

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

March 11, 2014

Re: Request for Comment – Consultation on the *Canada Business Corporations Act (CBCA)*

This letter is submitted on behalf of the Institute of Corporate Directors (ICD) in response to the invitation to comment on the Consultation Paper, “Consultation on the *Canada Business Corporations Act*” published by Industry Canada on December 11, 2013.

The ICD is a not-for-profit, member-based association with more than 8,000 members and eleven chapters across Canada. Our vision is to be the pre-eminent organization in Canada for directors in the for-profit, not-for-profit and Crown corporation sectors. Our mission is to foster excellence in directors to strengthen the governance and performance of Canadian corporations and organizations. This mission is achieved through education, certification and advocacy of best practices in governance.

In order to develop this letter, the ICD assembled a Task Force of distinguished directors and corporate governance experts from across Canada. The Task Force consisted of:

Mr. Ian Bourne – Calgary – Corporate Director
Mr. Peter Dey – Toronto - Corporate Director
Mr. Thierry Dorval – Montreal – Partner, Norton Rose Fulbright Canada, LLP
Ms. Maryse St-Laurent – Calgary – Vice-President and Corporate Secretary, TransAlta Corporation

The undersigned was Chair of the Task Force.

This letter reflects the views of the Task Force, the input of our Chapters across the country and has been approved by the National Board of the ICD.

The ICD strongly agrees with the federal government that Canada must maintain a strong corporate governance framework that both reflects and facilitates the best practices of Canadian corporations. Before commenting on the specific issues outlined in the Consultation Paper we would like to make three general comments:

- 1) It is the ICD's view that, in most instances, corporate governance in Canada is best advanced through identification of best practices and their development in the market as opposed to the imposition of prescriptive rules and regulations. Prescriptive rules and regulations can be rigid, have unintended consequences, may be indifferent to the diversity of businesses which will be subject to them, and may be contrary to the fundamental concept of director accountability, which is reinforced through annual elections.

In the corporate governance arena "one size does not fit all" and caution must be exercised before promoting universal standards or prescriptive rules. Furthermore, legislative changes can be insensitive to markets and could negatively affect Canadian companies' ability to compete globally or attain – and indeed develop – future international best governance practices. Canada, it must be noted, has had successful experience with "comply or explain" models, allowing companies the flexibility to develop an approach to corporate governance that reflects their own particular circumstances.

- 2) While the CBCA provides an effective framework for federally incorporated businesses, Canadian companies are also subject to a variety of rules, regulations and precedents that inform their operations. These include rules set out by provincial governments, provincial securities regulators, the stock exchanges and the courts. The ICD believes that each of these plays an important and distinct role in the Canadian governance landscape and that, as a guiding principle, any changes to the CBCA should not interfere with the mandates or decisions of those bodies or add to the regulatory burden of companies by overlaying duplicative requirements. Where we believe it is more appropriate for another jurisdiction to take the lead in rule-setting, we indicate so below.
- 3) A number of the proposals in the Consultation Paper have greater application to public, rather than to, private companies. The Canadian Securities Administrators ("CSA") and the Toronto Stock Exchange ("TSX") already have rules covering such proposals. Such rules can also be changed more expeditiously to respond to market conditions and needs than can legislative reform of the CBCA. We concur with the statement in the Consultation Paper that, "as a framework statute the CBCA provides the basic structure and standards for the direction and control of a corporation, but it does not prescribe how a corporation is to be run." Changes to the CBCA that seek to dictate the operations of a corporation would run opposite to the intention and purpose of the legislation.

In our view, the need for flexibility, avoiding duplication and inconsistency and ease of amendment means that a legislative amendment to the CBCA should only be made with the greatest of caution and only if it will clearly enhance and add long term value to corporate governance and the competitiveness of Canadian businesses.

Below are our comments on the questions raised in the Consultation Paper.

Executive Compensation

The issue of executive compensation has continued to attract considerable interest from provincial regulators, investors and the public. Stakeholders and others are invited to provide input on whether the provisions of the CBCA reflect corporate best practices and the interests of shareholders in this area.

The ICD strongly believes that it is the responsibility of the board of directors to approve the company's compensation strategy, policies and practices - a responsibility which must be exercised consistent with the board's fiduciary duty to act in the best interests of the company. We do not support practices that effectively undermine or diminish the board of directors' responsibility on compensation matters.

Executive compensation requires a thorough understanding of the company's long term strategy and its performance, as well as the roles and responsibilities of its executives. Access to confidential, competitively sensitive information is also essential when establishing fair levels of compensation. These are matters which the board is best suited to evaluate.

It is also important to note that Canadian compensation levels have historically been significantly lower than in the U.S. or U.K. - jurisdictions where mandatory "say on pay" has been introduced as a political response to public concern over unjustified executive pay. Leading Canadian companies also have a history of consulting with institutional shareholders on governance matters, and, should they believe it necessary, through the shareholder proposal mechanism in the CBCA, shareholders can submit proposals on compensation issues.

The willingness of Canadian boards to respond to shareholder concerns may reflect a cultural difference in Canada and may reflect differences in these governance practices from those in the U.S. or U.K. For example, Canadian companies tend to have fewer management directors serving on the company's board of directors than in the U.K. and in Canada the CEO rarely serves as Chair of the Board, unlike in the U.S. In our view, there is no need to adopt mandatory say on pay as a stick to promote a better dialogue with shareholders.

While the boards of various companies may decide to adopt say on pay voluntarily, we do not think the fact that other jurisdictions have adopted mandatory say on pay as a political reaction is a valid reason to adopt the practice in Canada. In deciding not to adopt auditor attestation of internal control over financial reporting (codified in the U.S. as section 404 of the *Sarbanes-Oxley Act of 2002*), Canada recognized that this might not be appropriate regulation and took a different

approach. This approach was well received by most public market participants. We believe say on pay is another instance where Canada should distinguish itself.

Simply put, it is unclear to us what problem would be solved by mandating “say on pay” votes in Canada.

Shareholder Rights

Shareholder voting rights are the foundation of corporate democracy, and a transparent, accurate, efficient and accountable shareholder voting process is fundamental to good corporate governance and the maintenance of market confidence. Stakeholders and others are invited to provide input on whether the shareholder voting provisions of the CBCA adequately facilitate shareholder democracy.

In 2012, the TSX issued rules for issuers listed on that exchange addressing many of the items discussed in the Consultation Paper, including requiring individual election of directors, annual elections for all directors, and the annual disclosure regarding whether the company has adopted a majority voting policy for uncontested director elections or explanation of its reasons for not adopting such a policy. In advance of these rules, the ICD submitted comments to the TSX expressing support of the direction they ultimately took.¹ We further note that the TSX has subsequently mandated that issuers adopt a majority voting policy. We do not believe that these particular issues now need to be addressed through amendments to federal legislation.

We note that TSX-V also has rules related to these matters for junior issuers but they are proportionately less rigorous than those applicable to the more senior issuers listed on the TSX. We believe this ability of the stock exchange to calibrate regulation to the size and maturity of the issuer allows for rules that are fit for their purpose and that provide greater flexibility, allowing for growth and increased economic activity. . This, again, favours permitting the TSX to suitably regulate in this area.

Mandatory voting by ballot

The ICD is of the view that the current provisions in the CBCA, allowing any shareholder or proxyholder to require a ballot, either before or after any vote by show of hands, are appropriate and, therefore, would not recommend amendments in this area

¹ <https://www.icd.ca/Resource-Centre/Policy-on-Director-Issues/Positions/TSX-Proposed-Amendments-to-Company-Manual-Regardin.aspx>

Individual election of directors

The ICD agrees with the recent TSX rule requiring individual election of directors for listed companies. We hold the view that a shareholder should not be placed in the uncomfortable position of voting 'for' some directors that the shareholder does not support, or withholding votes from all candidates when, in fact, the shareholder may support the election of many, or even most, of the director nominees. We are sympathetic to the view that where shareholders are able to vote for directors individually, they will feel more involved in the election process.

We also acknowledge that individual voting for directors may provide some shareholder feedback on director suitability – since shareholders who disapprove of a particular director nominee or the decisions of a particular committee of directors can make their dissatisfaction known by withholding voting for that nominee or the members of that committee.

Maximum one-year terms and annual elections for directors

The ICD favours annual director elections for public companies because accountability to shareholders is increased. We agree with the recent TSX rule in this respect and note that the vast majority of issuers already hold annual elections.

Having said this, the CBCA currently allows for staggered boards. Private companies – particularly small and medium-sized enterprises – may benefit from longer board terms, which can provide a greater degree of predictability in their growth phases.

The ICD believes that the recent TSX rules address shareholder accountability issues regarding public companies and that current CBCA rules provide private companies the flexibility to foster stability on their boards.

Director election by majority vote

The ICD believes that majority voting policies are a best practice and we support the recent TSX rule mandating such policies for issuers listed on its exchange. However, we oppose the adoption of a majority election standard.

Majority voting raises real concerns that the vote (i) would result in “failed elections” – i.e. that no directors are elected or that an insufficient number of the directors are elected with the attributes necessary to meet statutory director residency requirements or requirements to have an audit committee comprised of at least three independent directors or, (ii) would result in the loss of directors with a particular skill set which the board believes is necessary or desirable.

If a company has adopted a majority voting policy, the board is provided the flexibility to manage the consequences of a failed election in the best interests of the corporation and having regard to

the board's accountability to shareholders. Conversely, a majority election standard removes the element of flexibility from the board and can result in failed elections without a proper process or procedure to deal with the consequences.

The ICD believes that majority voting policies provide corporations with a way to exercise shareholder democracy without disrupting the operation and/or governance of the business.

In light of the recent TSX rule mandating majority voting policies, we do not believe a CBCA amendment is required.

Over-voting and empty voting

As we stated in our comment letter to the Ontario Securities Commission ("OSC") in response to *OSC Staff Notice 54-701*, if the continued evolution of corporate governance best practices is going to put greater emphasis on voting by shareholders, resulting in more potentially contentious business at meetings, then the integrity of the proxy voting system should be reviewed before additional pressure is placed on it.²

The ICD believes provincial regulators are best positioned to work with system participants to clarify rules within the proxy system. With this said, we will comment generally that Canada's shareholder voting system must maintain its integrity and that, in principle, every voter should have an economic interest in the issuer. To this point, there may be a role for Industry Canada to work collaboratively with provincial securities regulators to further evaluate the transparency and efficiency of Canada's share voting system.

Moreover, just as the ICD supports increased transparency by issuers, we believe it is important that shareholders also be obligated to operate transparently. Simply put, a company should be able to obtain an understanding of its actual ownership. The ICD would support initiatives by regulators and legislators that improve transparency and integrity in the proxy voting infrastructure.

As the ICD stated in our submission to the Canadian Securities Administrators ("CSA") in response to *CSA Consultation Paper 54-401 - Review of the Proxy Voting Infrastructure*, we recognize that the current system is complex and that efficient and reliable solutions will require time to develop, but Canada requires a proxy voting system that yields results that all stakeholders have confidence in.³

² https://www.osc.gov.on.ca/documents/en/Securities-Category5-Comments/com_20110328_54-701_magidsons.pdf

³ http://www.osc.gov.on.ca/documents/en/Securities-Category5-Comments/com_20131113_54-401_iofcropd-en.pdf

Shareholder and board communication

The ability of shareholders to communicate effectively and efficiently with both corporate management and other shareholders is integral to maintaining investor confidence and facilitating good corporate governance. Stakeholders and others are invited to provide input on whether the provisions of the CBCA could further enhance communication between shareholders and corporate management, and among shareholders themselves, and whether the provisions are consistent with technological advances.

Electronic meetings for public companies

The ICD believes that employing electronic technology in shareholder meetings, including AGMs, can increase accountability for both issuer and shareholder but there remains an important place for frank and direct communication that “electronic-only” meetings cannot provide.

Overall, we believe every company should continue to be allowed to choose if and how to employ electronic technology at their shareholder meetings.

Facilitation of “notice and access” provisions under the CBCA

“Notice and access” allows reporting issuers to realize efficiencies in the distribution of proxy materials to shareholders by posting the materials on a non-SEDAR website. The ICD notes that the CSA has already adopted “notice and access” in Canada through *National Instrument 54-101 – Communication with Beneficial Owners of Securities of a Reporting Issuer* and *National Instrument 51-102 – Continuous Disclosure Obligations*. To encourage greater efficiencies in Canada’s capital markets, we strongly support legislative amendments to the Act that would facilitate “notice and access”.

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

It is the ICD’s position that engaged shareholders have a positive impact on corporate governance. As the owners of the company, it makes sense to give shareholders access points to its governance. However, a balance must be struck between ensuring that the concerns of shareholders are met against allowing for the orderly execution of corporate strategy as recommended by management and approved by the board.

It is important to stress that the composition of a board of directors takes time, thought and analysis. Canada’s excellent record in corporate governance has not been achieved through luck or coincidence. When looking to fill a position, a board will identify skills and experience from which it would benefit and then conducts a search for candidates. Amending rules to increase access to proxy circulars could damage the integrity of our country’s corporate boards by impacting this careful selection process.

S.137 of the CBCA currently allows shareholders with at least five per cent ownership to nominate alternate directors and compels issuers to publish their names in the proxy circular. In our view, this “proposal” system is preferable to a “contest” system, which is adversarial, upsets the board composition process and threatens to lead to proxy battles.

Shareholders who are unwilling or unable to influence board selection through dialogue or the proposal mechanism have the option to resort to a proxy contest.

Filing deadline

For the purposes of shareholder proposal deadlines, the ICD supports amending the CBCA to reference the last annual meeting (rather than the notice date of the last meeting).

Reasonable time to speak to a proposal at the annual meeting

The ICD believes it is the responsibility of the meeting chair to determine reasonable speaking time for meeting participants, which will vary with the circumstances, and that the CBCA should not be amended in this regard. For example, a legislated minimum may be inappropriate where a single shareholder has multiple proposals.

Board Accountability

The accountability of boards of directors is fundamental to good corporate governance. Directors are elected by shareholders to manage and supervise the business of the corporation in its best interest. Shareholders must have the ability to ensure board accountability and meaningfully evaluate board performance. Stakeholders and others are invited to provide input on whether the provisions of the CBCA adequately balance the respective roles of boards and shareholders and enable shareholders to require appropriate levels of accountability from boards.

Roles of the CEO and the Chair of the Board

The ICD strongly believes that separating the roles of CEO and Chair is best practice and we note that the majority of Canadian issuers have already adopted this. We do, however, believe that public companies should have some flexibility in this regard, and thus, we support a “comply or explain” model for public companies. The ICD believes that private companies should have flexibility in this area.

Shareholder approval of significantly dilutive acquisitions

We note that companies listed on the TSX are required to obtain shareholder approval for acquisitions that would result in a dilution of existing shareholders’ interests in excess of 25 per cent. This rule provides shareholders and issuers with regulatory clarity. The ICD believes that any

amendment to the CBCA in this area would be duplicative and, that wording in two different rules-setting documents under two different jurisdictions could be potentially confusing.

Private companies also operate under an appropriate mechanism whereby the voting and veto rights of the shareholders can be supplemented through negotiation and set out in shareholder agreements.

Access to oppression remedy by shareholders

The ICD believes that the CBCA's current oppression remedy provides stakeholders meaningful access to a fair process through the courts. We also note that mediation through the courts in the context of the oppression remedy is already required in Ontario and common in Quebec and that mediation in other jurisdictions such as in Alberta is also common. For this reason, we do not favour an alternative to the courts process and note that an unintended but important benefit to the current oppression remedy is that it helps develop judicial precedent and enhances a judiciary's experience and expertise in commercial matters.

Disclosure of the board's understanding of social and environmental matters on corporate operations

As a member of the Global Network of Director Institutes ("GNDI"), the ICD has published a policy perspective paper on integrated reporting, in which we support corporate reporting that is principles-based and enables companies and their boards to effectively communicate those issues of significance to their shareholders.⁴

A number of Canadian companies have voluntarily adopted meaningful corporate social responsibility programs. In addition, we note that the CSA has already published guidelines on disclosure requirements relating to environmental matters in *CSA Staff Notice 51-333 – Environmental Reporting Guidance*, which provides issuers guidance on continuous disclosure requirements regarding environmental matters and public companies are required to disclose their social and environmental policies in their Annual Information Forms, which are approved by their boards.

We do not favour CBCA regulation in this regard, nor believe it is necessary.

Securities transfers and other corporate governance issues

Submissions are invited as to the continued relevance of CBCA provisions related to securities transfers and insider trading, given the overlapping regulatory jurisdictions between the CBCA and provincial

⁴ <http://www.gndi.org/>

laws in these areas. Comments are also sought on the operation of CBCA provisions related to director residency, trust indentures and proportionate liability.

Insider trading provisions in the CBCA

The ICD believes that provincial securities laws adequately cover insider trading concerns for public companies. To the extent necessary, consideration could be given to retaining insider trading rules in the CBCA for private companies.

Canadian residency requirements for CBCA directors

The ICD believes that current CBCA rules requiring at least 25 per cent of the directors of a corporation be resident Canadians is appropriate and should not be changed.

Incorporation Structure for Socially Responsible Enterprises

Submissions are invited on the utility of SREs in the Canadian context and the extent to which current CBCA incorporation provisions and structures facilitate the creation of SREs.

Incorporation of hybrid enterprises under the CBCA

In light of the BCE decision we question the need for establishing a new regime for SRE's.

We believe the BCE decision held that for-profit corporations can be socially responsible and Canada has robust not-for-profit and Crown Corporation sectors. In this regard, we would refer the department to a 2012 paper by Ms. Carol Liao, prepared for the Canadian Foundation for Governance Research, a wholly-owned subsidiary of the ICD.⁵

Corporate Transparency

Stakeholders and others are invited to make submissions regarding whether, and how, the availability of beneficial ownership information to competent authorities, the existence of bearer shares and the disclosure of nominee shareholder information should, and could, be addressed in the CBCA.

The ICD believes that these are matters that should be left to specialized statutes or criminal law and should not be addressed in the CBCA.

Corporate governance and combatting bribery and corruption

Stakeholders and others are invited to provide input as to the adequacy of existing CBCA provisions on corporate records, accounting standards and audits to combat bribery in international transactions.

⁵ http://www.cfgr.ca/docs/reports/CFGR_2013_Final_Report_Liao.pdf

The ICD notes that provisions in the *Corruption of Foreign Public Officials Act* address the issues of foreign bribery and corruption and that to avoid confusion believes the CBCA should not be amended in this respect. Should there be a need for further legislation in this area, it should be addressed through specialized statutes, not through the CBCA.

Diversity of corporate boards and management

Stakeholders and others are invited to comment as to whether new measures to promote diversity within corporate boards should be included in the CBCA and what such measures might entail.

We note that the OSC recently issued proposed rules, which would introduce a “comply or explain” model. The ICD submitted a comment letter to the OSC in advance of this issuance supporting this model and we believe the OSC is in the best position to advance this initiative at this time.⁶

Corporate Social Responsibility

Stakeholders and others are invited to submit comments as to whether the existing provisions of the CBCA adequately promote CSR objectives and whether additional measures to promote CSR objectives are warranted in the CBCA.

The ICD believes that companies are best positioned to determine the nature of their corporate social responsibility activities. In a recent GNDI policy perspective paper on integrated reporting, the ICD supported principles-based corporate reporting but we believe that firms should have the flexibility to adapt their CSR programs to evolving needs and that increasing the regulatory burden in this area limits that flexibility.

Administrative and technical matters

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

The ICD generally favours disintermediation and we would favour a regime that allows companies to deal more directly with their beneficial owners.

⁶ https://www.osc.gov.on.ca/documents/en/Securities-Category5-Comments/com_20130923_58-401_icdeng.pdf



1. 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?

Canadian firms have increasingly become seen as targets by activist investors, with one recent report labelling Canada as the "promised land" for activists seeking proxy battles.⁷ We believe that the current exemption is adequate, allows for adequate communications and that the threshold should be maintained. Any increase in the threshold will further reduce the transparency of dissident activity, which may be detrimental to our corporations in the long term.

Conclusion

The ICD appreciates the federal government's interest in ensuring the CBCA remains current but we note that most of the issues discussed in the Consultation Paper have primary application to public companies and are already addressed by provincial securities regulators and stock exchange rules. It is our view that any amendments to the CBCA should only be made if they will add clear value to corporate governance in Canada, avoiding duplication with existing provincial regulations and allow issuers to maintain flexibility. We encourage Industry Canada to address any questions to the undersigned and thank you for the opportunity to comment.

Yours truly,

Stan Magidson, LL.M., ICD.D
President and CEO

⁷ <http://www.activistinsight.com/research/Activist%20Insight%20Annual%20Review%202014-final%20web%20pdf.pdf>