

Canadian Coalition for  
**GOOD GOVERNANCE**

THE VOICE OF THE SHAREHOLDER

May 14, 2014

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Marketplace Framework Policy Branch  
Industry Canada  
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Dear Sir/Madam:

**Re: Industry Canada Consultation on the *Canada Business Corporations Act*  
(the “Consultation Paper”)**

The Canadian Coalition for Good Governance (“CCGG”) has reviewed the Consultation Paper and we thank you for the opportunity to provide our comments.

CCGG’s members are Canadian institutional investors that together manage over \$2 trillion in assets on behalf of pension funds, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices in Canadian public companies and the improvement of the regulatory environment in order to best align the interests of boards and management with those of their shareholders and to promote the efficiency and effectiveness of the Canadian capital markets.

A list of our members is attached to this submission as Appendix 1.

## OVERVIEW

CCGG supports this initiative by Industry Canada and welcomes the opportunity to provide our input on the many important corporate governance issues that the Consultation Paper raises as part of its review of the Canada Business Corporations Act (“CBCA” or the “Act”).<sup>1</sup>

We note that all of our comments and recommended amendments to the CBCA are intended to apply only to public companies governed by the CBCA (which the CBCA calls “distributing corporations”) and not private companies.

## GENERAL COMMENTS

### *Be a Leader*

CCGG believes that the proposed amendments to the Act provide the opportunity for the CBCA to be a leader in Canada in modernizing corporate legislation to reflect best in class corporate governance provisions that are globally recognized. If CBCA becomes best in class, then it is reasonable to expect that the corporate and securities laws in the provinces and territories will follow.

### *Jurisdictional Cooperation*

Several of the issues covered in the Consultation Paper could perhaps be more appropriately dealt with under provincial securities laws, as discussed in more detail below. One could argue, in fact, that ideally all public company matters should be dealt with under securities legislation. CCGG recognizes, however, that a complete revamping of the current legislative and regulatory landscape does not present a timely solution to the important issues raised in the Consultation Paper. For now, CCGG believes that these issues should be dealt with under federal corporate legislation in order to help create a consistent level playing field across the country to the extent possible and to avoid the delay that would inevitably result from attempting to coordinate reform across all the provinces. If the issues are later addressed under provincial laws, as we expect some of them will be, then, if appropriate, the CBCA can vacate its provisions in favour of the provincial counterparts. For this reason we encourage Industry Canada to adopt any amendments stemming from this consultation in a form that provides for maximum flexibility without the need to go back and make further changes to the statute, possibly by putting the relevant provisions in the CBCA Regulations where amendments can be made by the Governor in Council rather than parliament.<sup>2</sup>

### *Clarification of Directors’ Duties under the CBCA*

The opportunity to amend the CBCA happens rarely. Accordingly, CCGG believes that Industry Canada should take this opportunity to clarify the ambiguity surrounding the duties owed by directors following the Supreme Court of Canada decision in *BCE Inc. v. 1976 Debentureholders*. We recommend that Industry Canada begin a consultation process at this time that would solicit the views of a broad group

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<sup>1</sup> Because CCGG’s position on several of the issues in the Consultation Paper is outlined in detail in our 2010 Brief to the Committee on Industry, Science and Technology re: Five Year Review of CBCA (the “2010 Brief”) we have attached that brief to this letter as Appendix 3 and refer to it frequently herein.

[http://www.ccg.ca/site/ccgg/assets/pdf/Brief\\_to\\_Standing\\_Committee.pdf](http://www.ccg.ca/site/ccgg/assets/pdf/Brief_to_Standing_Committee.pdf)

<sup>2</sup> CBCA section 261(1).

of stakeholders with the goal of clarifying directors' duties and providing guidance as to whom those duties are owed.

The question of what comprises a director's duties takes place within the context of the broader debate about which constituency should have primacy in Canada's corporate governance model: shareholders, a broader group of stakeholders, directors, a combination? This debate is taking place in several areas currently under regulatory consideration, such as the on-going discussions between the Canadian Securities Administrators ("CSA") and the Autorité des marchés financiers over the proper balance of power in takeover bid defence situations. CCGG believes that now is the appropriate time to attempt to provide some clarification about these issues within the Canadian regulatory context.<sup>3</sup> Views on this issue likely will vary dramatically and a solution will not be easy, but that fact should not deter Industry Canada from considering the issue now.

## RESPONSES TO SPECIFIC REQUESTS FOR COMMENT

### **I. Executive Compensation**

#### *Say on Pay*

Canada is becoming an outlier among developed nations in not having a mandatory say on pay vote that allows shareholders to voice their views on the appropriateness of an issuer's executive compensation practices. In some countries, say on pay votes are advisory in nature, such as those mandated in the U.S. since 2011 under the Dodd-Frank Wall Street Reform and Consumer Protection Act, and in other countries they are binding, such as the ones recently adopted in the U.K. and Switzerland. CCGG believes that the CBCA should provide for an annual advisory say on pay vote for all public companies governed by the Act.

As corporate governance norms continue to develop, say on pay has become part of the global 'new normal'. It already has been adopted voluntarily by approximately 130 of Canada's largest issuers and those aspiring to best practices, which CCGG believes has been beneficial for the quality of disclosure and for productive engagement between shareholders and boards. The say on pay votes have taken place in Canada without the disruption and usurpation of directors' responsibilities that many warned would follow on the adoption of say on pay. CCGG believes it is important, however, that the playing field be consistent and level, in order that shareholders of all public companies have this ability and that all directors benefit from this form of shareholder communication.

While CCGG believes that the current executive compensation disclosure requirements under provincial securities laws constitute an appropriate methodology for protecting stakeholders in this area, CCGG also believes it is appropriate that such an important communications device as say on pay be contained in the federal corporate statute, as is the current right to submit shareholder proposals. CCGG will continue to urge the Ontario Securities Commission (the "OSC") to adopt mandatory annual say on pay advisory votes as part of securities regulation, as we did in our response to the OSC's Staff Notice on

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<sup>3</sup> In the U.K., legislation was adopted in 2006 to attempt to clarify the duties owed by directors through the concept of 'enlightened shareholder value' (see section 172 of the U.K. Companies Act, 2006 set out in Appendix 2 hereto). The legislation has not to date resulted in settling the issues, however. See, for example, Andrew Keay in *Moving towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and All That: Much Ado about Little?* Working paper, 4 January 2010 and *The Duty to Promote the Success of the Company: Is It Fit for Purpose?* SSRN-id1662411-1.pdf

Shareholder Democracy Issues in 2011<sup>4</sup>, and we encourage Industry Canada to communicate with the OSC about its initiatives with respect to say on pay. We note, however, that because the OSC is the only Canadian securities regulator, as far as we are aware, that is currently considering this issue, including say on pay in the CBCA would have an important impact in showing that Canadian regulators believe that say on pay votes are appropriate.

## **II. Shareholder Rights**

### **A. Voting**

#### *Mandatory voting by ballot at shareholder meetings and disclosure of results by public companies*

As discussed in CCGG's 2010 Brief to the Standing Committee on Industry, Science and Technology<sup>5</sup>, CCGG believes that detailed voting results should be disclosed for every matter on the ballot for a shareholder meeting, apart from routine procedural matters related to the conduct of the meeting for which a show of hands voting and summary reporting of whether the matter was carried or defeated is adequate. For all other matters on the ballot, voting results should give shareholders enough information to assess the level of shareholder support as well as to ascertain trends in changing levels of support by disclosing the votes cast in person and by proxy and the number or percentage of votes cast for, against or withheld from the vote.

#### *Individual election of directors and 'slate' voting*

As CCGG has maintained in the past<sup>6</sup>, shareholders should be able to vote for directors on an individual basis rather than on the basis of 'slate' voting which requires that shareholders vote for all or none of the directors. Being able to hold individual directors accountable is fundamental to meaningful shareholder democracy. The TSX already requires that its listed issuers provide for individual voting for directors but it is important that the CBCA enshrine this principle for all public companies incorporated under the Act so that it is not only a listing requirement which the TSX could change in the future.

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

The CBCA should be amended to require that all directors at CBCA public companies be elected annually. Staggered terms of up to three years, as are currently permitted under the CBCA, do not theoretically pose the same problems of entrenchment that they do in the U.S.<sup>7</sup> In practice, however, staggered boards reduce director accountability and can impede the ability of shareholder to make timely and needed changes to the board.<sup>8</sup> Concerns about disruption and lack of board continuity are unwarranted as evidenced by the fact that almost all large Canadian companies now permit voting for all directors annually with no adverse consequences. Again, although such a provision is a TSX listing

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<sup>4</sup> [http://www.ccg.ca/site/ccgg/assets/pdf/CCGG\\_Response\\_to\\_OSC\\_Staff\\_Notice\\_54-701.pdf](http://www.ccg.ca/site/ccgg/assets/pdf/CCGG_Response_to_OSC_Staff_Notice_54-701.pdf)

<sup>5</sup> 2010 Brief

<sup>6</sup> 2010 Brief and CCGG response to staff notice 54-701:Regulatory Developments regarding Shareholder Democracy Issues [http://www.ccg.ca/site/ccgg/assets/pdf/CCGG\\_Response\\_to\\_OSC\\_Staff\\_Notice\\_54-701.pdf](http://www.ccg.ca/site/ccgg/assets/pdf/CCGG_Response_to_OSC_Staff_Notice_54-701.pdf)

<sup>7</sup> Under the Act directors can be removed at any time by an ordinary resolution of shareholders at a special meeting. CBCA section 109(1)

<sup>8</sup> See CCGG\_Response\_to\_OSC\_Staff\_Notice\_54-701 on Shareholder Democracy Issues, page 4

requirement, it should be enshrined in the CBCA for all public companies incorporated under the Act in case the TSX decides to change this requirement in the future.

### *Director election by majority vote*

It is now universally accepted in the corporate governance world that a majority voting standard for uncontested director elections, as opposed to the plurality standard currently found in the CBCA, is fundamental to shareholder democracy. The ability to vote only 'for' or 'withhold', as is the case under the plurality standard, leads to the unacceptable result that a director who receives only one vote 'for' (and such vote may be his or her own) is elected even if all other votes are 'withheld'. Under this system, directors are not truly accountable to shareholders.<sup>9</sup> It is imperative that the CBCA adopt a true majority vote standard for uncontested director elections. Under this standard, shareholders can vote 'for' or 'against' directors so that directors who do not receive a majority of votes in their favour are not, as a matter of law, elected to the board.

Currently section 54 of the CBCA Regulations requires that a form of proxy must be in the form required by section 9.4 of NI 51-102, an instrument of the CSA, effectively delegating the form of voting for director elections to the CSA. On February 13, 2014, the TSX announced that it had amended its listing requirements so that its listed issuers must adopt a majority voting policy in uncontested director elections – and that majority voting policy will be substantially in the form of the model policy which CCGG has been publicly advocating since 2006. While the new TSX listing requirement constitutes tremendous progress towards shareholder democracy in Canada, that rule applies only to TSX listed issuers (and not to TSX-V listed issuers or other public companies not listed on the TSX) and the TSX could change the requirement in the future. Accordingly, it is important that the CBCA be amended to enshrine within the Act the right to majority voting for all public companies incorporated under the Act.

The importance of this next step is widely recognized. The Globe and Mail editorial on February 18, 2014 stated as follows: "The new TSX rule is a breakthrough in Canadian corporate governance, but the campaign is not over. The TSX is a private company: nothing has changed in the legal structure for director voting. The new standard will only apply however long and in whatever format the exchange chooses. Ottawa should reform its key corporate legislation – the Canada Business Corporations Act – to entrench majority voting as a legal requirement for all companies with public shareholders.... A fundamental reform of shareholder democracy is long overdue. Annual board elections should be more than an empty gesture."

CCGG stresses that the majority voting provision should be drafted in such a way that directors do not ultimately have discretion over whether a director is elected or removed from the board. This would eliminate the phenomenon of 'zombie directors', that is, directors who stay on the board after an uncontested election despite receiving a majority of votes 'withheld'.<sup>10</sup> This will require drafting a

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<sup>9</sup> The 'majority voting policies' currently adopted by many Canadian companies attempt to provide a 'work around' this consequence by requiring directors that receive a majority of the votes cast 'withheld' to tender their resignation and the remaining directors have the discretion to decide whether the resignation will be accepted. The model majority voting policy published by CCGG in 2006 states that the remaining directors "shall" accept the resignation barring "extraordinary circumstances", a qualification missing from most of the majority voting policies voluntarily adopted to date in Canada with the result that directors in Canada can stay on the board despite receiving a majority of 'withhold' votes. See next page and footnote 10 regarding 'zombie directors'.

<sup>10</sup> Corporate governance: The curse of zombies in the boardroom, by David Milstead, the Globe and Mail, July 24, 2013; Zombie Directors Should Exit U.S. Boardrooms, by Nell Minow, Bloomberg.com, July 18, 2012

provision that permits some limited flexibility to allow for the sorts of situations that are referred to by those who object that majority voting can lead to “failed boards”, for example where the number of directors stipulated in the articles has not been elected. This can be addressed by the ‘work around’ currently found in section 106(7) of the CBCA for such situations and by allowing a period of time for alternative nominees to be found. The fact that the majority of Canada’s largest issuers have had majority voting policies in place for years and the prospect of “failed boards” has not materialized is evidence that the concern is unwarranted. The important point is that the principle of shareholder authority in director elections should prevail.<sup>11</sup>

#### *“Over voting” of voting rights attached to corporate shares*

“Over voting” is the unfortunate by-product of our current complicated and unreliable proxy voting system. Layers of intermediaries between a registered shareholder and the beneficial owner along with practices such as securities lending have resulted in an inability to ensure that votes received and tabulated can be reconciled with votes cast or to confirm that votes cast have in fact been received. The OSC and the CSA are currently expending much time and resources on trying to fix this system<sup>12</sup> and CCGG encourages Industry Canada to work with the OSC and CSA in this area to ensure that CBCA’s actions do not present obstacles to a securities regulatory solution. Any amendments to the CBCA related to this area must be developed in concert with securities regulators to ensure consistency and the smooth functioning of the proxy voting system. Fixing this system is of the utmost importance for all public companies and is essential to shareholder democracy.

#### *“Empty voting” by shareholders without an economic interest in the corporation*

“Empty voting”, that is, the separation of voting interests from the economic interests of shareholders, can occur when, for example, shares are subject to short selling or derivatives transactions. The British Columbia Court of Appeal in *TELUS v Mason Capital*<sup>13</sup>, in commenting on the issue of “empty voting”,

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<sup>11</sup> In the U.S. the Council of Institutional Investors’ proposed amendments to the Model Business Corporation Act to include majority voting suggests the following wording: “Unless the articles of incorporation require a greater number of affirmative votes, in a meeting at which a quorum is present, directors are elected by the affirmative vote of a majority of the votes of the shares represented at the meeting and entitled to vote in the election, unless ... fewer than the minimum number of directors, as defined in the company’s articles of incorporation or bylaws, is thereby elected, in which case those directors receiving a plurality of the votes cast by the shares entitled to vote, but not a majority, are elected for a holdover period of 90 days (the “holdover directors”), during which time all the directors having received a majority of affirmative votes, and thus duly elected, shall fill the seats of the holdover directors according to the provisions of section 8.10. If no directors receive a majority of the votes cast by the shares entitled to vote, then those directors receiving a plurality of the votes cast by the shares entitled to vote are elected for a period of 180 days.” In addition to including a similar provision, the CBCA would need to be amended to provide that the form of proxy related to director elections must provide for a ‘for’ and ‘against’ option, rather than, as is currently the case, refer to the form of proxy prescribed under NI 52-102 s 9.4 (6) which states that a form of proxy for the election of directors must be ‘voted or withheld from voting’.

<sup>12</sup> The CSA released a consultation paper on the topic in August 2013

[http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa\\_20130815\\_54-401\\_proxy-voting.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20130815_54-401_proxy-voting.pdf). CCGG’s response to the consultation paper can be found at

[http://www.ccg.ca/site/ccgg/assets/pdf/csa\\_consultation\\_paper\\_review\\_of\\_the\\_proxy\\_voting\\_infrastructurefinal\\_3.pdf](http://www.ccg.ca/site/ccgg/assets/pdf/csa_consultation_paper_review_of_the_proxy_voting_infrastructurefinal_3.pdf). The OSC followed up the consultation paper by hosting a roundtable on Canada’s Proxy Voting Infrastructure on January 29, 2014; a transcript of the roundtable discussion can be found at

[http://www.osc.gov.on.ca/en/SecuritiesLaw\\_csa\\_20140129\\_54-401\\_roundtable-transcript.htm](http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20140129_54-401_roundtable-transcript.htm)

<sup>13</sup> *TELUS Corporation v Mason Capital Management LLC*, 2012 BCCA, 403

stated that “[t]o the extent that cases of ‘empty voting’ are subverting the goals of shareholder democracy, the remedy must lie in legislative and regulatory change.” CCGG believes that this is another area where it is important for Industry Canada to work with the CSA in order that the issues are properly addressed.

## **B. Shareholder and board communication**

### *Electronic meetings for public companies*

CCGG supports an amendment to the CBCA to provide for electronic participation in shareholder meetings but shares the view that the CBCA should not permit public companies to limit shareholder meetings to electronic-only format so as to preserve the ability of shareholders to directly communicate with corporate management.

### *Facilitation of ‘Notice and Access’ provisions under the CBCA*

The CBCA should be amended to provide for ‘Notice and Access’ in a manner consistent with what has been implemented under provincial securities regulation so that issuers do not have to rely on the exemption to section 150(1) provided in section 151 as a work around.

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

Under the CBCA (and applicable securities laws) it can be onerous and prohibitively expensive for shareholders to propose nominees for director elections and to actively solicit other shareholders to vote for those nominees.<sup>14</sup> CCGG believes that the CBCA should be amended to make it easier for significant shareholders to nominate directors and to communicate with other shareholders about the desirability of those candidates.<sup>15</sup> In CCGG’s view the ability to nominate directors where shareholders see a need should be an accepted right of shareholders and a basic tenet of shareholder democracy, and not viewed as a necessarily hostile attempt at change of control or overthrow of the existing board.

Other countries offer variations on this right as a matter of course. In Italy, for example, at least one nominee on every slate presented to shareholders at the annual general meeting is proposed by shareholders holding a minimum percentage of shares based on market capitalization, and information about the nominee(s) is included in proxy materials alongside information about management nominees. In Sweden, shareholders appoint members of the nominating committee by a simple majority

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<sup>14</sup> For example, as we have previously outlined in our 2010 Brief, a shareholder holding five percent of a company’s outstanding shares may requisition a meeting to elect new directors but must issue an accompanying proxy circular at its own expense. Alternatively, a shareholder holding a prescribed amount of shares for a prescribed time can submit a shareholder proposal but in this case (i) the corporation is not required to include information about the shareholder’s nominee in the circular in the same location as management’s nominees and (ii) the shareholder proponent is restricted to a 500 word statement in support of the proposal, whereas the length of management’s response is unrestricted. The shareholder can issue a general public statement explaining its position but can only directly solicit up to 15 other shareholders without preparing a dissident proxy circular. For a discussion of the challenges presented by these alternative methods and others available see our 2010 Brief pages 8-9.

<sup>15</sup> Currently under section 68 (2)(b) of the CBCA Regulations, a shareholder who is a nominee or who proposes a nominee for election as a director may not communicate with other shareholders without soliciting a proxy if the communication relates to the election of directors.

at the AGM and the nominating committee then recommends director nominees to the shareholders. In Germany, a shareholder holding any number of shares can nominate a director and provide a supporting statement not longer than 5000 words. In the U.S. the SEC, in its 2010 Final Rule: Facilitating Shareholder Director Nominations, recommended that shareholders holding three percent of the outstanding shares for a three year period be able to include director nominees in company proxy materials and that such shareholders had to certify that they were not holding the stock for purposes of changing control of the company or to gain more than minority representation on the board.<sup>16</sup> The rule was later struck down by the U.S. Court of Appeals on the basis that the SEC did not do a sufficient cost benefit analysis of the rule but after that the then SEC Chair reiterated the importance of shareholders having a meaningful way to nominate directors.<sup>17</sup>

We recommend that the CBCA should be amended to permit a significant shareholder to have the opportunity to present nominee(s) to shareholders in proxy materials on an equal footing with management nominees. Any reasonable solicitation costs on the part of the shareholder should be reimbursed by the company, unless the majority of shareholders resolve otherwise. In order to distinguish this access to the proxy from situations where a change of control or board overthrow is the goal, however, the number of shareholder nominees should be restricted, say to 25% of the board.

While the Consultation Paper explicitly assumes that a five per cent share ownership constitutes a 'significant' shareholder, it is CCGG's view that this threshold would result in an unrealistically high hurdle that would allow proxy access only rarely. CCGG proposes that a holding of three percent of the outstanding shares is an appropriate threshold and that shareholders of a similar mind should be permitted to aggregate their holdings to reach that threshold. Alternatively, the percentage could vary with the market capitalization of the company, as it does in Italy. So for larger companies, where it is more expensive to acquire a relatively significant holding, the threshold would be lower, and for smaller companies it would be higher. CCGG does not believe that a holding period is necessary to ensure that proxy access is restricted to shareholders with a long term perspective on the company. Shareholders that are not seeking to change control of the board should be able to access the proxy and then let all of the company's shareholders decide at a shareholder meeting which directors they wish to elect.<sup>18</sup>

While Industry Canada is considering the important issue of proxy access, it is appropriate that it also consider amending the CBCA to require the use of a 'universal proxy' in the case of contested director elections. A 'universal proxy' includes all director nominees on the same proxy ballot whether nominated by management or by dissidents so that shareholders are able to freely choose the combination of nominees they wish to support, just as they are able to do if they attend the annual

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<sup>16</sup> <https://www.sec.gov/rules/final/2010/33-9136.pdf>

<sup>17</sup> In 2011 the Court of Appeal found that the SEC did not do an appropriate cost benefit analysis or back up the claim that the rule would improve shareholder value and board performance. In response then SEC Chair Mary L. Schapiro issued the following statement: "I firmly believe that providing a meaningful opportunity for shareholders to exercise their right to nominate directors at their companies is in the best interests of investors and our markets. It is a process that helps make boards more accountable for the risks undertaken by the companies they manage. I remain committed to finding a way to make it easier for shareholders to nominate candidates to corporate boards."

<sup>18</sup> In the U.S., the shareholder proposals asking for proxy access that receive the highest percentage of votes in favour are those asking for three per cent with a holding requirement of three years. In 2012, such proposals received a majority of votes cast at Nabors Industries and Chesapeake Energy. In 2013, such proposals received a majority of the votes cast at Verizon and CenturyLink, while management at Hewlett Packard put forward a three percent /three year management proposal which received over 97percent support.

general meeting in person. Under current practice, opposing sides in a proxy contest for the election of directors typically include only their own nominees even though in Canada there is no restriction on a dissident including management nominees on its proxy or vice versa. For example, in the CP/Pershing Square proxy contest in 2012 each party voluntarily used a universal proxy that included the other's nominees on its ballot. CCGG believes that this practice should be mandatory under the CBCA.

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

CCGG believes that issuers should be required to send proxy materials to all shareholders at the issuer's expense. There is no principled reason to treat shareholders that wish to keep details about their ownership private differently than those that do not. Current securities regulations allow beneficial owners whose securities are held through intermediaries to maintain their privacy ('objecting beneficial owners' or 'OBOs'). However, under securities regulation, issuers do not have to pay to send proxy materials to OBOs. Shareholders who do not object to sharing information about their holdings with issuers ('non-objecting beneficial owners' or 'NOBOs') are entitled to have proxy materials sent to them at the issuer's expense. The CBCA should be amended to include a provision requiring issuers to pay the cost of sending proxy materials to those share owners that wish to remain private while still respecting the NOBO/OBO distinction.<sup>19</sup>

#### *Shareholder proposal provisions*

- *filing deadline*  
CCGG supports changing the filing deadline for a shareholder notifying the corporation of a matter proposed for consideration at the annual meeting to a date referencing the last annual meeting itself rather than linking the deadline to the notice date of the previous meeting.
- *reasonable time to speak to a proposal at an annual meeting*  
CCGG supports the proposal that the CBCA should be amended to provide proponents of a shareholder proposal a reasonable period of time to speak to their proposals at the annual meeting. CCGG also supports increasing the number of words allotted to a shareholder proponent in the proxy circular in support of a shareholder proposal from 500 words to a more significant number, say at least 1000. As stated above, Germany for example permits 5,000 words in support of a shareholder proposal to nominate a director.

### **C. Board accountability**

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

There is an inherent conflict of interest when the Chair of a company's board also serves as the CEO of that company. The oversight of management, in particular the CEO, is one of the board's key responsibilities and a combined Chair/CEO is thus responsible for leading the body that oversees him or herself. The chair of the German exchange Deutsche Bourse recently said with respect to the 'Anglo-Saxon' model of sharing the CEO/Chair roles "The notion that the chief executive should supervise

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<sup>19</sup> For a more complete discussion of the NOBO/OBO distinction, please see our 2010 Brief to the Committee page 10 (attached as Appendix 3)

himself as chairman is an absurdity.”<sup>20</sup> Other important responsibilities of the Chair are compromised when the role is shared: setting the agenda for board meetings, ensuring directors receive the necessary information and that board meetings are conducted with open discussion and an independent assessment of management views. Similar challenges are presented when the Chair is not wholly independent of management. Accordingly, it is CCGG’s position that as a basic tenet of good governance the CEO should not also serve as the Chair and, further, that the Chair should be independent of management. This cardinal rule should be made explicit in the CBCA.

The CBCA could provide for a transitional period for companies that currently combine the roles pursuant to which boards could appoint a lead director independent of management to carry out the functions of the chair of the board as the board moves toward completely separating the roles of CEO and chair.

If there is a controlling shareholder of the company, then there could be an exception to the cardinal rule discussed above. In such a case, the Chair and the CEO role may be combined or the CEO may be an officer of the controlling shareholder provided there is a lead director independent of the controlling shareholder (and independent of management) appointed and the board has an effective and transparent process to deal with any conflicts of interest between the controlled corporation, minority shareholders and the controlling shareholder.

#### *Shareholder approval of significantly dilutive acquisitions*

Under the CBCA, shareholders have the right to approve certain fundamental changes to the corporation including the sale, lease or exchange of substantially all of the assets of the corporation, the issuance of a new class of shares, changes to the rights associated with certain shares, an amalgamation with another corporation and a going private transaction.

Shareholders similarly should have the right to approve a significant corporate acquisition that is paid for in shares if it will dilute the value of the shares held by existing shareholders by more than 25 percent. The TSX requires that all TSX listed companies obtain shareholder approval in those circumstances. A similar requirement is found in the listing standards of most major exchanges or in the corporate law of the jurisdictions in which the exchanges operate. CCGG believes that the CBCA should similarly require shareholder approval for dilutive acquisitions for all public companies.

#### *Access to oppression remedy by shareholders*

Canada is unique in offering a broad oppression remedy under section 241 of the CBCA to shareholders (along with directors, officers or creditors) for corporate actions that result in their interests being unfairly prejudiced or disregarded. In practice, however, the remedy is costly and cumbersome to use and leads to lengthy court proceedings that typically stretch over years.<sup>21</sup> In order to provide shareholders with a more meaningful remedy, Industry Canada should consider ways to reduce the costs and delays involved in resolving claims, perhaps by establishing a process pursuant to which claims could be arbitrated. Any such arbitration process, however, should not bar shareholders from seeking

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<sup>20</sup> Responsible Investor, *German exchange chief says it’s absurd to have CEO serve as board chair*, by Jan Wagner, February 6<sup>th</sup>, 2014

<sup>21</sup> See our 2010 Brief for further discussion of the costs and challenges presented by the s. 241 remedy, pages 12-13

redress through the courts given that shareholders must be able to hold management ultimately accountable if necessary to legal standards of fiduciary duty and negligence.

#### *Disclosure of the board's understanding of social and environment matters on corporate operation*

The disclosure of the board's understanding of social and environment matters on corporate operation is information of the utmost relevance to shareholders. It can help to provide shareholders with a better understanding of the material risks facing the company and how those risks are being overseen. While CCGG strongly supports such disclosure, it believes that regulation of this disclosure lies more appropriately within the provincial securities laws that currently prescribe the majority of rules related to disclosure rather than under the CBCA.

### **III. Securities Transfers and Other Corporate Governance Issues**

#### *The potential removal of the CBCA provisions relating to securities transfers*

CCGG agrees with the view that there is no longer a need to regulate such matters under federal corporate law statutes such as the CBCA given that the transfer of securities is concurrently regulated under more up to date provincial statutes.

#### *Insider trading provisions in the CBCA*

CCGG is of the view that insider trading is more appropriately regulated under provincial securities laws and the federal Criminal Code.

#### *Canadian residency requirements for CBCA directors*

Director residency requirements vary from country to country but few jurisdictions impose them<sup>22</sup>. The Consultation Paper outlines good arguments both for and against such requirements. CCGG is of the view that the Canadian residency requirements under the CBCA should be removed. This would serve the competitive purpose of bringing provisions more in line with the majority of countries, including most of those with a similar 'Anglo Saxon' corporate governance framework. If Canadian stock exchanges believe that residency requirements are important for various types of companies, they have the ability to make Canadian residency a listing requirement. It is CCGG's view, in fact, that whether or not there is a Canadian residency listing requirement, the stock exchanges should ensure that there are directors on the board who are familiar with Canadian culture, laws, financial regulation, local business practices and political landscape. In addition, CCGG believes that the CBCA should require that every director must attorn to the jurisdiction of the appropriate Canadian court, so that if need be an action can be brought against all directors in Canada.

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<sup>22</sup> Very few jurisdictions in Europe, Asia, Australasia and South America (other than Nordic countries and Argentina) impose residency requirements. As far as we are aware none of the U.S. states (with the exception of Hawaii), the U.K., New Zealand, France or Germany have director residency requirements while Australian requires that at least two directors of a public company be Australian resident directors. *Canada Business Corporations Act: Discussion Paper: Directors' and Other Corporate Residency Issues (August 1995)*; *Canada Business Corporations Act: Directors' Residency Requirements and Other Residency Issues (December 1999)*

## *Regulation of trust indentures under the CBCA*

No comment

## *The CBCA's modified proportionate liability regime*

No comment

## **IV. Incorporation Structure for Socially Responsible Enterprises**

No comment

## **V. Corporate Transparency**

CCGG supports the position that information concerning beneficial ownership should be available to competent law enforcement and tax authorities, as well as ownership information regarding bearer shares and warrants and information by nominee shareholders on the individuals for whom they are acting, provided, however, that such information should not be made available to issuers. The ability of shareholders to keep information on their shareholdings private should not be compromised.

## **VI. Corporate Governance and Combating Bribery and Corruption**

No comment

## **VII. Diversity of Corporate Boards and Management**

CCGG believes in the importance of diversity on boards and in senior management given that research shows that diversity enhances the quality of decision making and group performance.<sup>23</sup> As CCGG's 2013 *Building High Performance Boards* states, boards should reflect a wide variety of experiences, views and backgrounds, which to the extent practicable reflect the gender, ethnic, cultural and other personal characteristics of the communities in which the corporation operates and sells its goods or services.<sup>24</sup> The same principle applies to senior management. Because women comprise half the population, the lack of gender diversity on boards and in senior management is the most obvious form of lack of representation that needs to be addressed, but not the only one.<sup>25</sup> We believe, however, that diversity is better dealt with in securities regulation, where, for example, the OSC has already taken the initiative to address gender diversity on boards and in senior management through increased disclosure

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<sup>23</sup>Different is Better: Why Diversity Matters in the Boardroom <http://www.russellreynolds.com/content/different-better>; (2010, October). [Better Decisions through Diversity: Heterogeneity Can Boost Group Performance](http://www.russellreynolds.com/content/different-better). Kellogg Insight. Kellogg School of Management at Northwestern University; [https://www.credit-suisse.com/newsletter/doc/gender\\_diversity.pdf](https://www.credit-suisse.com/newsletter/doc/gender_diversity.pdf)

<sup>24</sup>[http://www.ccg.ca/site/ccgg/assets/pdf/building\\_high\\_performance\\_boards\\_august\\_2013\\_v12\\_formatted\\_\\_sept.\\_19,\\_2013\\_last\\_update\\_.pdf](http://www.ccg.ca/site/ccgg/assets/pdf/building_high_performance_boards_august_2013_v12_formatted__sept._19,_2013_last_update_.pdf) page 9

<sup>25</sup>In its response to the OSC's Consultation Paper on gender diversity, CCGG supported the OSC's initiative in this area to encourage the inclusion of more women on boards and senior management through the proposed adoption of disclosure requirements regarding gender diversity policies. [http://www.ccg.ca/site/ccgg/assets/pdf/submission\\_to\\_osc\\_staff\\_consultation\\_paper\\_58-~g\\_women\\_on\\_boards\\_and\\_in\\_senior\\_management.pdf](http://www.ccg.ca/site/ccgg/assets/pdf/submission_to_osc_staff_consultation_paper_58-~g_women_on_boards_and_in_senior_management.pdf) response letter to OSC Staff consultation Paper 58-401 Disclosure Requirements Regarding Women on Boards and in Senior Management.

requirements. At this time CCGG supports the ‘comply and explain’ model currently being proposed by the OSC. The OSC intends to review compliance after three years; CCGG suggests that Industry Canada monitor that review and if no progress has been made consider addressing the issue in the CBCA.

### **VIII. Arrangements Under the CBCA**

No comment

### **IX. Corporate Social Responsibility**

CCGG believes that the current provincial regulatory model of looking to disclosure of a company’s environment and social risks, and board and management oversight of those risks, as a means of enhancing corporate social responsibility is appropriate at this time and amendments to the CBCA are not necessary to promote corporate social responsibility objectives.

### **X. Administrative and Technical Matters**

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

No comment

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

No comment

**C. 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?**

No comment

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

Implicit in this question is the question of “what is a shareholder?” Is a ‘real’ shareholder one that has the long term interests of the corporation in mind or can shareholders with a short term horizon be considered true shareholders? Answering these questions is beyond the scope of the Consultation Paper and has implications beyond simply the ability to exercise a right of dissent. Until there is a consensus on the answer, CCGG believes that it is inappropriate to distinguish among shareholders and that there should not be a holding requirement before a shareholder can exercise a right of dissent.

**E. Should the definition of “squeeze-out transaction” in section 2 of the CBCA be amended to remove the reference to amendments of articles?**

No comment

**F. 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?**

No comment

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

Currently, provincial securities regulations give beneficial owners many of the same rights accorded to registered shareholders under corporate law. CCGG is in favour of providing beneficial owners with rights equal to registered holders but CCGG also is cognizant of the complexity and challenges of our current proxy voting system and the many layers of intermediaries there can be between a registered owner and a beneficial owner. Provincial securities regulators are currently spending a great deal of time and resources on trying to ameliorate the problems with the system or perhaps overhaul the system entirely. Given this context, CCGG suggests that Industry Canada should be acting in coordination with the provincial securities regulators in this area.

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

No comment

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

CCGG is of the view that the current prohibition on soliciting more than 15 shareholders without sending a dissident proxy circular is appropriate.

CCGG also believes, however, that shareholders should be free to discuss company matters openly and freely among themselves as they see fit without penalty or regulation as long as a proxy is not being sought. In fact, CCGG believes that regulation should facilitate discussion among shareholders. So, for example, if shareholders are given the ability to nominate a limited number of directors to the proxy that would not affect board control as suggested above, those shareholders should be able to discuss those nominees with other shareholders without constraint. Currently, pursuant to CBCA Regulation section 68(2)(b) a shareholder who is a nominee or who proposes a nominee for election as a director, if the communication relates to the election of directors, may not communicate with other shareholders without triggering the proxy solicitation rules, so that provision needs to be changed. When drafting provisions that would safeguard communications between shareholders, due attention must be paid to preclude those communications from triggering the solicitation and ‘acting jointly or in concert’ rules in order to avoid the potentially serious consequences that can follow.

## CONCLUSION

The opportunity to amend the CBCA provides a rare chance to further enshrine the principles of shareholder democracy in Canadian corporate law. CCGG is pleased to be able to provide its comments on the Consultation Paper and strongly encourages Industry Canada to take full advantage of this opportunity to position Canada in the forefront of good governance practices and thereby assist in promoting the efficiency and effectiveness of the Canadian capital markets.

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Thank you for the opportunity to provide you with our comments. If you have any questions regarding the above, please feel free to contact our Executive Director, Stephen Erlichman, at 416-847-0524 or [serlichman@ccgg.ca](mailto:serlichman@ccgg.ca) or our Director of Policy Development, Catherine McCall, at 416.868.3582 or [cmccall@ccgg.ca](mailto:cmccall@ccgg.ca).

Yours very truly,

A handwritten signature in blue ink, appearing to read "D. E. Chornous".

Daniel E. Chornous,  
Chair of the Board of Directors  
Canadian Coalition for Good Governance

## APPENDIX 1

### CCGG MEMBERS

Alberta Investment Management Corporation (AIMCo)  
Alberta Teachers' Retirement Fund Board  
Aurion Capital Management Inc.  
BlackRock Asset Management Canada Limited  
BMO Harris Investment Management Inc.  
BNY Mellon Asset Management Canada Ltd.  
British Columbia Investment Management Corporation (bcIMC)  
Burgundy Asset Management Ltd.  
Canada Pension Plan Investment Board (CPPIB)  
Canada Post Corporation Registered Pension Plan  
CIBC Global Asset Management  
Colleges of Applied Arts and Technology Pension Plan (CAAT)  
Connor, Clark & Lunn Investment Management  
Desjardins Global Asset Management  
Franklin Templeton Investments Corp.  
GCIC Ltd.  
Greystone Managed Investments Inc.  
Healthcare of Ontario Pension Plan (HOOPP)  
Industrial Alliance Investment Management Inc.  
Jarislowsky Fraser Limited  
Leith Wheeler Investment Counsel Ltd.  
Lincluden Investment Management  
Mackenzie Financial Corporation  
Manulife Asset Management  
NAV Canada (Pension Plan)  
New Brunswick Investment Management Corporation (NBIMC)  
Northwest & Ethical Investments L.P. (NEI Investments)  
Ontario Municipal Employees Retirement Board (OMERS)  
Ontario Pension Board  
Ontario Teachers' Pension Plan (Teachers')  
OPSEU Pension Trust  
PCJ Investment Counsel Ltd.  
Public Sector Pension Investment Board (PSP Investments)  
RBC Global Asset Management Inc.  
Régimes de retraite de la Société de transport de Montréal  
Russell Investments Canada Limited  
Sionna Investment Managers Inc.  
Standard Life Investments Inc.  
State Street Global Advisors, Ltd. (SSgA)  
TD Asset Management Inc.  
Teachers' Retirement Allowance Fund  
The United Church of Canada (Pension Board)

UBC Investment Management Trust Inc.  
UBS Global Asset Management (Canada) Co.  
University of Toronto Asset Management Corporation  
Workers' Compensation Board - Alberta  
York University Pension Fund

## APPENDIX 2

### Section 172 of the U.K. Companies Act:

**172. Duty to promote the success of the company** [note that “members” are similar to “shareholders” under the CBCA]

- (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 regards (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, customer and others,
  - (d) The impact of the company’s operations on the communities and the environments,
  - (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
- (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
- (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

## APPENDIX 3

# Canadian Coalition for GOOD GOVERNANCE

The Voice of the Shareholder

## BRIEF TO STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY RE: FIVE YEAR REVIEW OF CBCA

Submitted February, 2010

This brief is provided to the Standing Committee on Industry, Science and Technology by the Canadian Coalition for Good Governance (“CCGG”) in furtherance of the Committee’s Five Year Review of the Canada Business Corporations Act (“CBCA”). This brief is further to the oral submissions made by CCGG at the hearing before the Committee on November 16, 2009.

The Committee should note that all of our recommended amendments to the CBCA should only apply to CBCA public companies, not CBCA private companies.

### I. INTRODUCTION

#### A. *The Canadian Coalition for Good Governance*

CCGG is a coalition of approximately 45 of Canada’s leading institutional investors (such as pension plans, investment managers and mutual fund managers) managing retirement assets of over \$1.2 trillion, representing more than half of the retirement savings of all Canadians. Attached as Appendix “A” is a list of CCGG’s members.

CCGG promotes good governance practices in Canadian public companies and the improvement of the regulatory environment to:

- Align the interests of boards and management with those of their shareholders
- Promote the efficiency and effectiveness of the Canadian capital markets

Canadian corporate law requirements for public companies in the area of governance have not kept pace with domestic or international best practices. Over time, CCGG has issued best practices guidelines and urged companies to adopt them in advance of legislative change. Many companies have adopted these best practices with no disruption to their business. Some companies have not, however, and have indicated to us that they have no intention of doing so.

It is time to update the CBCA to reflect best corporate governance practices so that all CBCA public companies are required to implement them. Doing so will propel Canada forward as a governance leader at a time when countries around the world are increasingly recognizing the importance of good governance practices.

## **B. *Why good governance matters***

It is important for the Committee to understand why good governance is so important for Canadian companies and the Canadian capital markets. First and foremost, there is mounting evidence that good governance leads to the more efficient use of capital and better investment returns. The CBCA should enshrine governance norms that will improve the performance of Canadian public companies and attract capital to them from Canada and internationally.

As the providers of capital and ultimate owners of a company, shareholders delegate certain powers to boards of directors, including the powers over:

- Corporate strategy;
- Hiring CEOs (and often other senior executives) to design and execute strategy, monitoring their performance and establishing appropriate compensation plans;
- Core corporate functions, including oversight of audit, finance and human resources;
- Risk management; and
- Crisis management

As the overseers of senior executives and long-term corporate strategy, directors are the cornerstone of good governance. In order for them to fulfill that role, however, they must be accountable to shareholders and largely independent of management. Without accountability, there is a risk that directors' interests will become more aligned with those of management, rather than those of the shareholders.

In order to facilitate director's accountability to shareholders, the CBCA should be amended to enshrine basic democratic and governance norms for public companies, including:

- a fair process to elect directors;
- the ability of shareholders to nominate and remove directors;
- a voting system that accurately reflects votes cast and reports voting results;
- the ability of shareholders to approve significantly dilutive transactions; and
- the separation of the CEO and Chair of the board

## II. SUMMARY OF RECOMMENDATIONS

We recommend the following amendments to the CBCA, each of which is discussed in detail below.

<b>Recommendation #1</b>	<b>The Committee should broaden its consultations</b>
<b>Recommendation #2</b>	<b>The CBCA should prohibit slate voting and require a director by director vote</b>
<b>Recommendation #3</b>	<b>The CBCA should require a majority voting standard for director elections</b>
<b>Recommendation #4</b>	<b>The CBCA should require annual director elections for all CBCA public companies</b>
<b>Recommendation #5</b>	<b>The CBCA should require public companies to disclose the detailed results of shareholder votes for matters on the ballot</b>
<b>Recommendation #6</b>	<b>The CBCA should be amended to give significant shareholders access to the proxy circular</b>
<b>Recommendation #7</b>	<b>The CBCA should require all shareholders to be treated equally in the proxy process, irrespective of whether they want to protect the privacy of their information</b>
<b>Recommendation #8</b>	<b>The CBCA should facilitate “notice and access”</b>
<b>Recommendation #9</b>	<b>The CBCA should generally require the separation of the roles of chief executive officer and chair of the board</b>
<b>Recommendation #10</b>	<b>The CBCA should require shareholder approval for significantly dilutive acquisitions</b>
<b>Recommendation #11</b>	<b>The Committee should devise ways to give shareholders more meaningful ways to resolve claims under the oppression remedy</b>

### III. THE CBCA FIVE YEAR REVIEW PROCESS

***Recommendation #1 – The Committee should broaden its consultations***

CCGG urges the Committee to broaden its consultation process as part of this Five Year Review. The CBCA is a critically important piece of legislation that establishes key governance and other requirements for companies that carry on business throughout the country, and is seen as a model for its various provincial counterparts. Numerous other groups would provide the Committee with important insights and perspectives, including academics, regulators, issuers, and issuers' counsel. It is particularly important for the Committee to consult with members of the Canadian Securities Administrators (the "CSA") as there are important proposed securities law reforms that may require changes to the CBCA and/or its regulations in order to be effective.

### IV. BASIC DEMOCRATIC NORMS FOR VOTING BY INVESTORS

Because shareholders delegate their authority to the directors, shareholders are only empowered to vote on a small number of matters that are critical to the ongoing functioning of the company, such as the election of directors and the appointment of the auditor. It is essential that the voting process be democratic, fair and transparent. The following amendments are required in order for the CBCA to reflect these values.

***Recommendation #2 – The CBCA should prohibit slate voting and require a director by director vote.***

Currently, it is common practice for companies to propose a slate of directors and require shareholders to vote for all or none of them, commonly referred to as "slate voting". Although CCGG has urged companies to abandon this practice, approximately 25% of the largest Canadian companies (companies in the TSX/S&P Composite Index) still have slate voting. Slate voting is even more common in smaller companies. The CBCA should be amended to prohibit slate voting.

***Recommendation #3 – The CBCA should require a majority voting standard for director elections***

The lack of accountability caused by slate voting is compounded by the fact that directors can be elected without receiving a majority of votes in their favour. Currently, under the CBCA and provincial securities legislation, shareholders of public companies do not have the power to vote by proxy "for" or "against" directors. Their only right is to vote "for" them, or "withhold" their vote. A "withhold" vote has no practical effect. As a result, directors in a public company can be elected if they receive only one vote – and if they are a shareholder (which they often are), that vote can be their own!

Directors cannot be truly accountable to shareholders if shareholders have no meaningful way to remove them from the board. Under the current system, a director can lose an election by any normal measure – receiving less than 50% of the votes or even receiving just one vote – and not have to vacate

their seat on the board. Recent statistics from the United States reveal why majority voting is so important. Risk Metrics reports that as of September 23, 2009, 91 directors at 49 different companies failed to receive majority support (three times as many as in all of 2008), yet not one of those directors resigned from their board.

Previously, s. 54 of the CBCA Regulations required that votes for directors had to be in the form of either “for” or “withhold”. However, that regulation was recently amended to provide that the form of proxy must be as required by s. 9.4 of NI 51-102, an instrument of the CSA. Section 9.4 simply replicates the previous CBCA requirement that votes for directors must be in the form of either “for” or “withhold”.

As a result of that amendment, the form of voting for director elections has effectively been delegated to the CSA. We understand, however, that the CSA is reluctant to establish rules in this area since the structure of director elections has historically been a matter of corporate law. An amendment to the CBCA requiring a majority voting standard for director elections would provide important clarification in that regard.

The for/withhold structure for director elections now found in s. 9.4 of NI 51-102 also appears to conflict with s. 106(3) of the CBCA which provides that shareholders can elect directors by “ordinary resolution”. That wording implies that shareholders can vote for or against directors, which s. 9.4 states they cannot, at least in respect of voting by proxy. It is inconsistent to allow registered shareholders who attend a meeting to vote against directors and not to allow shareholders who vote by proxy to do the same. Section 106(3) of the CBCA should be amended to clearly state that directors must be elected by majority vote, notwithstanding any provisions to the contrary in any other Act or regulations.

Until all applicable corporate laws are changed, CCGG has developed a “majority voting” board policy which provides a framework to allow companies to establish majority voting. In general, the policy provides that a director who fails to win a majority of votes in their favour must resign their seat on the board. Our policy has already been substantially adopted by 98 of Canada’s largest companies which demonstrates that majority voting can be implemented without business interruption.

Opponents of majority voting often argue that requiring directors to obtain majority support before they are elected could lead to “failed elections”, i.e. elections where an insufficient number of directors are elected to achieve the required quorum for the board. This is a very unlikely scenario for two reasons. First, shareholders are very reluctant to block the election of a director absent a compelling reason to do so. Second, if a shareholder intends to block the election of more than one director, that shareholder would most likely be proposing his/her own directors for election at the same meeting.

Even without majority voting, all CBCA public companies already operate with the risk that they will lose directors to the point where they no longer have quorum or have any directors at all (such as through a resignation en masse).

In any event, existing sections of the CBCA establish a process to follow if one or more directors are not re-elected at an annual meeting. Under s. 111 of the CBCA, if a director is not re-elected, the remaining directors (as long as they constitute a quorum) can appoint a director to fill that vacancy for the remainder of the term of the original director. If an election results in less than a quorum of directors elected or if there has been a failure to elect the number of directors required by a company’s articles, then the directors are required to call a special meeting of the shareholders without delay in order to fill

the vacancy. In the very unlikely event that an election results in no directors being elected, the special meeting can be called by any shareholder.

Similarly, if a director is removed from office at a special meeting called for the purpose of removing directors, s. 109 of the CBCA allows that vacancy to be filled by a resolution of the shareholders at that meeting. Alternatively, a new director may be appointed by the remaining directors according to the process established under s. 111, as set out above.

The Committee should ensure that any provisions added to the CBCA to establish majority voting address how a majority will be achieved when multiple nominees are put forward for a smaller number of vacancies.

The Committee should note that to the best of our knowledge, Canada and the United States are the only jurisdictions that do not use a majority voting system for director elections.

***Recommendation #4 – The CBCA should require annual director elections for all CBCA public companies***

Currently, under s. 106(3) of the CBCA, directors can be elected for up to three years and can be elected for terms of different lengths. Boards that allow directors to be elected for different terms are referred to as “staggered boards”. Staggered boards can impede the ability of shareholders to make needed changes to the board, as not all directors come up for re-election each year. For example, if an issue regarding compensation arises and there are three members of a compensation committee, each of whom has a different three year term, it can take up to four years to replace the entire committee (unless a special meeting is requisitioned).

However, the Committee should note that all large Canadian companies have already moved to annual director elections which have not caused any disruptions to boards or their ability to engage in long-term planning. In fact, directors at the 127 companies in the S&P/TSX Composite that report the results of annual director elections received an average of 96.8% votes in their favour. Interestingly, the directors at the 78 companies in that index with a majority voting policy that report the result of annual director elections received even greater support, with an average of 97.9% of votes in their favour.

This should address the concerns raised by several committee members at the hearing on November 16, 2009 who questioned whether annual director elections would be disruptive to boards. The CBCA should be amended to require annual director elections for all CBCA public companies.

***Recommendation #5 – The CBCA should require public companies to disclose the detailed results of shareholder votes for matters on the ballot***

Section 141 of the CBCA currently provides that voting at a meeting of shareholders may take place by show of hands, unless a shareholder or proxy holder entitled to vote at the meeting demands a ballot.

If a matter is passed by way of a show of hands, under s. 142(3) of the CBCA and applicable securities laws the company is only required to record and disclose the fact that a resolution was carried or defeated, without disclosing the number of votes cast for or against the resolution. In contrast, if a vote

is conducted by ballot a company must provide much more detailed information including the votes cast in person and by proxy and the number or percentage of votes cast for, against or withheld from the vote.

Several problems result from the lack of transparency of this process. A report that only states whether a matter was passed or defeated does not give shareholders any information through which they can assess the level of shareholder support for matters on the ballot (such as director elections), nor can they ascertain any trends in changing levels of support.

In addition, companies are not under any obligation to confirm to shareholders who submit their votes by proxy that their votes have been received and tabulated. This lack of confirmation, when coupled with the fact that the vote results are not reported, makes it virtually impossible for shareholders to independently confirm that their votes have been counted.

CCGG does not take issue with show of hands voting and summary reporting of whether the matter was carried or defeated for routine procedural matters related to the conduct of the meeting. However companies should be required to report detailed and accurate voting results for all matters listed on the proxy, including director elections. CCGG has been urging companies to provide detailed voting results as a matter of best practice. Many of Canada's largest companies voluntarily report their voting results for director elections, but 38% of companies in the TSX/S&P Composite still do not. (That number would likely be much higher if smaller companies were considered.) All CBCA public companies should be required to disclose the detailed results of shareholder votes for all substantive matters listed on the proxy.

The Committee should note that companies already have all of the detailed results of any vote (other than a show of hands vote) in a report that is prepared by a scrutineer who attends the meeting and tabulates the vote. Requiring companies to disclose that information would not impose any additional administrative burden.

***Recommendation #6 – The CBCA should be amended to give significant shareholders access to the management proxy circular***

Under the CBCA and applicable securities laws, it is difficult and expensive for a shareholder to propose alternate directors for election and to actively solicit other shareholders to vote for their nominees. Currently, shareholders who wish to do so have the following four options:

- 1) A shareholder could prepare and mail its own dissident proxy circular in advance of the annual meeting. The dissident circular would include the names and backgrounds of the directors proposed for election and a statement as to why they should be elected. The estimated cost of doing so is a minimum of \$500,000 (including legal fees, printing and mailing costs) and would be considerably more for a large company or if a proxy solicitation service is used. These costs are prohibitive for most shareholders. While a successful shareholder can seek reimbursement of its expenses, there is no guarantee that the company will reimburse it.

Any shareholder that does incur the expense of preparing a dissident circular is also at a considerable economic disadvantage vis-à-vis management and an incumbent board which are able to use the

company's resources to prepare the management information circular urging the election of their preferred directors.

- 2) If a shareholder holds 5% or more of the shares (which is rarely the case for an individual or institutional investor) the shareholder can:
  - a. Request that the management circular include a shareholder "proposal" calling for the election of different directors. A shareholder is limited to a 500 word statement in support of its directors, whereas management can issue a responding statement of unlimited length. A shareholder can issue a general public statement explaining its position, but can only directly solicit up to 15 other shareholders unless it prepares a dissident proxy circular at the prohibitive expense noted above, or
  - b. Requisition a special meeting to elect new directors and issue a proxy circular at its own expense. A shareholder is entitled to be reimbursed for its reasonable expenses unless the shareholders at the special meeting resolve otherwise.

Although the CBCA permits several shareholders to aggregate their holdings to reach the 5% threshold, those shareholders may then be considered to be "acting in concert" which may have ramifications under provincial securities law and may require those shareholders to make onerous filings in the U.S. In most public companies, this option is of little use and would still not permit the broad solicitation of other shareholders without the preparation of a dissident proxy circular.

- 3) A shareholder can ask the company to agree to include the shareholder's alternative director nominees in the management proxy circular, but it is highly unlikely that such consent would ever be given.
- 4) Subject to a company's specific by-laws, a shareholder could attend the annual meeting and propose alternative directors. However, most shareholders vote their shares in advance of the annual meeting by proxy so this strategy would rarely be successful. Moreover, many shareholders grant discretionary authority to management in their proxies who would inevitably vote in favour of management's director nominees.

The CBCA should be amended to make it easier for significant shareholders to nominate alternative directors, if they deem it necessary to do so. The CBCA should provide that a significant shareholder (holding 5% of shares alone or with others) can require a company to include in its management proxy circular a shareholder's alternative nominees for directors, together with a description of their backgrounds and a statement from the shareholder as to why they should be elected. That shareholder should be able to freely solicit the support of other shareholders without the need to file a dissident proxy circular.

The inclusion of a shareholder's nominees in the management proxy circular should be at no cost to the shareholder and the shareholder should be reimbursed by the company for its reasonable solicitation costs, unless the shareholders resolve otherwise.

The Committee may want to consider whether it would be appropriate to require significant shareholders to hold their shares for a minimum period of time before they are allowed to propose their own directors in the management proxy circular, as is currently being debated in the United States.

***Recommendation #7 – The CBCA should contain a positive obligation on corporations to send proxy related material to all of their shareholders, irrespective of whether they choose to protect the privacy of their information***

Most shareholders hold their securities through an intermediary, such as a brokerage firm or custodian. In those circumstances, the registered holder of the security is the brokerage firm or custodian, but the beneficial owner is the shareholder.

Provincial securities laws allow beneficial owners to protect their “ownership information” from being disclosed to a company in which they own shares. “Ownership information” includes the name and address of shareholders and information about the securities held in their account. If a beneficial owner does not want this information disclosed they are referred to as “objecting beneficial owners” or “OBOs”. Beneficial owners who do not object to the disclosure of their ownership information are referred to as “non-objecting beneficial owners” or “NOBOs”.

Investors are increasingly choosing to protect their personal information. According to Broadridge, the market leader in investor communications services, approximately 50% of shareholders are currently OBOs, which has risen from 38% in 2005.

Provincial securities laws currently provide that when a company sends out proxy related materials to shareholders to enable them to vote at a meeting, they are required to pay for the distribution of those materials, unless the shareholder in question is an OBO, in which case they have no such obligation. Unless the intermediary or the shareholders themselves pay to receive proxy related material, OBOs will not receive the information necessary for them to exercise their voting rights. According to Broadridge, in 2009, 1390 issuers or 36% refused to pay for proxy material to be sent to OBOs, up from 345 issuers in 2008. As a result, approximately 148,000 OBOs, representing approximately 4.2 billion shares, received no proxy materials and were prevented from voting their shares.

Issuers should be required to send proxy materials to OBOs at the issuer’s expense. There is no principled reason to treat OBOs differently than NOBOs. The CBCA should include a provision requiring all shareholders to be treated equally in the proxy process, irrespective of whether they want to protect the privacy of their personal information.

***Recommendation #8 – The CBCA should facilitate “notice and access”***

The CSA has been developing a “notice and access” proposal, whereby shareholders will be able to access and download documents from companies’ websites to facilitate proxy voting. A ‘notice and access’ system has been developed in the U.S. and is generally seen to encourage proxy voting, lower costs and make the proxy system more efficient. However, since various provisions of the CBCA impose obligations on intermediaries to forward documents to shareholders in writing, the CSA is concerned that its proposals may interfere with CBCA requirements. It is important for the Committee to consult with the CSA on this issue (and generally, as set out in Recommendation #1) to ensure that provisions of the CBCA are not an obstacle to the CSA’s ability to proceed with these important reforms to the proxy voting system.

## V. BASIC GOVERNANCE NORMS

There are numerous governance norms that have become internationally accepted best practices, and voluntarily adopted by a large number of Canadian companies, but are not yet required by the CBCA. The following amendments to the CBCA are required to reflect these best practices.

***Recommendation #9 – The CBCA should generally require the separation of the roles of chief executive officer and chair of the board***

One of the key roles of the board of a public company is to oversee management, particularly the CEO. If the chair of the board is also the CEO, the board may have difficulties carrying out its supervisory function. The chair of the board sets the agenda for board meetings and ensures that directors have the necessary information. The chair is also responsible for conducting board meetings in a way that fosters constructive debate and appropriate challenges to management. Good governance generally requires the chair of the board to be someone other than the CEO and to be independent of management.

On a transitional basis, a board could consider appointing a lead director independent of management to carry out the functions of the chair of the board as the board moves towards fully separating the roles of CEO and chair of the board.

If there is a controlling shareholder of the company, the chair of the board should be independent of that shareholder or a lead director independent of the controlling shareholder should be appointed.

CCGG has been urging companies to voluntarily separate the role of the CEO and the chair of the board. Of the 157 largest corporate issuers in Canada, only 72 have a chair of the board that is independent of management.

***Recommendation #10 – The CBCA should require shareholder approval for significantly dilutive acquisitions***

Under the CBCA, shareholders have the right to approve certain fundamental changes to the corporation including the sale, lease or exchange of substantially all of the assets of the corporation, the issuance of a new class of shares, changes to the rights associated with certain shares, an amalgamation with another corporation and a going private transaction.

Shareholders should similarly have the right to approve a significant corporate acquisition that is paid for in shares if it will dilute the value of the shares held by existing shareholders by more than 25%. The TSX recently changed its listing requirements to require all TSX listed companies to obtain shareholder approval in those circumstances. A similar requirement is found in the listing standards of most major exchanges and/or in the corporate law of the jurisdictions in which the exchanges operate. The CBCA should similarly require shareholder approval for dilutive acquisitions.

## VI. REMEDIES FOR INVESTORS

***Recommendation #11 – The Committee should devise ways to give shareholders more meaningful ways to resolve claims under the oppression remedy***

The oppression remedy under s. 241 of the CBCA is a critically important remedy for shareholders and others (referred to in the CBCA as “complainants”) who seek redress for corporate actions that result in their interests being prejudiced or unfairly disregarded. However, the section as it currently stands does not provide shareholders with meaningful access to a remedy.

First, the cost of bringing an application in court for relief under s. 241 can be prohibitively expensive, even for large institutional shareholders. In contrast, the company and its directors and officers may use corporate assets to fund their defence to claims for relief under s. 241.

Perhaps more significantly, the court process through which remedies can be obtained under s. 241 typically involves lengthy delays. Those delays, together with the delay caused by multiple levels of appeal, can result in complainants not obtaining relief for many years.

Laudably, the CBCA attempts to ameliorate the cost burden on a complainant by allowing a court to order a company to pay interim costs to that complainant. However, even if a complainant is successful in obtaining such an order, it would still have to invest considerable resources to pursue its action. Interim cost orders also do not address the problem of delay.

The Committee should devise ways to reduce the costs and delays involved in resolving claims under the oppression remedy in order to make it a meaningful remedy for shareholders, perhaps by establishing a process whereby those claims could be arbitrated.

## VII. CONCLUSION

The statutory review of the CBCA provides a unique opportunity for Canada. The financial crisis has brought a new focus on governance and the critical role it plays in ensuring the long-term profitability of companies. Internationally, there is an emerging consensus that governance reforms are necessary to ensure that companies are well-run and accountable to their shareholders. For example, of the three major pieces of governance-related legislation that have been introduced in the U.S. since the financial crisis, two will abolish staggered boards and all three will require majority voting for director elections and the separation of the CEO and chair of the board. The SEC has developed a proposal to give shareholders access to the proxy. Proposed legislation in the U.S. will even require a shareholder advisory vote on compensation for all U.S. public companies.

Enshrining our recommended governance reforms in the CBCA will give Canada an opportunity to become a governance leader, thus encouraging the flow of capital to Canadian public companies and the more efficient use of that capital once invested.