

Calgary

May 15, 2014

Toronto

SENT BY ELECTRONIC MAIL

Montréal

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

Ottawa

New York

Dear Sirs/Mesdames:

Comments in Response to Consultation on the *Canada Business Corporations Act*

This letter is in response to the public consultation (the “Consultation”) and request for comments on the *Canada Business Corporations Act*¹ (the “Act” or the “CBCA”) published by Industry Canada on December 11, 2013.

The public consultation comes thirteen years after the last legislative review of the CBCA was undertaken, and this effort to consider whether the CBCA should be updated to reflect developments and experiences since 2001 is a worthwhile endeavour that we fully support.

Parts I to IV of this letter set out our comments on certain key issues that have been identified in the Consultation and by our practitioners and clients. Part V provides our recommendations relating to certain other issues identified in the Consultation. Part VI provides recommendations for further changes to the CBCA which were not identified in the Consultation.

I. “EMPTY VOTING”

The shareholder voting regime in the CBCA should be strengthened in order to stem the detrimental impacts of “empty voting”.

A. General Comments on Empty Voting

The Canadian corporate governance system is based on the premise of one-share, one-vote, where a fundamental feature of share ownership is the right of the shareholder to vote on matters affecting the corporation. Shareholders are accorded a special role in corporate governance because they are the source of risk capital for companies and therefore have real economic exposure to the outcome of important corporate decisions.

¹ R.S.C. 1985, c. C-44.



Through their voting rights, shareholders elect directors, appoint external auditors and approve certain matters of fundamental importance. Our system of governance generally accepts as valid a decision made by a majority of shareholders acting in their own self-interest. However, a fundamental assumption underlying our system of corporate governance is that shareholders are entitled to have a say on certain kinds of decisions because they have a real economic interest in the outcome.

Empty voting arises where the right to vote that attaches to a share has been decoupled from the economic interest represented by that share (as a result, for example, of shorting strategies or other derivatives-based arbitrage), and the right to vote is then exercised by a party with little, no, or even negative economic interest or exposure to the corporation (e.g., because that exposure has been completely hedged). The result is a misalignment between the interests of the “empty voter” and the interests of all other shareholders who do have an economic interest in the company. In certain recent high profile examples in Canada and the United States, individual investors or funds have sought to profit by exploiting the decoupling of the voting right and the economic interest of a share in a company such that their ability to profit hinges on their voting shares in a manner that is detrimental to the best interests of the company and all other shareholders.

The principal circumstances in which decoupling of voting rights and economic interest in a share may occur are:

Selling shares after the record date for voting – A shareholder who sells shares between the record date for a shareholder meeting and the meeting date generally will have a right to vote those shares even though the shareholder is no longer exposed to the economic consequences of their decision.

Share borrowing and lending – When an investor borrows shares immediately prior to a record date, the right to vote the loaned shares usually moves from the lender to the borrower. If the borrower does not sell or return the borrowed shares until after the record date, the borrower may be able to vote the borrowed shares despite having no economic interest in the corporation’s shares.

Derivatives – A shareholder can enter into a derivative or swap transaction to limit its economic exposure to the shares it holds in order to exercise voting rights without commensurate economic exposure. Our firm was recently involved on behalf of TELUS Corporation in a protracted episode that lasted a year and that saw a fund that had hedged its economic exposure work actively to profit from a short position it had placed on the company. This hedge fund (Mason Capital) attempted to vote a very substantial block of TELUS common shares that had been rapidly acquired in a manner that was designed to significantly decrease the value of TELUS’s then outstanding non-voting shares (by seeking to defeat TELUS’s proposal to move to a single class of common shares and eliminate the



class of non-voting shares). This was a classic example of a fund decoupling voting rights from its economic exposure and structuring its affairs so that it was in fact motivated to act in a manner adverse to the interests of other shareholders. An enormous amount of management and board time (and important corporate resources) were then spent in the wholly unproductive exercise of having to counter this empty voting arbitrage strategy.

Any decoupling of voting rights and economic interest which occurs as a result of shares being sold after the record date for voting is inherent in the proxy voting process which necessitates the establishment of a record date for voting that is several weeks in advance of the meeting date in order to provide shareholders with adequate time to receive and review materials and provide voting instructions. The amendments made to the CBCA in 2001 reflected consideration of that issue and reached an appropriate conclusion, which we support. Rather, our concerns lie with respect to other sources for decoupling of voting rights and economic interest, including through share borrowing and lending and the use of derivative instruments.

B. Previous Attempts to Regulate Empty Voting in Canada

Empty voting has been the subject of academic discussion for some time. Despite several proposed rule and policy amendments, to date no legislative or regulatory amendments have been implemented in Canada to address the concerns surrounding empty voting. The Canadian Securities Administrators (“CSA”) Notice and Request for Comment on proposed National Instrument 55-104 – *Insider Reporting Requirements and Exemptions*² (“NI 55-104”) dated December 18, 2008 stated that the CSA was aware of and reviewing issues related to empty voting. A key initiative in the Ontario Securities Commission’s Statement of Priorities for 2012-13 was to improve the proxy voting system by conducting an empirical analysis to review concerns raised about its accountability, transparency and efficiency and facilitate discussions amongst market participants to improve the system.

In March 2013, the CSA published for comment proposed amendments to the Canadian early warning regime, which includes National Instrument 62-103 – *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (“NI 62-103”).³ The proposed amendments were intended to provide greater transparency regarding securities holdings, by reducing reporting thresholds and requiring the disclosure of hidden ownership strategies, such as empty voting, that may significantly undermine the early

² (2010) 33 O.S.C.B. 3673.

³ CSA Notice and Request for Comment, Proposed Amendments to Multilateral Instrument 62-104 – *Take-over Bids and Issuer Bids*, National Policy 62-203 – *Take-over Bids and Issuer Bids* and National Instrument 62-103 – *Early Warning System and Related Take-over Bid and Insider Reporting Issues* (2013), 36 OSCB 2675.

warning regime.⁴ To date, these amendments and the public comments received remain under consideration and have not been implemented. If implemented, the proposed amendments to NI 62-103 will address some, but not all, of the transparency concerns associated with empty voting.

More recently, in August 2013, the CSA issued CSA Consultation Paper 54-401 – *Review of the Proxy Voting Infrastructure*⁵ seeking input from stakeholders on the Canadian proxy voting infrastructure. Consultation Paper 54-401 recognizes that shareholder voting is “one of the most important methods by which shareholders can affect governance, communicate preferences and signify confidence or lack of confidence in an issuer’s management and oversight”, making it “fundamental” to the quality and integrity of Canadian public capital markets.⁶ Two of the five specific factors identified in Consultation Paper 54-401 as having contributed to the complexity of proxy voting and its resulting challenges are directly related to empty voting.

We welcome discussion by securities regulators of the impact of empty voting on the integrity of the capital markets in Canada. However, we are strongly of the view that the exercise of voting rights by shareholders is principally the responsibility of corporate law and, accordingly, important concerns relating to empty voting must be addressed by legislative amendments to corporate statutes, including the CBCA. Legislative amendment remains necessary to grant the courts the discretion to deal with empty voting and to place certain limitations on shareholder access to corporate remedies when these remedies would otherwise be used by shareholders with no economic interest in the company. The amendments proposed in this letter, if implemented, would complement, but not duplicate, the NI 62-103 amendments under consideration by the CSA.

C. Recommended Amendments Relating to Empty Voting

Recent high profile examples in Canada and in the United States (including the TELUS episode mentioned above) have shown that empty voting is more than an academic concern. It has in several instances proven highly detrimental to the best interests of the company and its other shareholders. Courts on both sides of the border have been hamstrung in efforts to protect companies from the effects of empty voting, concluding repeatedly that such protection requires legislative amendment. To that end, we propose the following amendments to the CBCA.

Section 137 should be amended to require greater disclosure relating to the beneficial owner where the registered shareholder making the proposal is not also the beneficial owner of the shares.

⁴ *Ibid.*

⁵ (2013), 36 O.S.C.B. 8130.

⁶ *Ibid.* at 8131.



With respect to shareholder proposals under section 137 of the CBCA, the description of persons eligible to make proposals in section 137(1.1) should be amended to require greater disclosure with respect to beneficial ownership where the person submitting a proposal under section 137 (i) is not the registered shareholder, or (ii) is the registered shareholder but does not have beneficial ownership of the shares. In either case, the proponent should be required to provide the same details about both the registered shareholder and the beneficial owner as would be required to be disclosed if the person exercising the right was both the registered shareholder and the beneficial owner.

Paragraph 137(1.1)(a) should be amended to require that the person(s) making the proposal include persons who have beneficially owned at least the prescribed number of shares for at least the prescribed period.

It is appropriate to restrict eligibility to make shareholder proposals to person(s) with a significant economic interest in the corporation who have held that interest for a meaningful period of time. Paragraph 137(1.1) of the CBCA should be revised to preclude a beneficial owner who is not eligible to make a shareholder proposal from circumventing such provisions by enlisting the aid of a registered shareholder which has held title to a sufficient number of shares for such period but lacked beneficial ownership of such number of shares over such period.

Paragraph 137(1.1)(b) should be amended to require greater disclosure relating to a supporting beneficial owner that is not also a supporting registered shareholder.

A proposal may also be submitted under paragraph 137(1.1)(b), on the basis that the person submitting the proposal has the support of persons who, in the aggregate, and including or not including the person that submits the proposal, have been, for at least the prescribed period, the registered holders, or the beneficial owners of, at least the prescribed number of outstanding shares of the corporation. We recommend that a person making a proposal under paragraph 137(1.1)(b) be required to disclose the same details about any registered shareholder or beneficial owner supporting the proposal as would be required to be disclosed if the supporting registered shareholder or beneficial owner was the proponent of the proposal. Consistent with our recommendation in respect of section 137 above, the supporting person should be required to provide the same details about both the registered shareholder and the beneficial owner as would be required to be disclosed if the supporting person was both the registered shareholder and the beneficial owner of the prescribed number of shares for the prescribed period.

Section 143 should be amended to require a shareholder that requisitions a meeting to have held at least the prescribed number of shares for at least the prescribed period and, where the registered shareholder is not also the beneficial owner, to require the beneficial owner to have beneficially owned at least the prescribed number of shares for at least the prescribed period.



The proposed amendments to section 143 seek to ensure that the beneficial owner, and not only the registered owner, is also required to satisfy the minimum periods of ownership. This would act as a significant deterrent to parties that seek to accumulate large blocks of shares rapidly and in a non-transparent manner in order to implement arbitrage strategies that hinge on having immediate access to the meeting requisition mechanism. The proposed amendments would also maintain consistency between the required holding periods for shares in sections 137 and 143, and other provisions of the CBCA.

Section 143 should be amended to require greater disclosure where a shareholder that requisitions a meeting is not also the beneficial owner of the shares.

Consistent with our recommendations above with respect to section 137 and paragraph 137(1.1)(b), the registered shareholder of the shares should be required to disclose the same details about the beneficial owner as would be required to be disclosed about the beneficial owner if the beneficial owner was the registered shareholder requisitioning the meeting.

This proposed amendment would promote transparency with respect to the identity of the party taking the shareholder action, as a beneficial owner seeking to take shareholder action would not be able to keep its identity hidden behind the registered shareholder, which, in Canada, is often Clearing and Depository Services Inc. (“CDS”).

Section 144 should be amended to grant the courts the discretion to address votes by shareholders whose economic interests are not commensurate with their voting power.

In order to equip the courts to effectively address the negative impacts of empty or negative voting, we are of the view that the courts should be given express authority to address voting by shareholders whose economic interest in the company is not commensurate with their voting position, including authority to disqualify votes in appropriate circumstances. The jurisdiction of the court to intervene in circumstances of abusive empty voting was considered by the British Columbia Court of Appeal.⁷ The Court acknowledged the concerns raised by empty voting tactics but concluded that it had no inherent jurisdiction to intervene, finding that courts are “entitled to intervene only when they have specific authority to do so under statutory provisions”.⁸ Specifically, the Court observed that it could not have regard to whether shareholdings represent a “material interest in the company”.⁹ The Court concluded that “[t]o the extent that cases

⁷ *TELUS Corporation v. Mason Capital Management LLC*, 2012 BCCA 403, 38 B.C.L.R. (5th) 273 [Telus].

⁸ *Ibid.*, para 74.

⁹ *Ibid.*, para 77.

of ‘empty voting’ are subverting the goals of shareholder democracy, the remedy must lie in legislative and regulatory change.”¹⁰

It is important that this deficiency in our corporate statutes be rectified and that the CBCA become a corporate statute that Canadian public companies are able to look to as providing the courts with the ability to deal with empty voting. We therefore propose that section 144 of the CBCA be amended to grant the courts the discretion to issue an order disqualifying some or all of a holder’s shares from being voted at a meeting, if the holder of those shares does not have an economic interest in the company that is commensurate with its voting position.

Specifically, we recommend that a court be granted the discretion to, on its own motion or on the application of a director, a shareholder who is entitled to vote at a meeting of shareholders or the Director, order that some or all of a shareholder’s shares shall not be voted and/or counted in voting results with respect to matters specified in the order. In making such an order, we recommend that the court be granted the discretion to consider whether the beneficial owner of the shares does not have an economic interest in the company that is commensurate with the number of shares beneficially owned and entitled to be voted at the meeting by the beneficial owner.

II. CORPORATE GOVERNANCE AND COMBATING BRIBERY AND CORRUPTION

We are of the view that amendments to the CBCA are not necessary to combat bribery in international transactions and to maintain accounting standards. In passing *An Act to amend the Corruption of Foreign Public Officials Act*¹¹ (the “CFPOA Amendment Act”), Parliament has addressed these issues in addition to implementing Canada’s obligations as a signatory of the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

The CFPOA Amendment Act resulted in far-reaching and critical amendments to the *Corruption of Foreign Public Officials Act*¹² (the “CFPOA”). All of the changes came into force immediately upon receiving royal assent, save for the provision that will eliminate the exception for “facilitation payments,” which will come into force on a date to be fixed by an order of the federal Cabinet.

The provisions of the CFPOA Amendment Act point towards continuing vigorous enforcement by the Canadian government of the CFPOA, including: increased prison terms for Canadian nationals including officers and directors of Canadian corporations,

¹⁰ *Ibid*, para 81.

¹¹ S.C. 2013, c. 26.

¹² S.C. 1998, c. 34.

the elimination of the territorial jurisdiction test, increased exposure to CFPOA penalties by adding a books and records provision, and the elimination of exceptions and defences such as those for facilitation payments and businesses not earning profits. These amendments have already required the revision of anti-corruption compliance programs of Canadian businesses operating overseas, particularly to take into account the new books and records provision and the phasing out of the exception for facilitation payments.

Relevant to the CBCA, the provisions of the CFPOA Amendment Act now in force have had the following specific effects:

- Introduced a books and records provision that imposes extensive and detailed requirements which prohibit certain bookkeeping practices and types of transactions if related to bribery of foreign public officials. This provision of the CFPOA may be applied along with other provisions of Canadian law such as section 155 (financial disclosure) of the CBCA and sections 361 (false pretences), 380 (fraud), and 397 (falsification of books and documents) of the *Criminal Code of Canada*.¹³
- Clarified the definition of “business” by removing the words “for profit”, eliminating the potential defence that an unprofitable business cannot be charged under the CFPOA.

In addition, the CFPOA Amendment Act significantly expanded the scope of Canadian prosecutorial jurisdiction to cover activities of Canadians (including officers and directors) and Canadian corporations, even if all the activities related to the alleged bribery take place or the falsification of books and records occurs outside Canada. The basis for the offence now includes conspiracy to commit, an attempt to commit, being an accessory after the fact or any counselling in relation to the offences of bribery or falsification of books and records.

In light of the expanded prosecutorial jurisdiction, the increased severity of sentences upon conviction and the RCMP’s exclusive authority to lay charges pursuant to the CFPOA, amendments to the CBCA with respect to combating bribery and corruption are unnecessary.

III. INSOLVENT COMPANY ARRANGEMENTS UNDER THE CBCA

Section 192 plans of arrangement are used to effect a range of fundamental changes to corporations, including acquisitions, amalgamations, debt for equity swaps and internal

¹³ R.S.C. 1985, c. C-46.



reorganizations. Section 192 has also extended the use of the plan of arrangement provision to financial restructurings of insolvent corporations.

A. General Comments on Arrangements under the CBCA

1. Compliance with the Director’s Policy Statement

We understand that Policy Statement 15.1 of the Director under the CBCA, *Policy Concerning Arrangements Under Section 192 of the CBCA* (January 4, 2010) (the “Policy Statement”), sets out the position of the Director as to the permissible use of and appropriate procedural safeguards and substantive requirements applicable to arrangements under section 192. We are of the view that the recommendations below should be incorporated into the CBCA through legislative amendment where appropriate with other recommended safeguards appropriately reflected in revisions to the Policy Statement. It is our further view that to the extent that procedural safeguards and substantive requirements applicable to such arrangements are not reflected in amendments to the CBCA or the regulations thereunder but remain in the Policy Statement, the CBCA should require applicants to engage with the Director regarding any proposed deviation from the Policy Statement and to report such non-compliance and the results of such engagement to the courts on applications for interim or final orders.

2. Creditor expectations

In a restructuring of an insolvent company under the *Companies’ Creditors Arrangement Act*¹⁴ (the “CCAA”) or under Part III of the *Bankruptcy and Insolvency Act*¹⁵ (the “BIA”), creditors expect to receive any financial recovery based in part on the established priority of recovery under the insolvency statutes. However, this priority of recovery does not apply to a restructuring by way of a plan of arrangement under the CBCA. The result causes an imbalance in the risk-reward calculations undertaken by creditors before investing. To illustrate, equity holders may receive or retain some value in a CBCA arrangement. Conversely, section 6(8) of the CCAA provides that a CCAA plan of compromise or arrangement may not be sanctioned by the court unless it provides that all claims that are not equity claims have been paid in full before the equity claim is to be paid.

¹⁴ R.S.C. 1985, c. C-36.

¹⁵ R.S.C. 1985, c. B-3.



B. Recommendations Relating to Arrangements of Insolvent Companies under section 192

1. Jurisdiction and solvency

Section 192 should be amended to grant the court jurisdiction under the CBCA over a non-applicant corporation that is proposed to be arranged in a section 192 plan of arrangement.

We note that the courts have approved a number of CBCA arrangements involving insolvent companies, beginning in the 1980s and in particular since 2008. The principal approaches to addressing the solvency requirement in subsection 192(3) that have been accepted by the courts are (i) the “solvent applicant approach,” where the section 192 applicant is a solvent NewCo that is not the company that is primarily proposed to be arranged; and (ii) the “solvent through arrangement approach” where the court accepts that the applicant will be solvent upon completion of the arrangement.

We recognize that section 192 arrangements involving an amalgamation between an applicant and a non-applicant corporation have been routinely approved by the courts. However, with respect to the solvent applicant approach, we have reservations concerning the jurisdiction of the courts under the CBCA to grant orders relating to an arrangement of a corporation that is not an applicant to the court and is insolvent. Moreover, we also have reservations concerning the jurisdiction of the courts under the CBCA to grant a stay of proceedings affecting the rights of third parties vis-à-vis the non-applicant corporation. Nevertheless, we are generally supportive of flexibility in restructuring proceedings being available to distressed companies.

In order to clarify the jurisdiction of the courts, we are of the view that section 192 should be amended to grant the courts express jurisdiction under the CBCA over an insolvent, non-applicant company that is proposed to be arranged under a section 192 plan of arrangement. We make this recommendation alongside our recommendation that the safeguards proposed below be implemented to protect the interests of stakeholders of insolvent corporations proposed to be arranged.

2. Triggers for stakeholder safeguards

Arrangements under section 192 that involve principally the compromise of debt and contemplate a stay of proceedings should trigger stakeholder safeguards.

We are of the view that legislative amendments respecting arrangements of insolvent corporations should not impact the facilitative nature of section 192 with respect to other types and circumstances of arrangements. Therefore, it is our view that the safeguards recommended in this letter regarding insolvent corporations should be triggered only where a proposed section 192 arrangement involves principally the compromise of debt



and contemplates a stay of proceedings in respect of one or more of the corporations involved in the arrangement. This trigger reflects the language in the current Policy Statement, providing consistency to market participants.

We consider that arrangements under section 192 that involve principally the compromise of debt may be similar in effect and concept to restructurings under the CCAA or Part III of the BIA. The CCAA is the more relevant comparator, as the companies that have undertaken restructurings under section 192 of the CBCA have typically done so as an alternative to restructuring under the CCAA. Parliament has seen fit to codify in the CCAA safeguards that were developed in practice and by the courts to protect the interests of stakeholders of a CCAA debtor company. In order to protect the integrity of the insolvency regime in Canada, we are of the view that certain stakeholder safeguards are necessary in the section 192 plan of arrangement regime.

3. Stay orders granted under section 192

We believe that a plan of arrangement under section 192 involving an insolvent company should be an efficient, targeted financial restructuring, and that section 192 is not an appropriate procedural vehicle for an operational restructuring. An operational restructuring of an insolvent company is more appropriately pursued under the CCAA. To ensure that a restructuring of an insolvent company under section 192 is a narrow, financial restructuring, we make the following recommendations with respect to stays of proceedings granted under section 192.

Section 192 should be amended to provide the courts express statutory authority to grant stays of proceedings in connection with an application for a section 192 arrangement, but stay orders should generally be limited to narrow, first party stays of proceedings and no-default orders.

In recent practice, the courts have found wide discretion to grant stay orders under section 192. We are of the view that grounding the jurisdiction to grant stays of proceedings in the legislation will provide greater predictability to stakeholders as well as allow for appropriate safeguards to be implemented with respect to stay orders.

However, the scope of stay orders permitted to be granted under section 192 should be restricted, reflecting the narrow and focused financial restructuring that is appropriately undertaken in a section 192 plan of arrangement.

Section 192 stays of proceedings should generally be limited to the following:

- A broader stay against contractual counterparties terminating a contract with a company proposed to be arranged based solely on the existence of or application for the proceedings; and



- A narrow stay affecting only named parties or parties who hold the securities proposed to be arranged.

In addition, the section 192 stay provisions should be aligned with the provisions of the CCAA with respect to eligible financial contracts, such that a section 192 applicant or other company proposed to be arranged would not be permitted to deal with an eligible financial contract in a manner that would not be available under the CCAA. While the court in *Re Enron Canada Corp.*¹⁶ reached this conclusion in its decision based on consideration of the provisions of the CCAA, the potential disruptions to the derivatives market that would result from a contradictory decision are sufficiently significant as to merit express legislative treatment in the CBCA plan of arrangement provision.

Interim stay orders granted under section 192 should be limited to a maximum duration of 90 days.

Our recommendations relating to an appropriate maximum duration for an interim stay order under section 192 are linked to our recommendations above respecting the scope of restructuring that is appropriately undertaken in a section 192 plan of arrangement, and respecting the scope of stay orders to be granted in a section 192 arrangement.

We are of the view that, in the context of a narrow, financial restructuring under section 192 and respecting a narrow stay order as outlined above, it would be appropriate to grant an interim stay order that is effective from the date of the interim order until the scheduled date of the final order application plus the days necessary for closing the arrangement transaction. This view further assumes that the company proposed to be arranged is ready to circulate its proposed plan of arrangement, fully prepared and filed with the court at the interim order application, to its shareholders for the purpose of considering and voting on the arrangement. In that context, an appropriate stay of proceedings should provide for a sufficient period of time to give advance notice of the record and meeting date for the meeting under securities laws, if applicable, plus a reasonable opportunity to distribute proxy materials to shareholders and for shareholders to respond to them by providing voting instructions, plus the days necessary for closing the transaction.

The CBCA Regulations prescribe that notice of a shareholder meeting must be given not less than 21 days and not more than 60 days before the meeting.¹⁷ Securities laws require 25 days advance notice of the record and meeting dates for a public company.¹⁸ We

¹⁶ (2001) 310 A.R. 386, 20 B.L.R. (3d) 127 (Alta. Q.B.).

¹⁷ S.O.R./2001-512, s. 44.

¹⁸ National Instrument 54-101 – *Communication with Beneficial Owners of Securities of a Reporting Issuer*, s. 2.2, (2002) 25 O.S.C.B. 3361, as amended. This 25 day period may be abridged subject to certain conditions in accordance with section 2.20 of the instrument.



therefore recommend that section 192 be amended to provide that interim stays of proceedings granted under section 192 be limited in duration to 90 days. We further recommend that the Policy Statement be revised to state the position that section 192 applicants that anticipate a shorter notice period and that seek interim stay orders should request stay orders only for a duration which approximates the minimum period in which to conduct a special meeting in compliance with corporate law and, in the case of a distributing corporation, applicable securities laws plus the days necessary for closing the transaction.

If the company opts to reschedule its shareholder meeting such that the arrangement would close after the stay of proceedings has expired, the company should be required to apply to the court for an extension of the stay order. The stay extension hearing would provide the court an opportunity to hear submissions from the applicant on the revised arrangement timeframe and the necessity of the stay order, and from stakeholders on the impact of the stay.

Where the company proposed to be arranged is not ready to circulate its proposed plan of arrangement to shareholders, we are of the view that the court should have the authority to grant an interim stay order for a maximum duration of 30 days. The applicant could apply to the court for an extension of the stay order at the expiry of the 30 days. As above, the stay order extension hearing would provide the court an opportunity to hear submissions on a proposed arrangement timeframe and on the necessity and impact of the stay order. The 30-day expected limit for preliminary stay orders should be reflected in the Policy Statement.

4. Fairness opinions

A practice has developed of fairness opinions being provided with the information circular distributed to security holders in a proposed section 192 arrangement that involves an insolvent company. The fairness opinion is typically addressed to the board of directors, or a committee of the board, of the company, reflecting the terms of the financial advisor's engagement. Fairness opinions typically contain standard language limiting reliance on the opinion to the addressee(s). Nevertheless, fairness opinions appear to have taken on an enhanced role as an indicator, or proxy indicator, of fairness to security holders and the court. The existence of a fairness opinion is routinely noted by the courts as an indicator of the fairness of a proposed CBCA arrangement of an insolvent company; however, we do note that courts are paying increasing attention to the content of fairness opinions.

In light of the enhanced role of fairness opinions in section 192 arrangements involving insolvent companies, we are of the view that standards of independence of fairness opinion providers and standards of the content of fairness opinions should be strengthened in respect of opinions intended to be provided to or relied upon by security



holders. We do see, however, value and merit in the ability of directors of corporations to obtain fairness opinions in their own right for the purpose of forming a business judgement on the appropriateness and fairness of a proposed arrangement.

(a) Content of fairness opinions

Fairness opinions intended to be provided to or relied upon by security holders should provide reasons for the conclusion that a proposed arrangement is advantageous to all security holders.

Where an arrangement involves principally the compromise of debt, the Policy Statement sets out the Director's position that an opinion report of an independent financial adviser should be provided to all security holders. The Director's position is that the fairness opinion should set out the reasons why the plan of arrangement is advantageous to all security holders, and demonstrate that each class of security holders would be in a better position under the arrangement than if the corporation were liquidated. Neither of these content guidelines are reflected in general market practice involving arrangements of insolvent corporations.

In light of the enhanced role of fairness opinions suggested by the Policy Statement and the practice of the courts, we are of the view that fairness opinions in support of proposed arrangements of insolvent companies which are intended to be provided to or relied upon by security holders should provide reasons and a demonstration of why the arrangement is advantageous to all classes of security holders. Fairness opinions intended to be provided to or relied upon by security holders should also assess the fairness of the proposed transaction as among security holders. Stricter application of the Policy Statement guidelines, as discussed above, will be necessary in order to achieve this standard.

(b) Independence of fairness opinion providers

Fairness opinion providers in respect of opinions intended to be provided to or relied upon by security holders should be independent of (i) the transaction, (ii) all significant parties to the transaction, and (iii) conflicts of interest.

The Policy Statement calls for fairness opinions to be provided by financial advisers that are independent of all of the parties to the proposed arrangement. General market practice with respect to arrangements of insolvent corporations has been for the fairness opinion to be provided by the financial adviser that is acting on the transaction itself, and for the fairness opinion provider to receive a portion of their compensation contingent upon the successful completion of the transaction. We recognize that having the financial adviser to the transaction provide a fairness opinion, with at least some compensation contingent upon completion of the transaction, can help to incentivize the financial adviser to propose a transaction that is fair. We further recognize the role that



contingent fee structures can play in ensuring that fees are earned on the creation of value for the company.

We are of the view, however, that where a proposed arrangement involves principally the compromise of securities, at least one fairness opinion that is intended to be provided to or relied upon by security holders should be provided by a financial adviser that is independent of the transaction – i.e., not advising on the transaction – and that is independent of the significant parties to the transaction. Further, in order to avoid conflicts of interest, a provider of an independent fairness opinion intended to be provided to or relied upon by security holders should not receive compensation that is contingent upon completion of the proposed transaction.

IV. THE EXERCISE OF SHAREHOLDER RIGHTS

1. Should the CBCA more fully recognize beneficial owners of shares by giving them more of the rights of registered shareholders?

A beneficial owner should be able to exercise more shareholder rights on the same basis as a registered owner, but only on a full-disclosure basis.

Consistent with our recommendations above regarding sections 137 and 143 with respect to disclosure of details relating to beneficial ownership, we support the ability of a beneficial owner to exercise the rights of a registered shareholder with respect to making shareholder proposals and requisitioning shareholder meetings, provided that those rights are exercised on a full-disclosure basis. Conversely, as recommended above, we believe that a registered shareholder that is not also the beneficial owner of the shares should not be able to exercise the rights of a registered shareholder without providing full disclosure regarding the beneficial owner(s) on whose behalf the registered shareholder is acting.

Registered shareholders are granted important rights in the oversight and governance of corporations. The historic rationale for giving these rights only to registered holders is that the company and other shareholders should be able to tell from the register who is in fact exercising the rights in question and should be able to validate that such party is in fact a valid shareholder. With the exponential growth in the number of shares that are held through institutions such as CDS (that are in turn the sole registered owner of what are often millions of shares in a company), it is critical that a company and other shareholders be able to ascertain and confirm the identity of beneficial holders holding through institutions like CDS that seek to exercise particular shareholder rights.

Permitting beneficial owners to exercise such rights on less than a full disclosure basis puts the shareholder-corporation relationship at risk. Full disclosure includes providing proof of beneficial ownership of the shares for which shareholder rights are sought to be exercised. Full disclosure will help eliminate the potential for inappropriate and deliberately non-transparent behaviour on the part of shareholders, it will ensure that



beneficial owners of shares are able to exercise the rights of a registered shareholder only on the same basis as a registered shareholder, and it will assist in ensuring that the voting and other shareholder rights attaching to specific shares are not exercised by both beneficial owners and registered shareholders.

Our support for extending to beneficial owners the ability to exercise the rights of registered shareholders with respect to making shareholder proposals and requisitioning shareholder meetings, does not extend to other rights held by registered shareholders. However, where the shareholder proposal or shareholder requisition has included disclosure regarding the beneficial owner consistent with our recommendations above, we would support giving the beneficial owner the right to attend the shareholder meeting at which the proposals set out in the shareholder proposal or shareholder requisition are to be considered and, at the meeting, to propose the motion that places the proposals before the meeting for consideration. The right to vote on the proposals would remain with registered shareholders and their duly appointed proxies.

2. Should there be a minimum shareholding period before shareholders can exercise the right of dissent?

Shareholders should be required to hold shares for the prescribed period before being able to exercise their right of dissent.

We are of the view that shareholders should be required to hold shares for the period prescribed by regulation before they can exercise the right of dissent. We recommend a minimum period of 6 months. This proposed amendment would align the minimum share-holding period before exercising the right of dissent with the minimum share-holding period before a shareholder may submit a shareholder proposal under section 137(1.1) of the CBCA, and with the proposed amendment to section 143(1) above respecting a shareholder requisition of a meeting, as prescribed period under the CBCA Regulations.

A required share-holding period will assist in mitigating the potential for gamesmanship in the context of a proposed transaction. For example, under the current regime, an investor could buy shares before the record-date for a shareholder vote on a proposed transaction. The investor could then dissent to cause, or assist in causing, the transaction to fail, as proposed transactions typically contain maximum dissent thresholds of 5 percent of shareholders. The motivation of such gamesmanship can be to cause the share price to rise upon the failure of a proposed transaction, resulting in undue gains to the investor.



V. OTHER COMMENTS AND RECOMMENDATIONS

A. Executive Compensation

We do not support the introduction of a mandatory requirement that companies provide shareholders with a separate advisory vote on executive compensation. Oversight of the company's compensation strategy and practices is clearly within the purview of the board's responsibilities and the board is in a better position than shareholders to make determinations on pay. Moreover, the board has a fiduciary responsibility to discharge such oversight responsibility with care, diligence and skill in a manner consistent with the board's fiduciary duty to act in the best interests of the company. Shareholders have no such fiduciary duty. Although directors should consider the interests of shareholders when discharging their responsibilities with respect to executive pay, a shareholder advisory vote on the executive compensation report provides little information regarding shareholder views since directors will not know why shareholders voted for or against the resolution. There are other and better mechanisms through which shareholders may make their views known to management and the board. In any event, say on pay voting is not appropriate for private companies.

B. Shareholder Rights and Voting

1. Mandatory ballot voting

We believe this is neither necessary nor appropriate. Shareholders who wish to have a ballot vote on a matter may attend the meeting and request that one be conducted.

2. Individual voting for election of directors

We support individual voting for election of directors. It is integral to Canada's corporate governance regime that directors are elected by shareholders. We think it enhances accountability and shareholder involvement in the election process if shareholders have the opportunity to cast votes for the election of each director. Individual voting for election of directors can also provide additional feedback to directors – shareholders who disapprove of a particular director nominee or the decisions of a particular committee of directors can make their dissatisfaction known by withholding from voting for that nominee or the members of that committee. We note that it does not impose any significant additional costs compared to slate voting and, by itself, does not adversely affect the election process or give rise to a risk that shareholders will fail to elect a sufficient number of directors to satisfy corporate and securities law requirements regarding board composition.

3. Majority voting

Canadian issuers which have adopted majority voting for directors have generally done so as a board policy. Under the typical Canadian policy, a director who receives less “For” votes than “Withhold” votes is required to tender his or her resignation conditional upon the board determining whether or not to accept it in the circumstances.

We note that some of the underlying causes of investor frustration in the U.S. which led to shareholder proposals on majority voting generally do not exist in Canada. Although proposals of the U.S. Security and Exchange Commission to permit shareholders to submit the names of director nominees to be included in the management proxy circular have been the subject of fierce debate in the U.S., shareholders of corporations incorporated under the CBCA or provincial corporate statutes modeled on the CBCA holding at least 5 percent of the outstanding shares have long been able to submit shareholder proposals which include nominations for directors. Moreover, under such Canadian corporate statutes, shareholders may at any time, by ordinary resolution, remove a director from office and fill the resulting vacancy, while many U.S. corporate statutes do not give shareholders such power. These differences may account for the fact that although the adoption of majority voting in the U.S. has largely been as a result of shareholder proposals, Canadian companies which have adopted majority voting have done so voluntarily.

Although the number of Canadian issuers which have adopted majority voting policies continues to increase, we do not think that majority voting policies are appropriate for all issuers. For example, a significant proportion of Canadian public companies are controlled companies, for which a majority voting policy will have little or no impact. In addition, the existence of such a policy may adversely affect the ability of smaller issuers to recruit talented directors. We note that despite considerable momentum on the issue of majority voting in the U.S. over the last several years, the final version of the Dodd-Frank Wall Street Reform and Consumer Protection Act did not include a requirement for companies to have a majority voting threshold in uncontested board elections as had been proposed in earlier versions of the legislation. As flexibility is necessary in this area, if any regulatory response is to be taken in this area it should be limited to a requirement to disclose whether or not the issuer has adopted a majority voting policy and, furthermore, any such requirement should not be applied to venture issuers.

We are also sympathetic to the concern that a director election standard may result in “failed elections” – i.e., that no directors are elected or that an insufficient number of directors are elected with the attributes necessary to meet statutory director residency requirements or requirements to have an audit committee comprised of at least three independent directors – or might result in the loss of directors with a particular skill set which the board believes is necessary or desirable.

4. Annual elections of directors

We think that the flexibility to elect directors for terms of more than one year should be retained. We note that all Toronto Stock Exchange (“TSX”) listed issuers are required to elect all members of the board annually. We do not believe it is necessary or appropriate to extend this requirement to all CBCA companies. In any event, we note that shareholders have the right, subject to satisfying the prescribed eligibility requirements, to requisition a shareholder meeting and remove and replace a director at any time.

C. Shareholder and Board Communication

1. Electronic meetings for public companies

The CBCA should be amended to facilitate electronic-only security holder meetings for public companies.

We are of the view that, in many circumstances, the utility of in-person meetings for shareholders is greatly overstated. Shareholder consideration of the majority of matters that are routinely addressed at a shareholder meeting is not typically furthered by in-person attendance at the meeting. Electronic-only meetings would lead to greater ease of attendance by shareholders and improved cost efficiency for companies. Moreover, electronic-only or combined electronic and in-person meetings have been successfully held by a number of U.S. issuers. The CBCA currently contains provisions which may constrain the ability of CBCA companies to hold electronic-only meetings. For example, the CBCA requires that all participants be able to communicate adequately with each other during the meeting, whereas in larger groups it is only reasonable to expect participants to have an opportunity to communicate to the meeting and to hear others communicating to the meeting rather than participants being able to communicate among themselves more fluidly.

2. Facilitation of “notice and access” provisions under the CBCA

The CBCA should be amended to facilitate electronic delivery of materials to security holders via notice and access.

As a result of amendments made in February 2013 to CSA National Instrument 51-102 – *Continuous Disclosure Obligations*¹⁹ (“NI 51-102”) and NI 54-101 – *Communication with Beneficial Owners of Securities of a Reporting Issuer*,²⁰ companies in most Canadian jurisdictions are able to satisfy requirements under securities laws for the delivery to shareholders of the notice of meeting, management proxy circular and annual

¹⁹ (2004) 27 O.S.C.B. 3439, as amended.

²⁰ *Supra* note 18.



financial statements using notice and access. The advantage of notice and access is that it provides a means of delivering such materials to shareholders electronically without obtaining the recipient's prior consent to do so. Many U.S. corporations and an increasing number of Canadian ones utilize notice and access for the distribution of proxy materials to their shareholders.

The consent requirements for electronic delivery under the CBCA currently preclude CBCA companies from taking advantage of notice and access. Under section 252.3(2) of the CBCA, to provide a person with a document electronically, (a) the addressee must consent in writing and have designated an information system for receipt and (b) the electronic document must be provided to that information system. Under section 7(2) of the CBCA Regulations, the electronic document may be provided via notice and access instead of to the information system designated in the consent, but prior consent to electronic delivery is still required. This consent requirement affects both the delivery of such materials to registered shareholders pursuant to CBCA sections 149, 150 and 155 and to beneficial owners pursuant to CBCA section 153.

Although Corporations Canada issued a notice in February, 2013 stating that it was prepared to grant exemptions to permit CBCA companies to distribute proxy materials to registered shareholders using notice and access, it noted that it does not have authority to grant exemptions to permit such materials to be distributed to beneficial owners in the same manner. In any event, it should not be necessary to seek an exemption if notice and access as permitted under Canadian securities laws is being used. The CBCA should be revised to provide that the delivery requirements in sections 149, 50, 153 and 155 may be satisfied via notice and access.

3. Access to proxy circular by "significant" shareholders (more than 5-percent share ownership)

We are of the view that the CBCA already provides for significant ability of shareholders holding more than 5 percent share ownership to access the company's proxy circular for purposes of nominating additional individuals to serve as director. Subsection 137(2) provides that a corporation that solicits proxies shall set out a shareholder proposal in the management proxy circular, or attach the shareholder proposal thereto and the proposal may include a proposal to replace some or all of the existing directors.

The CBCA also appropriately balances the cost of adding matters for shareholders to consider at meeting. There is no cost to a shareholder to use the shareholder proposal mechanism in the CBCA, which is one reason why eligibility to use that mechanism is restricted. Further, shareholders are entitled to rely on exemptions from solicitation requirements under the CBCA to solicit support for such proposals.

4. Reasonable time to speak to a proposal at a meeting

We do not believe that it is appropriate to prescribe a specific amount of time for a shareholder or proxyholder to speak to a proposal that is before a shareholder meeting. The chair of the meeting has a duty at law to oversee the conduct of the meeting and ensure that there is adequate discussion of the proposals before shareholders vote. We also do not believe it is appropriate to accord the persons who submitted a proposal which is before the meeting a preferential opportunity to speak to the proposal in comparison to other shareholders. Indeed, there should be no need for them to speak to the proposal as their supporting statement is required to be included in the proxy circular sent in advance of the meeting.

D. Board Accountability

1. The roles of the Chief Executive Officer and the Chair of the Board

Corporations should have flexibility to adopt a corporate governance structure that best meets their needs. While we agree that in the case of public companies it is usually desirable that the roles of CEO and of Chair of the Board be held by separate persons, that is not always practical or appropriate for public companies.

2. Shareholder approval of significantly dilutive acquisitions

We are of the view that shareholder approval of significantly dilutive transactions by public companies is sufficiently addressed by the listing standards of the TSX and other exchanges.

3. Social and environmental disclosure

We do not believe it to be necessary or appropriate to implement any requirement to provide social and/or environmental disclosure. Most public companies do provide some disclosure on social and environmental matters, in response to disclosure requirements and guidance from securities regulators in Canada and the U.S. and to address requests from shareholders and other interested parties.

For greater certainty, we strongly believe that no change is required on any of the above matters with respect to privately-held companies.

E. Insider Trading Provisions under the CBCA

Insider trading is adequately addressed by NI 55-104.²¹ The CBCA insider trading provisions in sections 126–131 are not needed and should be removed from the Act.

²¹ *Supra* note 2.



F. Incorporation Structure for Socially Responsible Enterprises

We believe this is worth pursuing.

G. Corporate Transparency

We do not believe that making available beneficial ownership information to competent authorities, disclosure of the existence of bearer shares or the disclosure of nominee shareholder information should be addressed in the CBCA.

H. Diversity of Corporate Boards and Management

Osler strongly supports diversity in all its forms and values diversity on corporate boards of directors and in management. However, we are also of the view that it is important to maintain flexibility for corporations to adopt corporate governance structures that are suitable to their circumstances. In this regard, we do not believe it is appropriate for Parliament to legislate a diversity requirement for boards or management for all corporations under the CBCA.

I. Corporate Social Responsibility

We are of the view that corporate social responsibility (“CSR”) has already become a part of the corporate governance landscape, and that amendments to the CBCA to promote CSR objectives are not necessary at this time.

We note that Canadian courts, including the Supreme Court of Canada (the “SCC”), have been gradually imposing CSR considerations on companies. Most notably, the SCC held in *BCE Inc. v. 1976 Debentureholders*²² that a board of directors may take into account a range of stakeholder interests as it considers what is in the best interests of the company. We are of the view that allowing judicial interpretation of CSR, and its implications for corporations and corporate governance, to develop is the preferable path at this time.

VI. FURTHER RECOMMENDATIONS

1. Arrangements

The requirement in CBCA section 192(3) that it not be “practical” to achieve the desired structural change in some manner other than as an arrangement has not proven to be an obstacle to transactions proceeding by plan of arrangement under the CBCA, is unnecessary and should be removed.

²² 2008 S.C.C. 69.



2. Time to hold a called shareholder meeting

The CBCA prescribes certain timeframes for “calling” a meeting of shareholders, but currently does not prescribe an outside timeframe for holding the meeting. We believe that the Act should be amended to prescribe an outside timeframe to hold a shareholder meeting that has been “called.”

* * * *

Thank you for the opportunity to participate in the Industry Canada public consultation on the *CBCA*. If you have any questions or comments, please contact Andrew MacDougall (416-862-4732 or amacdougall@osler.com), Martin McGregor (403-260-7051 or mmcgregor@osler.com), Edward Sellers (416-862-5959 or esellers@osler.com) or Robert Yalden (514-904-8120 or ryalden@osler.com).

Yours very truly,

Osler, Hoskin & Harcourt LLP