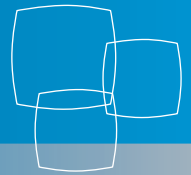




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Corporate, Insolvency and Competition Law Policy



Consultation on the *Canada Business Corporations Act*

Industry Canada

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Corporate, Insolvency and Competition Law Policy

Consultation on the *Canada Business Corporations Act*

Industry Canada is conducting public consultations on the *Canada Business Corporations Act* (the "Act" or "CBCA").

About the Consultation

Industry Canada is undertaking this consultation to ensure that the governance framework for CBCA corporations remains effective, fosters competitiveness, supports investment and entrepreneurial activity, and instills investor and business confidence.

Accordingly, we are interested in receiving comments on the full range of CBCA corporate governance matters, including those described below and in the attached discussion paper.

Issues Under Review

The House of Commons Standing Committee on Industry, Science and Technology (the "Committee") conducted a statutory review of the CBCA in 2009–10. In June 2010, the Committee published a report that recommended that the Government consult on four issues: (1) rules relating to disclosure of executive compensation, (2) rules applicable to shareholder voting and participation rights, (3) rules regarding the holding and transfer of shares and insider trading, and (4) rules applicable to the incorporation of socially responsible enterprises.

In addition to these issues, other issues have been identified for review and consultation. The topics include greater transparency of the ownership of corporations, the role of corporate governance legislation in preventing bribery and corruption, the diversity of the members composing corporate boards and management teams, takeover bid rules, the use of the arrangement provisions of the CBCA to restructure insolvent businesses, the role of corporate social responsibility, and administrative and technical reforms to the Act.

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Introduction

About the Act

The CBCA sets out the legal and regulatory framework for nearly 235,000 federally incorporated corporations. Most CBCA corporations are small or medium-sized privately held companies. However, many large businesses have chosen to incorporate under the provisions of the CBCA, including almost half of Canada's largest publicly traded companies. As an important marketplace framework law, the CBCA is designed to enhance the efficiency and competitiveness of the Canadian marketplace.

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. The Act sets out the rules and provides the mechanisms to facilitate the interaction among shareholders, directors, management and other interested parties that determines corporate decision making. With respect to publicly traded corporations, some of the corporate governance provisions contained in the CBCA overlap with parallel provisions in provincial securities laws, such as the process for selecting directors and the rights of shareholders to participate in key corporate decisions.

When the CBCA came into force in 1975, it was considered a leading-edge corporate law statute. The evolution of the corporate marketplace since its enactment led to comprehensive amendments to the Act in 2001. Among other things, these amendments enhanced shareholder participation in corporate decision making, increased transparency and accountability, and further harmonized the Act with provincial securities laws. The overall effect was to facilitate entrepreneurship and assist corporations in meeting the challenges of an increasingly competitive global marketplace.

Today, Canada's corporate governance framework is well recognized internationally for its efficiency. In 2013, the World Bank ranked Canada third among 185 economies for a regulatory environment that is conducive to starting and operating a business and fourth in protecting investors.¹ The efficacy of corporate boards of directors and the protection of minority shareholders' interests have also been identified by the World Economic Forum as factors that give Canada a competitive advantage over other countries.²

The CBCA remains a well-functioning statute. Nevertheless, continuous changes and developments in the marketplace require constant monitoring to ensure that Canada's corporate regulatory structure meets the challenges of the future. To grow and thrive in the global knowledge-based economy, Canada needs a strong corporate governance framework that both reflects and facilitates the best practices of Canadian corporations.

Discussion Paper

I. Executive Compensation

The Committee recommended that consultations be conducted on the *Canada Business Corporations Act* (the "Act" or "CBCA") with respect to the following compensation matters:

- shareholder advisory votes on compensation packages
- respective roles of federal and provincial jurisdictions on this issue

Currently, corporate boards are entitled to fix the compensation levels of directors, officers and employees of the corporation.³ Regulations under the CBCA set out information that must be contained in the management proxy circular respecting compensation.⁴

The Committee considered whether shareholder review of executive compensation should be required by law under the CBCA. Some witnesses appearing before the Committee supported advisory votes on executive compensation packages (known as "say-on-pay") at meetings of shareholders of public corporations.⁵ Such votes have recently been adopted by many of Canada's largest corporations, and in the European Union, and are now mandatory in the United States for corporations subject to federal proxy rules under the *Dodd-Frank Act*.

Another view is that current disclosure requirements for executive compensation in place under provincial securities laws for publicly traded companies adequately protect stakeholders, indicating that the trend in executive compensation matters reflects a move toward disclosure standards developed by provincial securities regulators and away from federal regulation of this area through the CBCA.⁶

Since the release of the Report in June 2010, 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.

II. Shareholder Rights

A. Voting

The Committee recommended further consultation on the following issues related to voting rights under the CBCA:

- mandatory voting by ballot at shareholder meetings and disclosure of results by public companies
- individual election of directors and "slate" voting
- maximum one-year terms and annual elections for directors
- director election by majority vote

The CBCA provides for show-of-hands voting unless a shareholder requests a vote by ballot.⁷ When a show-of-hands vote is conducted, corporations typically only record in the minutes whether the resolution passed, without including a detailed record of the results. Witnesses before the Committee supported mandatory recorded votes for public corporations under the CBCA.⁸ They submitted that in the absence of recorded vote results, shareholders are unable to assess the level of shareholder support for issues put to a vote, or changes in the level of support, or obtain independent confirmation that all votes had been counted.

With respect to the election of directors under the CBCA, the Committee heard witness testimony supporting CBCA amendments to prohibit slate voting.⁹ Some publicly traded corporations have adopted the practice of nominating a group of directors (a "slate") and requiring shareholders to vote for the entire slate on an "all-or-none" basis. This practice has been criticized on the basis that presenting a slate of nominee directors for election by shareholders does not permit shareholders to express their approval or disapproval of individual nominees on the slate.

The CBCA permits director terms of up to three years,¹⁰ and it also permits "staggered" terms, under which not all of the directors face re-election in a single year.¹¹ Witnesses testified before the Committee in support of CBCA amendments requiring annual director elections and prohibiting staggered boards with overlapping terms of office for directors.¹² Staggered boards and long terms of office are considered by some to impede the ability of shareholders to intervene and make changes to the composition of the board. However, others contend that staggered boards with overlapping terms of office, under which not all directors are subject to re-election in a given year, may contribute to the stability and effectiveness of the board and provide more of a long-term perspective to corporate results than would be the case under annual elections.

The CBCA currently permits the election of directors by plurality voting, under which the candidate receiving the most votes wins election to the board even if the candidate did not receive the votes of a majority of shareholders. Other plurality-voting schemes give shareholders a choice between voting for a nominee or withholding their vote. In an uncontested election, such rules could allow the election of a director with as few as one vote, even if all the other votes were withheld. Witnesses before the Committee supported CBCA amendments requiring that directors be elected by a majority vote of all shareholders so as to improve director accountability to shareholders.¹³ A majority voting model would require that a candidate obtain a majority of shareholder votes to gain a position on the board. However, concern has been expressed that such provisions may result in "failed elections," wherein no candidate receives a majority and the board of directors does not achieve the necessary quorum to conduct corporate business.¹⁴

In addition to the voting issues identified by the Committee, other issues related to shareholder voting rights have attracted stakeholder attention:¹⁵

- "overvoting" of voting rights attached to corporate shares
- "empty voting" by shareholders without an economic interest in the corporation

The CBCA and similar corporate statutes provide shareholders with the ability to influence major corporate decisions by exercising the voting rights attached to their shares at shareholder meetings. The accurate and timely exercise of the voting rights embodied in corporate shares is essential to the model of shareholder democracy embodied in the CBCA. However, it is uncommon for shareholders of publicly traded corporations to hold and vote their shares directly. Instead, most shares are now held indirectly through intermediaries such as brokers or financial institutions, which typically vote these shares for the beneficial owners through proxy arrangements. In addition, the increasing complexity of financial markets and uses for shares, such as the practice of share lending (for the purposes of short sales and other legitimate investment purposes), have raised concerns that the voting rights of shareholders may not be effectively exercised. An issue that has arisen as a result of the increase in beneficial as opposed to direct share ownership, and increased options for share usage, is overvoting, which has the potential to distort the integrity of shareholder votes.

Overvoting occurs when the voting rights attached to a share in a corporation are exercised more than once. Typically, this occurs when votes are cast inadvertently by both the intermediary and the beneficial owner of the shares. Alternatively, if shares are lent to a third party and the loaned shares are not allocated against specific beneficial shareholder accounts, it is possible that both the borrower of the shares and the beneficial owner will vote in respect of the same shares.

Granting shareholders the right to vote on corporate matters is based on the expectation that they have an economic interest in the success of the corporation. Stakeholders, however, have raised the issue of empty voting, which occurs when a shareholder has transferred its economic interest, through a hedge or other financial transaction, to a third party but has retained the right to vote. Empty voting has been criticized on the basis that it may compromise the principles of shareholder democracy. If an empty-voting shareholder is insulated from a decline in the value of the corporation's shares or can benefit from a lower share price, the empty votes may be exercised in a way contrary to the interests of the company and of other shareholders.

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.

B. Shareholder and Board Communication

The Committee recommended additional consultations on the following matters related to communication between shareholders and corporate boards under the CBCA:

- electronic meetings for public companies
- facilitation of "notice and access" provisions under the CBCA
- access to proxy circular by "significant" shareholders (more than 5-percent share ownership)
- equal treatment of shareholders in proxy process, irrespective of shareholder privacy concerns
- shareholder proposal provisions, including
 - filing deadline
 - reasonable time to speak to a proposal at an annual meeting

A hallmark of an effective corporate governance framework is the ability of shareholders to present their concerns to the board and to be given full and timely information so they can participate meaningfully in corporate governance decisions. To facilitate greater communication among participants in the corporate governance process, electronic distribution of information from a corporation to its shareholders has been permitted under the CBCA since 2001, including the holding of electronic or virtual shareholder meetings.¹⁶ The objective of these provisions is to allow corporations to use new technologies to reduce costs and enhance shareholder participation. Witnesses before the Committee supported electronic participation in shareholder meetings. However, it was also proposed that the CBCA not permit public companies to limit shareholder meetings to electronic-only formats so as to preserve the ability of shareholders to directly communicate with corporate management.¹⁷

As part of the trend toward facilitating corporate communication through the use of technology, notice and access provisions have been proposed, which would allow corporations to post documents on company websites for shareholders to download. It was suggested to the Committee that the CBCA should facilitate such provisions on the grounds that they may facilitate the proxy voting process, lower costs and improve efficiency.¹⁸ Implementation of such provisions may, however, conflict with current CBCA provisions that require delivery of certain paper documents to shareholders.¹⁹

Communication from management to shareholders is primarily achieved through the management proxy circular, including communication on the nomination of directors. While shareholders are able to prepare and mail their own dissenting proxy circular to other shareholders at their own expense, the Committee heard testimony that the cost of preparing and distributing an alternative shareholder circular can be prohibitive. To facilitate shareholder nomination of alternative directors, and enhance their ability to solicit support for their election, it was submitted to the Committee that the CBCA be amended to permit significant shareholders (holding more than 5 percent of shares) to include their alternate nominees for directors in the management proxy circular at no cost or to allow for reimbursement of costs by the corporation.²⁰

The Committee heard evidence that the increasing tendency of shareholders to protect their personal information from disclosure under applicable privacy laws impacts the ability of corporations to send proxy-related material directly to shareholders in cases where shares were held through intermediaries such as brokerage firms. It was submitted to the Committee that the CBCA contain a provision requiring corporations to send proxy-related material to shareholders, notwithstanding the decision of shareholders to protect their personal information.²¹ However, this proposal did not address how to reconcile potential conflicts with federal and provincial privacy laws.

The CBCA shareholder proposal provisions provide a mechanism under which qualifying shareholders can notify the corporation of a matter proposed for consideration at the annual meeting.²² While shareholder proposals can enhance shareholder participation in corporate decision making, concerns were raised before the Committee regarding certain procedural matters that were said to hinder the ability of shareholders to utilize proposals. First, the deadline in the CBCA to submit a proposal is based on the anniversary date of the notice date for the previous annual meeting. Witnesses before the Committee supported harmonizing the deadline for filing CBCA proposals with the provincial approach of referencing the last annual meeting itself, rather than linking the deadline to the notice date of the previous meeting. Also, while the CBCA provides a 500-word limit to the shareholder's supporting statement for the proposal in the management proxy circular, it does not specify the length of time a shareholder is to be given at a shareholders' meeting to explain and defend the proposal. It was submitted that the CBCA should provide a reasonable period of time for shareholders to speak to their proposals at the annual meeting.²³

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.

C. Board Accountability

The Committee also recommended consultations on matters related to the accountability of boards of directors under the CBCA:

- roles of the Chief Executive Officer (CEO) and the Chair of the Board
- shareholder approval of significantly dilutive acquisitions
- access to oppression remedy by shareholders
- disclosure of the board's understanding of social and environmental matters on corporate operations

The CBCA is silent as to whether the CEO and Chair of the Board must be separate individuals. Witnesses submitted to the Committee that the two roles should be independent of one another. As the board of directors is required to exercise supervision over corporate management, it was suggested that if the CEO exercising management functions and the Chair of the Board are the same person, the Board may be precluded from fulfilling its supervisory duty over corporate management.²⁴

When undertaking major acquisitions, corporations may issue new shares to the shareholders of the acquired corporation instead of cash payments. This type of transaction may result in a dilution of the existing shareholders' interest in the corporation. While the CBCA requires shareholder approval for transactions involving the disposition of substantially all the property of the corporation,²⁵ shareholder approval is not required for acquisitions paid for in whole or in part by the issuance of new shares. Such decisions are generally within the authority of the board of directors. Witnesses submitted that the CBCA be amended to require shareholder approval of acquisitions that would result in a dilution of existing shareholders' interests in the corporation in excess of 25 percent.²⁶

Witnesses also expressed concern that the CBCA's oppression remedy may result in costs and delays that could prevent meaningful access to this remedy. The CBCA gives a "complainant" shareholder, creditor, director or officer the right to seek relief in the courts against oppressive corporate conduct that unfairly disregards their interests.²⁷ It was submitted by witnesses that "more meaningful" ways be found to resolve oppression claims and address the potential problems that cost and delay may impose on a complainant's access to the remedy, such as providing a form of arbitration as an alternative to the court proceedings prescribed under the CBCA.²⁸

Shareholders are increasingly concerned with the social and environmental impact of the corporations in which they invest. As a means of further meeting these concerns and improving corporate accountability, it was submitted to the Committee that the CBCA should require publicly traded corporations to disclose the board's understanding of the impact and potential impact of social and environmental matters on the corporation's operations.²⁹

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.

III. Securities Transfers and Other Corporate Governance Issues

The Committee recommended consultations on the following issues:

- the potential removal of the CBCA provisions relating to securities transfers
- insider-trading provisions in the CBCA
- Canadian residency requirements for CBCA directors
- regulation of trust indentures under the CBCA
- the CBCA's modified proportionate liability regime

Currently, the CBCA contains provisions that relate to the transfer of securities.³⁰ The continued relevance of these provisions under the CBCA was questioned before the Committee. It was noted that regulation of these matters under provincial statutes was more up to date than under the CBCA. Given the concurrent regulation of these matters under provincial statutes, it was suggested that there may no longer be a need to regulate these issues under federal corporate law statutes such as the CBCA.³¹

The Committee also examined the insider-trading provisions of the CBCA.³² Witnesses submitted that the provisions for liability and the civil remedies for insider trading under the CBCA are not up to date and that the CBCA, as a framework statute that facilitates corporate action rather than prescribing it, may not be well suited for the regulation of insider trading. It was suggested that greater reliance on civil remedies such as class actions, along with a greater harmonization of the CBCA with provincial securities laws, could be considered for the regulation of insider trading under the CBCA.

The CBCA requires that at least 25 percent of the directors of a corporation be resident Canadians³³ and that at least 25 percent of the directors present at a directors' meeting be resident Canadians.³⁴ It was proposed to the Committee that there may no longer be a need to preserve board nationality and residency requirements in the CBCA. On the other hand, some have suggested that a Canadian nationality requirement allows for the expression of a Canadian viewpoint at directors' meetings. Others have suggested that the residency in Canada requirement enhances the effectiveness of Canadian director liability laws. Others have proposed that relaxing Canadian nationality and residency requirements would allow for stronger international representation on boards and may encourage multinational corporations to further invest in Canada.

The regulation of trust indentures under the CBCA was also raised before the Committee.³⁵ Trust indentures, commonly used when a corporation issues debt instruments to the public, govern the obligations of trustees acting on behalf of the rights of the debt holder.³⁶ The CBCA trust indenture provisions apply unless the Director of the CBCA determines that the obligations under the trust indenture are subject to the laws of another jurisdiction that are "substantially equivalent" to the CBCA.³⁷ While jurisdictions such as Ontario and the United States meet this test, it was submitted to the Committee that a CBCA company may be required to meet the CBCA requirements when issuing debt in foreign jurisdictions.

Until the 2001 amendments to the CBCA, parties involved in the preparation of financial information required under the Act were subject to joint and several liability for financial losses arising from negligence. The 2001 amendments introduced a modified proportionate liability regime, under which a defendant would only be liable for the portion of damages commensurate with the degree of responsibility for the loss.³⁸ While no specific recommendations were made, it was submitted to the Committee that the utility of these CBCA provisions was limited by concurrent provincial jurisdiction over negligence law, creating uncertainty over which liability regime may apply in a given case.³⁹

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

IV. Incorporation Structure for Socially Responsible Enterprises

The Committee recommended consultations regarding socially responsible enterprises (SRE):

- incorporation of hybrid enterprises (entities with both profit-making and non-profit goals) under the CBCA

SREs encompass a broad spectrum of entities from enterprising not-for-profits to benefit corporations. What SREs share in common is the use of a commercial business model to encourage social change. Both internationally and domestically, regulatory measures have been undertaken to support not-for-profit corporations and corporations with both profit-making and social objectives to attract investment and continue community-based goals.

Witnesses before the Committee noted the existence of such entities in the United States (known as low-profit limited liability corporations) and the United Kingdom (known as community interest companies). The Government of British Columbia amended the *Business Corporations Act* to allow for the incorporation of a new social enterprise called "community contribution companies" or C3s.⁴⁰ Similarly, the Government of Nova Scotia passed the *Community Interest Companies Act* for the creation of a new share entity that includes a social interest.⁴¹ The Committee recommended further consultation as to whether existing CBCA provisions are sufficient to enable these corporations or whether amendments are necessary to support the development of such enterprises.⁴²

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.

V. Corporate Transparency

Canada is a member of both the Financial Action Task Force (FATF), an intergovernmental body that develops and promotes policies in the area of anti-money laundering and anti-terrorist financing, and the Global Forum on Transparency and Exchange of Information for Tax Purposes (GFTI). The FATF has recently adopted a revised assessment methodology that outlines the criteria by which the international community will be assessed on its compliance with the FATF Recommendations. In the course of recent peer reviews, the FATF and the GFTI have recommended that Canada should adopt measures, such as those listed below, to ensure that companies are not used for tax evasion, money laundering and terrorist financing.⁴³

Recognizing the importance of corporate transparency and consistent with Canada's *G8 Action Plan on Transparency of Corporations and Trusts*, the Government is seeking stakeholder views on the following:

- improved access to accurate and timely information, by competent authorities such as law enforcement and tax authorities, on beneficial ownership of corporations, including possibly through the establishment of a central repository of corporations incorporated under the CBCA;
- disclosure of ownership information regarding bearer shares and bearer share warrants; and
- disclosure by nominee shareholders of information on the individuals for whom they are acting.

Currently, the CBCA requires public disclosure of certain information at the time of incorporation, such as the location of the registered office and information on share capital and directors of the corporation. However, there is no requirement to ensure that competent authorities, such as law enforcement, have access to accurate and current information identifying shareholders. While the CBCA requires corporations to maintain records, including a register of directors, officers and shareholders (including a list of the names and addresses of all shareholders), such measures may not permit the determination of beneficial ownership of corporate shares. CBCA shareholders can include corporate shareholders, which in turn can have other corporate or individual owners, from jurisdictions outside the CBCA.

The CBCA also allows for nominee shareholders, who act on behalf of the actual beneficial owners, and does not require disclosure of the fact that a shareholder is a nominee in the shareholder register.

While the CBCA generally requires that shares be issued to a registered owner, it also permits the existence of previously issued bearer shares, which are not issued in the name of a shareholder and whose ownership is determined by possession.

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.

VI. Corporate Governance and Combating Bribery and Corruption

The Organisation for Economic Co-operation and Development (OECD), through the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*⁴⁴ (the Convention), called upon states to develop measures to create and strengthen deterrents against bribery in international transactions. Parliament passed the *Corruption of Foreign Public Officials Act*⁴⁵ in 1998 to implement Canada's obligations as a signatory of the Convention.

In support of the Convention goals to combat bribery and produce a level playing field in international business, the OECD, through its 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*,⁴⁶ has called on states to take steps to further examine company and business accounting, external audits and internal controls, ethics, and compliance requirements and practices.

Currently, the CBCA requires corporations to prepare and maintain records of corporate activity, including articles and bylaws, minutes of meetings and resolutions of shareholders and directors, and adequate accounting records.⁴⁷ The CBCA also requires the preparation and disclosure to shareholders of annual financial statements.⁴⁸ All public corporations are required to appoint an independent auditor,⁴⁹ although private corporations may dispense with this requirement through unanimous shareholder consent.⁵⁰

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.

VII. Diversity of Corporate Boards and Management

While definitions of diversity and methods of achieving this goal vary, it has been suggested by many stakeholders that a commitment to diversity, including gender diversity, could provide a corporation with access to a broader pool of knowledge and experience, varied social backgrounds and skills beyond those traditionally found in corporate boardrooms. This could result in new market opportunities, greater innovation and access to new talent pools for recruitment.

Several jurisdictions have adopted measures to increase women's representation on boards of directors, including legislating quotas for representation, mandating diversity targets, and issuing voluntary guidelines for corporations to put in place gender diversity policies, targets and reporting.

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.

VIII. Arrangements Under the CBCA

The CBCA contains provisions that permit a solvent corporation to apply for court approval to enter into an "arrangement."⁵¹ The CBCA expressly contemplates the use of court-approved arrangements for purposes such as amendments to corporate articles, amalgamations, and the liquidation of a corporation where it is not practicable to follow the procedure set out in other provisions of the CBCA to achieve the change. Recently, the arrangement provisions in the CBCA have increasingly been used to restructure the debts of an insolvent business as an alternative to a restructuring under the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*.

The CBCA provides that an applicant for arrangement provisions cannot be insolvent. However, courts have permitted the use of arrangements for insolvent companies as long as one or more of the applicant companies is solvent.⁵² Court approval is required for the final plan implementing the arrangement, and the Director of the CBCA has published a policy statement requiring the disclosure of sufficient information to permit stakeholders to make informed decisions on the proposed arrangement.⁵³

The use of CBCA arrangements for restructuring insolvent corporations has been supported by some practitioners and stakeholders as providing an efficient, cost-effective alternative to insolvency proceedings. However, others have expressed concerns that CBCA arrangements may not be appropriate in the insolvency context as insolvency legislation provides express protection for creditors, greater transparency and judicial oversight of the full proceeding.

Comments are invited as to whether the use of arrangements under the CBCA to restructure insolvent corporations is appropriate under certain circumstances and, if so, whether additional CBCA provisions may be necessary to safeguard the interests of creditors and other stakeholders similar to those found in insolvency statutes.

IX. Corporate Social Responsibility

Some stakeholders have called for greater consideration of the extent to which the CBCA, as presently constituted, accommodates the pursuit of corporate social responsibility (CSR) objectives.

The promotion of CSR principles and practices could result in more innovative, productive and competitive Canadian businesses. While CSR does not have a universal definition, it has been defined as voluntary responsible business conduct in areas such as employment and industrial relations, human rights, the environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation.⁵⁴ Many see CSR as the private sector's method of integrating economic, social and environmental imperatives. In addition to the integration of CSR principles into corporate structures and processes, CSR may also involve the creation of innovative and proactive solutions to societal and environmental challenges as well as collaboration between internal and external stakeholders to improve CSR performance.

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.

X. Administrative and Technical Matters

In addition to the issues discussed above, Industry Canada has identified other administrative and technical matters for review. These issues include shareholder rights and the measures proposed to improve the efficiency of corporate administration and the administrative process.

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

The CBCA provides for the vesting of undisposed property of a dissolved corporation in the Crown.⁵⁵ If the corporation is subsequently revived, any property that vested in the Crown, or the proceeds of its disposition, is to be returned to the revived corporation.⁵⁶

Some stakeholders have submitted that since the CBCA also provides that the rights of a revived corporation are restored in the same manner and to the same extent as if it had not been dissolved, a separate procedure governing the return of property vested in the Crown is redundant, and places undue burden on revived corporations.⁵⁷

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

When a corporation is dissolved under the CBCA, the portion of property belonging to a shareholder or a creditor that cannot be found is converted into cash and paid to the Receiver General of Canada.⁵⁸ If a creditor or shareholder subsequently establishes a claim to any such funds, the Receiver General must pay an amount equal to their entitlement.⁵⁹

Unlike some provincial statutes, there is no time limit to establish a claim against the Receiver General in the CBCA.⁶⁰ The result is that there are now cases where the Receiver General of Canada currently holds money for corporations dissolved since the 1920s.

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?

The CBCA provides that if a corporation is dissolved while it still owns property, that property vests in the Crown.⁶¹ If the corporation is revived, the property is returned to the corporation.⁶²

Unlike some provincial corporate statutes, there is no time limit on revival. An issue arises when money is spent on the property by the Crown while it is in its possession. There is currently no mechanism to allow recovery of money spent by the Crown on the property (e.g. when the Crown had to pay for decontamination). On revival, it is possible that a corporation may reacquire property, without set-off for increases in value due to Crown expenditures.

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

The CBCA provides that shareholders who dissent from shareholder votes on certain fundamental corporate matters may require the corporation to purchase their shares for "fair value."⁶³ Fundamental changes triggering this right include amendments to corporate articles changing its share structure,⁶⁴ amalgamation with other corporations⁶⁵ and the disposition of substantially all of the corporation's property outside the normal course of business.⁶⁶

The dissent provision balances the power of the majority of shareholders to effect fundamental changes while providing existing

shareholders with an opportunity to exit the corporation when the nature of their investment in the corporation has significantly changed as a result. However, stakeholders have advised of occasions where the dissent right was not exercised by existing shareholders but rather by a person who bought shares in a corporation after a major reorganization or sale of an important part of its assets was announced, but before the reorganization has been approved by shareholders, solely with the objective of exercising the right of dissent. Accordingly, it has been suggested that the dissent right be limited to shareholders who have owned their shares for a minimum period of time.

E. Should the definition of "squeeze-out transaction" in section 2 of the CBCA be amended to remove the reference to amendment of articles?

A majority of shareholders of a non-publicly held CBCA corporation may, under certain circumstances, eliminate (or squeeze out) the minority shareholders of the corporation against their will.⁶⁷ The CBCA defines a squeeze-out transaction as a transaction where a corporation's articles are amended with the effect of terminating the interest of a shareholder or a class of shareholders without their consent.⁶⁸ Since not all squeeze-out transactions require amendments to corporate articles, concerns have been expressed that the presence of the term "require an amendment to its articles" in the definition may unduly restrict the situations in which a corporation may use a squeeze-out transaction.

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?

The CBCA permits going-private transactions, under which the majority shareholders of a publicly held corporation may eliminate the interests of the minority shareholders, transforming the public corporation to a private one.⁶⁹ A going-private transaction triggers the shareholders' right of dissent under the CBCA.⁷⁰

The current definition of going-private transaction under the CBCA can be interpreted as including a share consolidation, which could in turn result in a right to dissent by shareholders.⁷¹ This is not the case under some provincial laws. The current definition in Ontario and Quebec excludes such transactions:

... a consolidation of securities that does not have the effect of terminating the interests of holders of equity securities of the issuer in those securities without their consent, through the elimination of post-consolidated fractional interests or otherwise, except to an extent that is nominal in the circumstances.⁷²

This exclusion is not included in the CBCA definition of a going-private transaction.

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)?

Generally, the CBCA recognizes registered shareholders as the owners of the corporation and provides them with the shareholder rights (e.g. the right to vote, the right to receive a dividend).⁷³ However, the CBCA also grants rights to beneficial owners of shares in some provisions, such as the right to make shareholder proposals,⁷⁴ and standing as a "complainant" to access the oppression remedy.⁷⁵

It has been suggested that, as most shares are now held indirectly through intermediaries such as brokers or financial institutions instead of held directly by the shareholders, the rights of beneficial shareholders be further expanded to include access to other rights of registered shareholders, such as the right to vote and the right of dissent.

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

Currently, the CBCA requires a non-distributing corporation to solicit proxies if it has more than 50 shareholders entitled to vote at a meeting.⁷⁶ Often, these shareholders are the corporation's employees who are already aware of the corporation's business. It has been suggested that costs to small and medium-sized corporations could be reduced if the threshold was higher or removed.

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?

The exception to allow proxy solicitation in such circumstances was added to the CBCA in 2001,⁷⁷ reflecting the proxy solicitation rules in provincial securities laws at the time.

Stakeholders and others are invited to provide submissions on any of these matters and the adequacy of the existing CBCA provisions referred to above, as well as any suggestions for amendments and what such amendments might entail.

XI. Submitting Comments

Interested parties should submit their comments no later than May 15, 2014.

All submissions received will be posted on Industry Canada's website at www.ic.gc.ca.

Respondents are requested to provide their comments in electronic format (WordPerfect, Microsoft Word or Adobe PDF) at cbca-consultations-lcsa@ic.gc.ca.

Written submissions should be addressed to:

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

Footnotes

- [1](#) World Bank, "[Ease of Doing Business in Canada](#)," *Doing Business 2013*.
- [2](#) World Economic Forum, [The Global Competitiveness Report 2010–2011](#), PDF document 6.23 MB, 516 pages, pp. 384–385.
[PDF Reader](#)
- [3](#) [Canada Business Corporations Act](#), R.S.C. 1985, c. C-44, s. 125. Hereafter "CBCA" in notes.
- [4](#) [Canada Business Corporations Regulations](#), 2001, SOR/2001-512, s. 55.
- [5](#) The Standing Committee on Industry, Science and Technology, [Statutory Review of the Canada Business Corporations Act](#), 2010. PDF document 158 KB, 50 pages, p.9. Hereafter "Committee report" in notes.
[PDF Reader](#)
- [6](#) Committee report, p. 9.
- [7](#) CBCA, s. 141.
- [8](#) Committee report, p. 11.
- [9](#) Committee report, p. 12.
- [10](#) CBCA, ss. 106(3).
- [11](#) CBCA, ss. 106(4).
- [12](#) Committee report, p. 14.
- [13](#) Committee report, pp. 13–15.
- [14](#) Committee report, p. 13.
- [15](#) These issues are examined comprehensively in "[The Quality of the Shareholder Vote in Canada](#)" (October 22, 2010), a discussion paper prepared by Davies Ward Phillips & Vineberg LLP.
- [16](#) CBCA, ss. 132(5).
- [17](#) Committee report, p. 12.
- [18](#) Committee report, p. 17.
- [19](#) Committee report, p. 16.
- [20](#) Committee report, p. 16.
- [21](#) Committee report, p. 17.
- [22](#) CBCA, s. 137.
- [23](#) Committee report, p. 12.
- [24](#) Committee report, p. 15.
- [25](#) CBCA, ss. 189(3).
- [26](#) Committee report, p. 15.
- [27](#) CBCA, s. 241.
- [28](#) Committee report, p. 17.
- [29](#) Committee report, p. 10.
- [30](#) CBCA, Part VII.
- [31](#) Committee report, p. 18.

- [32](#) CBCA, Part XI. See Committee report, pp. 19–21.
- [33](#) CBCA, ss. 105(3). If a corporation has fewer than four directors, at least one must be a resident Canadian. Some business sectors designated for Canadian control or ownership by Parliament must have a majority of resident Canadian directors (CBCA, s. 105(3.1)).
- [34](#) CBCA, ss. 114(3).
- [35](#) Committee report, pp. 18–19.
- [36](#) "Trust indenture" is defined in ss. 82(1) of the CBCA.
- [37](#) CBCA, ss. 82(3).
- [38](#) CBCA, ss. 237.1 to 237.9. Joint and several liability continues to apply in cases of fraud and dishonesty (s. 237.4) and to claims by the Crown, charitable organizations and unsecured creditors (s. 237.2(2)).
- [39](#) Committee report, p. 21.
- [40](#) The [Finance Statutes Amendment Act, 2012](#) was introduced March 5, 2012, as part of Bill 23 and passed by the Legislature in May 2012.
- [41](#) Nova Scotia, [Community Interest Companies Act](#), December 2012.
- [42](#) Committee report, pp. 21–24. The amendments will come into force once regulations have been passed.
- [43](#) FATF, Mutual Evaluation of Canada, "Table 1: Ratings of Compliance with FATF Recommendations," Recommendation 33, [Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism: Canada](#), 2008.
- [44](#) The OECD [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) has been in force since 1999 and was ratified by all OECD member states and some additional states. In 2009, the Convention was supplemented by the [Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions](#).
- [45](#) [Corruption of Foreign Public Officials Act](#), S.C. 1998, c. 34.
- [46](#) OECD, [Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions](#), 2009.
- [47](#) CBCA, ss. 20(2).
- [48](#) CBCA, s. 155.
- [49](#) CBCA, s. 162.
- [50](#) CBCA, s. 163.
- [51](#) CBCA, s. 192.
- [52](#) *Re Mega Brands*, 2010 QCCS 646 (Que. S.C.).
- [53](#) [Policy Concerning Arrangements Under Section 192 of the CBCA](#).
- [54](#) OECD (2011), [OECD Guidelines for multinational enterprises](#).
- [55](#) CBCA, ss. 228(1).
- [56](#) CBCA, ss. 228(2).
- [57](#) CBCA, ss. 209(4).
- [58](#) CBCA, ss. 227(1).
- [59](#) CBCA, ss. 227(3).
- [60](#) CBCA, s. 227.
- [61](#) CBCA, ss. 228(1).

- [62](#) CBCA, ss. 228(2).
- [63](#) CBCA, s. 190.
- [64](#) CBCA, ss. 190(1)(a).
- [65](#) CBCA, ss. 190(1)(c).
- [66](#) CBCA, ss. 190(1)(e).
- [67](#) CBCA, s. 194.
- [68](#) CBCA, s. 2.
- [69](#) CBCA, s. 193.
- [70](#) CBCA, ss. 190(1)(e).
- [71](#) CBCA, s.2; *Canada Business Corporations Regulations*, SOR/2001-512, s. 3.
- [72](#) Ontario Securities Commission, Multilateral Instrument 61-101—*Protection of Minority Security Holders in Special Transactions*, s. 1.1, "business combinations" definition; Autorité des marchés financiers, *Regulation 61-101 Respecting Protection of Minority Security Holders in Special Transactions*, s. 1.1, "business combinations" definition.
- [73](#) CBCA, ss. 51(1).
- [74](#) CBCA, ss. 137(1).
- [75](#) CBCA, s. 238.
- [76](#) CBCA, ss. 149(1) and 149(2).
- [77](#) CBCA, ss. 150(1.1).