

March 5, 2014

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

Dear Sir/Madam,

I have pleasure in submitting my comments on the following issues addressed in the Discussion Paper relating to possible changes in the CBCA:

- Board Accountability (II. C)
- Corporate Social Responsibility (IX)

I also touch on corporate transparency in places, but not on the same aspects that are addressed in section V of the Discussion Paper.

First, however, I wish to observe that in my view these topics (together with corporate transparency but in a broader sense than is discussed in heading V of the Discussion Paper) are closely related in various ways, and need to be considered together, not in isolation from each other – even though for the purposes of drafting the CBCA they may need to be addressed in different sections of the Act.

Secondly, I wish to observe that in 1974 when today's CBCA was first enacted (after extensive research-based background papers and consultation), the world of trade and commerce was very different from the world of business forty years later. The information technology of today was unimaginable in 1974, two years before PCs came on the scene, nearly two decades before the worldwide web was created. Canada's federal corporate governance framework as represented by the CBCA therefore needs to be relevant and appropriate for the success of private enterprise in the business and social environment of the 21st. century, and for managing the affairs of companies doing business in an unprecedentedly and increasingly connected global context.

Board Accountability

First, I support the idea that under the CBCA the CEO and the chair of the Board should be separate individuals, for the reasons given in the Discussion Paper. Fortunately in practice in Canada, unlike the US, this is already largely the case for public companies.

Secondly, I think that even if desirable in theory, it would be difficult to set out in a statute such as the CBCA in any meaningful and practical way how a publicly traded company should provide disclosure of the Board's "understanding of social and environmental matters on (*sic*) corporate operations" (as indicated in the 4th. Bullet) or, as expressed further down in the body of text, disclosure of "the Board's understanding of the impact and potential impact

of social and environmental matters on the corporation's operations." How such an "understanding" might be measured and communicated meaningfully in practice would be a challenge in itself.

Disclosure requirements about social and environmental matters and board oversight of matters for which they are responsible (*and their enforcement of such requirements*) are better left to Canada's Securities Administrators (CSA) and stock exchanges. Also, certain industry sectors (e.g. Canadian extractive industries and financial institutions) are subject to sector specific national and international disclosure requirements, codes and principles about environmental and social matters.¹

Instead I recommend that serious consideration be given to amending section 122 of the CBCA and enacting something much broader and clearer, similar to section 172 of the UK Companies Act, 2006, which states:

"172. Duty to promote the success of the company

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
- (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company."

I believe that boards of leading successful Canadian companies already strive to function in this way. To be able to discharge such a duty, directors clearly need to have an adequate understanding of the impact and potential impact of social and environmental matters on the corporation's operations, and vice versa, as well as of the importance of stakeholder relationships. This reality is implicit in the CPA guidance for directors cited above.

The CSA could then use existing and future disclosure instruments and policies to require publicly traded companies to provide disclosures about how this duty is being discharged. The MD&A (ref. NI 51-102) that accompanies financial statements with CEO & CFO certification could be an effective vehicle for such disclosures, as well as the corporate governance disclosure instrument (ref. NI 58-01).

The evolution and emergence of Integrated Reporting according to the Integrated Reporting Framework published in December 2013 by the International Integrated Reporting Council (ref. www.theiirc.org) may over time prove to be another effective reporting vehicle, communicating the relationship between financial performance as shown in the financial statements with the many other factors that contribute to or impede a company's "success" for the benefit of its members as a whole, and, arguably, for other stakeholders in the company's "success".

¹ Guidance for directors about environmental and social issues and what they need to know and ask is provided in a 2011 CPA Canada publication "Sustainability: Environmental and Social Issues Briefing – Questions for Directors to Ask".

Regarding corporate transparency, I think consideration needs to be given to amending section 155 of the present CBCA to require, at a high level, the provision of additional narrative and quantitative disclosures to supplement the financial statements in order to communicate a more complete view of the company's operations, development, "success" and prospects, but to do so without duplication of (or contradiction with) mechanisms such as the MD&A and corporate governance disclosure requirements that are better handled by securities regulation, regulators and stock exchanges.

Corporate Social Responsibility

I fully support the arguments and reasons set out in the second paragraph under heading IX. of the Discussion Paper, but would add that in the world of the 21st. century a company's long term success likely depends on its effectiveness in meeting and managing the challenges enumerated in that paragraph. Connectedness with stakeholders (present and future) other than shareholders is a key factor for business success in today's and tomorrow's world. The corporate governance principles, frameworks and practices necessary for companies to meet such challenges with sound board oversight must be embedded in the CBCA.

I recommend that the most effective way of accomplishing the integration of what are often termed CSR principles into corporate objectives and policies will be the enactment, as proposed above, of something like section 172 of the UK Companies Act, 2006 as a fundamental aspect of directors' duty to promote the success of the company.

In considering this recommendation and how to adapt it for Canadian purposes, I think it will be important for those charged with analyzing the response to the consultation and drafting changes to the CBCA to be mindful of the BCE decision in 2008 and the subsequent outstandingly thoughtful and deeply researched paper by Ed Waitzer and Johnny Jaswal about that decision, its references to companies acting as "good corporate citizens" and the implications for corporate governance and directors' duties (ref. BCE Inc. v. 1976 Debentureholders, and "Peoples, BCE, and the Good Corporate Citizen" Waitzer & Jaswal, OHLJ, 2009).

As I stated at the outset, corporate social responsibility and board accountability are closely related topics, together with the issue of corporate transparency, whereby shareholders and other stakeholders are entitled and should be able to obtain reliable insights – beyond what financial disclosures alone can provide - into the success of the company and so hold directors accountable for that success and how it has been achieved, pursuant to a 21st. century understanding of their duty, as enacted in a suitably amended CBCA.

Respectfully submitted,

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Recipient of the Governor General's Queen Elizabeth II Diamond Jubilee Medal "in recognition of his national and international thought leadership in corporate sustainability".