy-related infrastructure in Canada. In particular, concerns have been raised regarding over-voting, empty-voting and more fundamentally, the ability of beneficial shareholders to have their votes registered and cast at shareholder meetings. Unless the current proxy system infrastructure is updated and more robust, any improvements to shareholder democracy provisions in the CBCA will have limited impact.

As the public disclosure of meeting results is currently mandated under applicable provincial securities regulation, we do not support mandating the disclosure results for distributing corporations under the CBCA.

- **Individual election of directors and slate voting;**

The TSX mandates individual voting in respect of director elections. Accordingly, we do not see the benefit of making amendments to the CBCA. In the event Industry Canada determines to proceed with requiring individual elections for directors, we strongly suggest that any such provisions be consistent with the TSX policies.

We do not support imposing individual voting of directors for private corporations. We note that many private corporations are subject to an unanimous shareholders agreement which governs the appointment and election of directors. Accordingly, mandating individual election of directors would likely conflict with the provisions of many unanimous shareholders agreements and there is no compelling policy rationale for imposing such a requirement in respect of a private corporation.

- **Maximum one-year terms and annual elections for directors;**

The TSX mandates that directors of listed issuers have one-year terms and annual elections for directors. Accordingly, we do not see the benefit of amending the CBCA to require distributing corporations to have maximum one year terms and annual elections for directors. In the event Industry Canada determines to proceed with implementing maximum one-year terms and annual elections for directors, we strongly suggest that such provisions be consistent with TSX policies.

One year term limits and annual elections for directors should not be imposed on private corporations.

- **Director election by majority vote;**

The TSX has adopted a majority voting requirement in respect of director elections. We are supportive of amendments to the CBCA that would codify that a director must receive a majority of votes in favour of his or her election in order to be appointed to the board. The language of the CBCA should be revised to enable shareholders to vote against a director's appointment and thereby enable shareholders to validly vote against an appointment (rather than merely withhold their vote in respect of a director nominee). Any amendments to the CBCA should be consistent with the TSX majority voting policy.

Director election by majority vote should not be imposed on private corporations.

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 further 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**

We support amendments to the CBCA to expressly permit distributing corporations to avail themselves of the notice and access provisions under applicable provincial securities regulation. Furthermore, the provisions of the CBCA should be amended to permit electronic communications with shareholders rather than requiring communication by way of mail. Shareholders are increasingly obtaining corporate disclosure through electronic/web-based means. The use of email or other electronic delivery for distributing corporations not only serves to reduce the cost of communicating with shareholders, it may even serve to improve the delivery and reading of disclosure materials. Shareholders should still have the ability to request to receive paper copies of disclosure documents that are otherwise delivered electronically.

- **Facilitation of “notice and access” provisions under the CBCA**

We support this initiative. Under current CBCA provisions, distributing corporations are prevented from using “notice and access” because of the requirement to deliver paper copies of annual shareholder information.

- **Access to proxy circular by “significant” shareholders (more than 5-percent share ownership)**

We do not support the proposal to allow significant shareholders to have access to a corporation’s proxy circular for purposes of nominating directors. This proposal would significantly increase the number of costly proxy battles. In addition, activist shareholders may have their own agenda which should not be subsidized by the corporation or other shareholders.

- **Equal treatment of shareholders in proxy process, irrespective of shareholder privacy concerns**

Given the Objecting Beneficial Ownership (“OBO”) concept under provincial securities regulation, the proposed amendments to permit the direct sending of disclosure materials to shareholders would conflict with provincial securities regulations that protect the identity of OBOs. Furthermore, as noted above, the current proxy voting infrastructure in Canada has been criticized as being deficient. Prior to making any changes in respect of the direct sending of proxy materials to shareholders under the CBCA, the current proxy voting infrastructure in Canada needs to be modernized.

- **Shareholder proposal provisions, including filing deadline and reasonable time to speak to a proposal at an annual meeting.**

We support proposed amendments to harmonize the deadline for shareholder proposals with the provincial approach, being the anniversary date of the last annual meeting. We do not support proposed amendments that would provide a shareholder with reasonable time at a shareholder meeting to speak to a shareholder proposal. Expanding the shareholder proposal provision to provide for a reasonable time to speak at shareholder meetings could unduly frustrate shareholder meetings and provide disgruntled shareholders with the opportunity to address personal grievances that have no bearing on the shareholder meeting. Furthermore, the written submission of the proposal that is included in the proxy circular provides the shareholder with ample opportunity to address shareholders concerning the proposal.

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 the Chief Executive Officer (CEO) and the Chair of the Board**

Provincial securities regulation requires reporting issuers to disclose position descriptions for the Chief Executive Officer and Chair. There may be circumstances where it is necessary for the CEO and Chair to be the same individual rather than separate individuals. The proposed amendment to separate the CEO and Chair roles may not necessarily result in improved corporate governance practices. We believe the current approach under provincial securities regulation sufficiently addresses this corporate governance issue and provides corporations with the flexibility to combine the CEO and Chair roles if deemed advisable by the corporation's board. Accordingly, we do not support this proposal.

- **Shareholder Approval of significantly dilutive acquisitions**

The TSX Company Manual requires listed issuers to obtain shareholder approval for any proposed issuance of 25% or more of the corporation's outstanding securities in respect of an acquisition transaction. We do not support this proposed change in respect of distributing corporations as shareholder approval for dilutive acquisitions is already mandated under the TSX Company Manual.

In respect of private corporations, an amendment is not necessary as a vast majority of private corporations are majority controlled or otherwise governed by an unanimous shareholders agreement that would govern the shareholder approval requirements in respect of dilutive acquisitions.

- **Access to oppression remedy by shareholders**

The proposal to enhance access to the oppression remedy to provide for arbitration as an alternative to court proceedings requires further study to determine whether arbitration will be more efficient and result in better access to the oppression remedy for aggrieved shareholders. Anecdotal evidence would suggest that arbitration is becoming increasingly costly and may not have a material cost advantage over court proceedings. In addition, any arbitration provisions would require detailed procedural safeguards to ensure that any awards granted in arbitration proceedings are determined fairly and with due process – thereby negating much of the cost advantages typically associated with arbitration proceedings.

- **Disclosure of the Board's understanding of social and environmental matters on corporate operations.**

We do not support this initiative. Disclosure obligations in respect of distributing corporations should be confined to the disclosure requirements prescribed by provincial securities regulation. Provincial securities regulators have the requisite expertise to prescribe regulations concerning disclosure by public corporations. Accordingly, this proposal should not be pursued and should be left within the proper jurisdiction of provincial securities regulators.

III. Securities Transfers and Other Corporate Governance Issues

Submissions are invited as to the continued relevance of CBCA provisions related to securities transfers and insider trading, given the overlapping regulatory jurisdictions between the CBCA and provincial laws in these areas. Comments are also sought on the operation of CBCA provisions related to director residency, trust indentures and proportionate liability.

- **Potential removal of the CBCA provisions relating to securities transfers**

We support this initiative. The provisions of the CBCA relating to securities transfer matters are both outdated and more appropriately governed by provincial securities transfer legislation.

- **Insider-trading provisions in the CBCA**

Insider trading provisions should not be expanded to provide a civil remedy for insider trading. Provincial securities regulations contain a comprehensive scheme to address insider trading. If insider trading remedies are to be expanded, it should be addressed by provincial securities regulators.

- **Canadian residency requirements for CBCA directors**

The Canadian residency requirements should be removed from the CBCA. Provincial business corporation statutes such as Quebec, Nova Scotia and British Columbia do not have residency requirements and the CBCA should be amended to be consistent with these provincial statutes. Non-Canadian entities wishing to establish a Canadian subsidiary are increasingly incorporating in the provincial jurisdictions which do not have Canadian residency requirements for directors.

- **Regulation of trust indentures under the CBCA**

The regulation of trust indentures should be harmonized and expressly provide that the trust indenture provisions apply only to trust indentures that are not otherwise exempt by prescribed regulation. The prescribed regulations should provide a list of the jurisdictions which are deemed to have substantially similar provisions to the CBCA and therefore do not require compliance with the CBCA trust indenture provisions.

- **CBCA's modified proportionate liability regime**

The proportionate liability provisions should be repealed. There doesn't appear to be any cases which have considered these provisions. Accordingly, these provision offer little or no utility. In addition, the provincial business corporations statutes do not contain a similar regime.

IV. Corporate Transparency

Stakeholders and others are invited to make submissions regarding whether, and how, the availability of beneficial ownership information to competent

authorities, the existence of bearer shares and the disclosure of nominee shareholder information should, and could, be addressed in the CBCA.

As noted above, provincial securities regulation recognizes the concept of OBOs, which has been a long-standing method for holding shares in Canada. Any amendments to the CBCA would be meaningless unless the OBO concept under provincial securities regulation is also amended. While there are concerns with the OBO concept in the Canadian capital markets, amendments to the CBCA would be premature unless provincial securities regulation is also amended to facilitate the disclosure of ownership information.

VI. Corporate Governance and Combating 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.

We do not believe that enhanced record keeping or accounting standards are required to be added to the CBCA to combat bribery in international transactions. Furthermore, we do not believe the CBCA is the appropriate legislation to contain provisions dealing with anti-bribery prevention. To the extent Canada's anti-bribery laws are viewed as being insufficient to address Canada's commitments under the Convention on Combating Bribery of Foreign Public Officials in International Transactions, the appropriate legislation to address these commitments is the Corruption of Foreign Public Officials Act (Canada).

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.

We are supportive of diversity initiatives. We note that the Ontario Securities Commission has recently proposed amendments to mandate disclosure concerning reporting issuers' gender diversity initiatives. Should Industry Canada wish to adopt measures in the CBCA which foster enhancing diversity on boards, we suggest that any such measures be consistent with the approach taken by the OSC. Accordingly, we do not suggest any measures that mandate certain thresholds be adopted. Rather, similar to the approach taken by the OSC, an initial step to promote diversity should be through mandating annual disclosure concerning a distributing corporation's diversity initiatives.

We do not suggest that private corporations be required to adopt board diversity measures.

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.

We do not believe that the CBCA needs to be amended to adequately promote corporate social responsibility. As noted in the Consultation Paper, corporate social responsibility does not have a universal definition and corporate social responsibility has different meanings depending on who is being asked to define it. As corporations evolve, the elements of what constitutes a particular corporation's corporate social responsibility also evolve. While it is expected that all corporations are "good corporate citizens", we believe that the existing provisions under the CBCA and precedents established by common law adequately enable a corporation to pursue its own corporate social responsibility objectives.

X. Administrative and Technical Matters

- **Should property of dissolved corporations that has vested in the Crown be automatically returned to revived CBCA corporations.**

We support the proposal that property of a dissolved corporation that has vested in the Crown be automatically returned to a revived corporation.

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

We support implementing a reasonable time period to recover money held by the Receiver General for dissolved corporations provided there is a robust process for unknown claimants to claim money in respect of dissolved corporations.

- **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?**

Certain provincial statutes such as the OBCA provide a time limit on the revival of a dissolved corporation. We support the proposal that a time limit be imposed in respect of the revival of a dissolved corporation under the CBCA; provided that the Director under the CBCA has discretion to waive the time limit if the circumstances warrant.

- **Should there be a time limit on how long shareholders must hold shares before they can exercise the right of dissent?**

We are not supportive of this initiative. We do not believe that a shareholder should be prevented from exercising dissent rights solely on the basis that it did not hold shares for a sufficient period of time. The determination of fair value of shares for which dissent rights are exercised has no relation to how long a shareholder has held the share, therefore, a time period should not be a pre-condition for exercising dissent right.

- **Should the definition of “Squeeze-out transaction” in section 2 of the CBCA be amended to remove the reference to amendment of articles?**

We are supportive of the proposed amendment to remove the reference to “amendment of articles” from the definition of “Squeeze-out transaction”. The reference to “amendment of articles” unduly restricts the protections afforded by section 194 of the CBCA.

- **Should the CBCA be amended to make it clear that a consolidation of shares, with or without a repurchase of fractional shares, is not a transaction that triggers a right of dissent.? Further, should “going-private transactions” permit the use of the right of dissent?**

We agree that the CBCA be amended to be consistent with the language in the OBCA to exclude a consolidation of shares from being entitled to dissent rights.

- **Should the CBCA more fully recognize beneficial owners of shares by giving them more of the rights of registered shareholders (eg. The right to vote, the right of dissent)?**

We agree that beneficial owners should be entitled to the same rights as registered shareholders. However, as noted above, the current proxy infrastructure in Canada needs to be modernized to ensure that beneficial shareholders are able to exercise the rights that are being extended to them.

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

As most non-distributing corporations have a limited number of shareholders, we do not believe it is necessary for the proxy solicitation requirements to be removed. One alternative could be to exclude from the threshold, shareholders who are employees of the corporation.

- **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 management of the corporation, without sending a dissident proxy circular if the total number of shareholders whose proxies are solicited is more than fifteen?**

We believe that the existing threshold of fifteen under the CBCA, which is consistent with applicable provincial securities regulation, should not be amended. We are concerned that increasing the threshold exception could result in activist shareholders contacting a significant portion of a corporation’s shareholders without the rigour of complying with the proxy circular disclosure requirements.

We thank you for allowing us the opportunity to comment on the proposals set out in the Consultation Paper. Please feel free to contact Paul Simon (416-367-6678 or psimon@blg.com) if you would like further elaboration of our comments.

Yours very truly,

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