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Dear Sirs/Mesdammes:

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

Thank you for the opportunity to respond to Industry Canada's consultation paper (the "Consultation Paper") requesting feedback on potential revisions to the *Canada Business Corporations Act* ("CBCA").

As noted in the Consultation Paper, the CBCA is of central importance to the governance of many Canadian corporations, including almost half of Canada's largest publicly traded companies. We agree that overall the CBCA remains a well-functioning statute and we are supportive of Industry Canada's initiative to conduct a consultation to ensure that the governance framework provided by the CBCA continues to be effective, foster competitiveness, support investment and entrepreneurial activity, and instill investor and business confidence.

Although the CBCA is an important and influential corporate statute in Canada, both being the most widely-used statute of incorporation among Canadian publicly traded corporate issuers as well as a model for most provincial corporate statutes, in many areas there are other rule-making bodies such as the stock exchanges and the provincial securities commissions which are better positioned to formulate regulations for publicly traded issuers. Industry Canada has recognized this in amending the Regulations under the CBCA in 2008 to remove the CBCA's own set of rules for the contents of proxy circulars in favour of referencing the requirements under National Instrument 51-102 – *Continuous Disclosure Obligations*.

As a framework statute, the CBCA has been influential in promoting a healthy level of consistency for corporate law throughout Canada. In considering potential amendments to the CBCA, we believe that it is important to maintain the CBCA as a foundation for corporate law in Canada. Amendments that would depart too significantly from standard accepted principles or that would create additional regulatory layers for CBCA companies (even amendments that

reflect best practices that have gained wide acceptance in the market place) could lessen the attractiveness of the CBCA as a statute for incorporation of Canadian businesses, create unnecessary duplication of corporate governance requirements, and lead to a fracturing of the generally consistent approach to corporate law among most jurisdictions in Canada.

I. Executive Compensation

The executive compensation disclosure requirements under securities laws allow shareholders substantial opportunity to understand and evaluate the appropriateness of a board of directors' approach to executive compensation.

We also note that there has been a trend in Canada of larger public companies voluntarily adopting "say on pay" policies. In 2013, 80% of TSX 60 issuers put a say on pay resolution to a vote of shareholders, compared with just over 50% in 2011. While smaller Canadian public companies have not adopted say on pay practices at the same rate as larger issuers, say on pay resolutions are becoming increasingly common among such issuers as well.

This trend toward the increased use of say on pay resolutions is being driven in large part by shareholders encouraging companies to adopt corporate governance best practices, and using existing mechanisms to influence the corporate governance practices of companies, such as withhold vote campaigns in director elections and the submission of advisory shareholder proposals.

In our view, the existing trend of companies giving shareholders the opportunity to consider say on pay resolutions demonstrates that it is not necessary to legislate corporate governance best practices. Moreover, what may be considered an appropriate practice among large publicly listed issues may be of less value for smaller issuers. Adopting a one-size-fits-all approach that requires all public issuers to adopt say on pay practices, even in situations where shareholders do not perceive a need, risks imposing unnecessary burdens on such smaller issuers. Furthermore, the views of components of the market place regarding best practices may change more frequently than would be appropriate for CBCA amendments.

II. Shareholder Rights

(a) Voting

Majority Voting

Since the issuance of the Consultation Paper, the TSX has adopted amendments to its Company Manual that will require all TSX-listed issuers to adopt majority voting policies requiring offers of resignation from any director who does not receive at least majority support from shareholders. Pursuant to this policy, issuers will be required to accept such resignations, unless there are "exceptional circumstances".

We note that the underlying issue that majority voting policies address is the deficiency that some perceive from the use of plurality voting for the election of directors which can result in directors being elected with as little as one vote when the number of nominees does not exceed the number of board positions to be filled. Although the TSX will now require majority voting policies for TSX-listed issuers, the election of directors is fundamentally an issue that arises under the statutory corporate law framework and the common law that has developed around it. Accordingly, we believe that there would be merit in Industry Canada studying whether plurality voting for director elections should be replaced by an alternative majority voting standard.

Staggered Boards

Given the recent TSX Company Manual amendments that now require annual elections of directors for TSX-listed issuers and the rarity of staggered boards in Canada in any event, the provisions of the CBCA that allow for staggered terms are arguably superfluous at least in respect of public companies and we would be supportive of amendments to the CBCA to eliminate the availability of staggered terms for directors of distributing corporations.

Over-Voting

As we have noted in our paper, *The Quality of the Shareholder Vote in Canada*[1], the phenomenon of over-voting is observed frequently enough at Canadian shareholder meetings to undermine market confidence in the integrity of the Canadian shareholder voting system. Over-voting arises from the fact that the vast majority of shares are owned indirectly through intermediaries, such as brokerage firms.

Given the complex nature of the system of beneficial ownership, and the many firms that play a role in this system (such as issuers, transfer agents, CDS, Broadridge Shareholder Services and brokerage firms and other intermediaries), improving the proxy voting system requires a broad initiative that involves all of these participants. In August 2013, the Canadian Securities Administrators ("CSA") issued Consultation Paper 54-401 - *Review of Proxy Voting Infrastructure* and provincial securities commissions have been conducting industry consultations with a view to better understanding the issues with the proxy voting system and determining what regulatory actions, if any, may be advisable to improve the system.

As is apparent from our paper, *The Quality of the Shareholder Vote in Canada*, we believe that improvements to the shareholder voting system are essential given the evolution in the marketplace over the last 25 years. However, we do not believe that there are any obvious amendments to the CBCA that should be made at this time. We anticipate that following the CSA consultations, amendments to the CBCA and other corporate statutes will be required to facilitate improvements to the proxy voting system. In particular, the distinctions between the status of registered and beneficial shareholders under the CBCA and the means by which

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1 Davies Ward Phillips & Vineberg LLP, *The Quality of the Shareholder Vote in Canada,* http://www.dwpv.com/Sites/shareholdervoting/index.htm

corporations communicate with and receive votes from beneficial shareholders requires further study as these distinctions are the underlying cause for many of the problems with the shareholder voting system.

Empty Voting

As with over-voting, "empty voting" is also being studied by the CSA as part of its review of the proxy voting infrastructure. However, while it is appropriate for the CSA to study this issue, empty voting is squarely an issue of corporate law that goes to the fundamental issue of the basis on which shareholders are given the right to vote.

As has been noted by the British Columbia Court of Appeal in *TELUS Corporation v. Mason Capital Management LLC*[2], the courts do not have express authority to address the voting of shares by shareholders who hold voting rights but have divested their economic exposure to shares voted. While the B.C. Court of Appeal was specifically considering the British Columbia *Business Corporations Act*, the Court's conclusion that "the remedy [for empty voting] must lie in legislative and regulatory change" is likely true of the CBCA as well.

Empty-voting is a highly complex issue and what constitutes empty voting is on its own difficult to precisely define. Nevertheless, ensuring that shareholder votes serve their intended purpose of determining the will of the owners of a corporation is crucially important. We therefore believe that Industry Canada should study whether 'empty voting' subverts the goals of shareholder democracy and, if so, consider amendments to the CBCA that would curtail the practice.

(b) Shareholder and Board Communication

Currently, corporations under the CBCA can apply for an exemption under section 151 to take advantage of the notice-and-access regime adopted under provincial securities laws. which allow for communication via electronic means between distributing corporations and their shareholders. We are supportive of amendments to the CBCA that would facilitate the use of the notice-and-access regime and obviate the need for exemption applications.

Shareholder Proposals

We are supportive of harmonizing the deadline for filing CBCA proposals with the provincial approach of referencing the date of the last annual meeting itself rather than linking the deadline to the notice date of the previous meeting.

We do not believe that it is necessary for the CBCA to specify that shareholders be provided a reasonable period of time at a shareholders meeting to speak to their proposals. Under general rules of meeting procedure, any shareholder at a meeting should be afforded an opportunity to speak to any matter of business put to the meeting for a vote. Including a provision in the CBCA

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2 2012 BCCA 403.

that would require that shareholders be afforded an opportunity to speak to their proposal would create an implication that a shareholder might not be provided a reasonable opportunity to speak to other matters of business at a meeting, such as the election of directors, unless the CBCA were to specifically require it.

(c) Board of Accountability

Separation of CEO and Chair

As noted above, we do not believe that it is necessary in all cases to legislate corporate governance best practices. In 2013, approximately 85% of TSX-listed issuers had an independent Chair, up from approximately 60% in 2011. In our view, this trend in corporate governance is being shaped by market forces and regulatory intervention is unnecessary. Moreover, National Policy 58-101 – *Disclosure of Corporate Governance Practices* and National Policy 58-101 – *Disclosure of Corporate Governance Practices* require issuers to detail their corporate governance practices to shareholders and explain circumstances where they deviate from "best practices". For example, Form 58-101F1 promulgated under National Policy 58-101 specifically requires that issuers disclose whether they have an independent chair of the board or a lead director. Where the board has neither a chair that is independent nor a lead director that is independent, issuers must describe what the board does to provide leadership for its independent directors. We submit that this disclosure-based regime strikes an appropriate balance that recognizes that strict governance practices may not be suitable to all issuers. It remains opens to shareholders to apply pressure on issuers to change their corporate governance practices.

Shareholder Approval of Dilutive Acquisitions

We do not believe that it is necessary for the CBCA to also deal with this issue (which is primarily only of concern for distributing corporations) as since 2009 the TSX Company Manual has required shareholder approval of acquisitions that result in greater than 25% dilution to existing shareholders.

Disclosure of the Social and Environmental Impact of Corporate Activities

Generally, disclosure requirements for public issuers are more appropriately addressed through securities regulation than in the CBCA. We believe that this is true with respect to the disclosure of the social and environmental impact of corporate activities.

III. <u>Securities Transfers and Other Corporate Governance Issues</u>

Insider Trading

We agree that the CBCA is not well-suited for the regulation of insider trading. Securities laws and the *Criminal Code* already provide for the regulation and reporting of insider trading and

those laws have been kept more up to date than the insider trading provisions of the CBCA. Eliminating the CBCA provisions on insider trading would make the CBCA consistent with other corporate statutes in Canada.

We do note there is no equivalent under provincial securities laws to section 130 of the CBCA, which prohibits insiders from short-selling or from selling calls and buying puts on securities of the corporations in which they are insiders. Consequently, simply eliminating the CBCA insider trading provisions would amount to a lessening of restrictions on trading by insiders of CBCA corporations unless these prohibitions were preserved.

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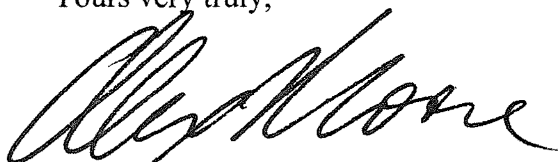
Thank you again for the opportunity to provide our comments in connection with this consultation.

Yours very truly,



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