November 25, 2019

Ministry of Government and Consumer Services
56 Wellesley St. W, 6th Floor
Toronto ON M7A 1C1

Dear Sir / Madame;


The Canadian Coalition for Good Governance ("CCGG") has reviewed the recommendations prepared by the Business Law Modernization and Burden Reduction Council (the "Council") and we thank you for the opportunity to provide comments.

CCGG represents "the voice of the shareholder" and endeavours to ensure that this stakeholder perspective is reflected in law and government policy. CCGG’s members are Canadian institutional investors that together manage approximately $4 trillion in assets on behalf of pension fund contributors, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices in Canadian public companies, as well as regulatory improvements to best align the interests of boards and management with those of their shareholders and to increase the efficiency and effectiveness of the Canadian capital markets. A list of our members is attached to this submission.

GENERAL

CCGG supports the Ontario government’s goal of ensuring that Ontario has modern laws that facilitate a prosperous business climate and reduce burden on business. The promotion of good corporate governance for public companies helps to advance these objectives, while unlocking new capital for Ontario businesses, since institutional shareholders factor the governance landscape into their capital allocation decisions.

Ontario law as it relates to public company governance has not kept pace with international best practices and developments in Canadian law. Over time, CCGG has issued best practice guidelines and urged companies to adopt them voluntarily 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. In such situations, legislative change is the appropriate step to ensure a level playing field.
Our comments on the Council’s recommendations are set out below. We have comments on Proposals #1 and #3 only, and would also like to raise two critical issues that the Council has not addressed in its recommendations. Note also that all of our comments and recommended legislative amendments apply only to public companies under the jurisdiction of the Ontario Business Corporations Act (which the OBCA calls “offering corporations”) and not private companies.

COUNCIL PROPOSAL #1: REMOVAL OF RESIDENT DIRECTOR REQUIREMENTS

The Council recommends removing the Canadian resident requirements for corporations governed by the OBCA.¹ We agree.

Across Canada, the trend is away from director residency requirements in the corporate statutes. Other than Ontario, only four provinces and the federal statute require a minimum number of directors to be Canadian residents.² In 2006, the OBCA was amended to reduce the general Canadian resident requirement from a majority of directors to 25% of directors. To our knowledge, director residency requirements are infrequent in jurisdictions outside Canada, although not unheard of.³

Removing the residency requirement would clearly help to relieve the regulatory burden on OBCA companies, and will promote the OBCA as a jurisdiction in which to incorporate and continue existing incorporations.

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 that whether or not there is a Canadian resident listing requirement, the stock exchanges should ensure that there are directors on the board who are familiar with Canadian laws, financial regulation, local business practices and customs, and the political landscape. However, there should not be a blanket residency requirement imposed on public companies in the corporate statute.

¹ Section 118(3) of the OBCA requires that at least 25% of the directors of a corporation other than a non-resident corporation shall be resident Canadians, but where a corporation has less than four directors, at least one director shall be a resident Canadian.
² See Canada Business Corporations Act, sections 105(3)–(3.3); Business Corporations Act (Alberta), section 105(3); The Corporations Act (Manitoba), sections 100(3)–(3.1); Corporations Act (Newfoundland and Labrador), sections 174(1)–(4); The Business Corporations Act (Saskatchewan), sections 100(3)–(3.1).
CCGG also believes that the OBCA should require that every director of an OBCA company must attorn to the jurisdiction of the appropriate Canadian court, so that if need be an action can be brought against all of a company's directors in Canada.

COUNCIL PROPOSAL #3: LIMITATION/RELIEF OF FIDUCIARY LIABILITY

The Council recommends allowing corporations to limit or relieve the liability of fiduciaries arising from the corporate opportunity doctrine in cases where the corporation (1) has renounced particular types of ventures in its articles and/or (2) has granted specific authorization to fiduciaries to take advantage of a particular business opportunity.4

We disagree. CCGG believes that the existence of fiduciary duties owed to corporations by directors and officers (and others where appropriate) is integral to good corporate governance. Removing or loosening liability under the corporate opportunity doctrine could adversely impact corporations and their shareholders, and disincentivize investments in Ontario businesses.

The owing of a fiduciary duty and concomitant fiduciary liability are defining features of corporate law in Canada. Such features of corporate law are arguably responsible, at least in part, for the success of the corporate form and, in turn, the economic growth over the past 150 years enjoyed by Canada and jurisdictions with comparable corporate law regimes.

Changes to the OBCA limiting or relieving fiduciary liability under the corporate opportunity doctrine will risk making it easier to usurp opportunities rightfully belonging to the corporation and increase the likelihood of abuse by fiduciaries, thereby harming shareholders.

Courts have struggled with establishing and applying the corporate opportunity doctrine precisely because it does not lend itself to rigid tests. The shifting nature of the common law tests for breach of fiduciary duty based on the facts of each case illustrates the difficulty of drafting one rule applicable to all situations where a corporate opportunity is pursued by a director.5

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4 Section 134(3) of the OBCA precludes a company from either contracting out of the duty of loyalty to the corporation (and sub-duty not to appropriate corporate opportunities for oneself) or from side-stepping the requirement through corporate articles or by-laws.

5 Three of the seminal cases involving the corporate opportunities doctrine highlight the difficulty courts have had determining a consistent approach. In Regal (Hastings) Ltd. v. Gulliver [1942] 1 All E.R. 378 (H.L.), the House of Lords found that the directors of the corporation were in breach of their fiduciary duties because they received a profit through the acquisition and
Accordingly, CCGG is of the view that it would be very difficult, if not impossible, to legislatively circumscribe any meaningful exceptions to the application of the doctrine without adverse impacts on shareholders.

Shareholders of widely-held companies are particularly vulnerable to such change. Securities laws recognize the policy problem of allowing the general public to invest in speculative ventures over which they have essentially no control. In the case of corporations, investors can at a minimum rely on directors and officers being compelled to act only in the best interests of the corporation. There should be no legislative abrogation from this protection.

For these reasons, there should be no relaxation of the corporate opportunity doctrine in respect of OBCA public companies.

COUNCIL PROPOSALS #2 AND #4 TO #7

CCGG has no comments on Proposals #2 and #4 to #7 in the Council’s recommendations.

resale of their shares by reason that they were directors (and acting in that capacity). In other words, but for being directors and acting in that capacity, they would not have made these profits off their shares of the corporation.

In Peso Silver Mines Ltd. v. Cropper (1965), 56 D.L.R. (2d) 117 (B.C.C.A.), aff’d [1966] S.C.R. 673, the corporation was denied relief against a director who, after the corporation rejected an opportunity to acquire mining rights, formed a new corporation which acquired these same rights. The court based its decision on two reasons: (1) the corporation no longer had a claim to these rights after a bona fide decision not to purchase them and (2) acquiring knowledge of the opportunity through one’s role as a director should not preclude someone from later taking advantage of the opportunity personally. The court’s reasons seemingly narrowed the doctrine’s scope from Regal (Hastings) and opened the door for a director to reject an opportunity on behalf of the corporation in order to usurp it for themselves and potentially rely on Peso as a full defence.

In Canadian Aero Services Ltd. v. O’Malley (1973), [1974] S.C.R. 592, two directors who left their company to form their own business in direct competition with their former company were found to have breached their fiduciary duty after having their proposal for mapping Guyana accepted over that of their former employer. In their reasons, the court widened the scope for liability by stating that it would be a mistake to follow Regal (Hastings) strictly and limiting the doctrine to cases where the knowledge was acquired in the role of director and the opportunity arose during the tenure in this role. Because these directors quit to pursue the opportunity they were liable. The court noted that each case should be assessed individually based on a number of factors "which it would be reckless to attempt to enumerate exhaustively", among which included "position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge".
CRITICAL ISSUES NOT REFERENCED IN THE COUNCIL’S RECOMMENDATIONS

There are also two critical reforms needed in the OBCA that the Council did not address: a majority voting system for director elections, and an annual non-binding vote on executive compensation for shareholders (also known as “say-on-pay”).

Majority Voting System for Director Elections

It is now universally accepted that a majority voting system for uncontested director elections, as opposed to the plurality system currently found in the OBCA, is fundamental to shareholder democracy. Under a plurality system, shareholders can either vote for a nominee or “withhold” their vote. They are not able to vote against a nominee. This allows directors to be elected even if the majority of shareholders do not vote in their favour (and even if they receive only a single vote in their favour). Under such a system, directors are not accountable to shareholders in any meaningful way.

CCGG believes it is imperative that the OBCA provide for a majority voting system for uncontested director elections. Under a majority system, shareholders can vote for or against directors, and directors who receive more “against” than “for” votes are simply not elected to the board, subject to limited, prescribed exceptions.

CCGG, its members, and others have advocated for the entrenchment of majority voting into corporate law for many years. In June of 2015, the Business Law Agenda Panel (which had been struck by a former Minister of Government and Consumer Services) published a report which recommended that “shareholders should have the ability to effectively choose their boards. For example, they should be entitled to vote against candidates for election to the board.”6 The Business Law Advisory Council (also struck by a former Minister of Government and Consumer Services) noted it as an issue for further consideration.7

Unfortunately, the former government failed to introduce the necessary amendments to the OBCA to realize this change. CCGG looks forward to working with the government to accomplish this goal.

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Working around the plurality voting system

CCGG published its model majority voting policy in 2006 to “work around” the plurality voting system in Canada’s corporate statutes and successfully persuaded a large number of issuers to voluntarily adopt the policy. In 2014, the Toronto Stock Exchange established a listing requirement pursuant to which each non-controlled listed issuer governed by a plurality-voting statute is required to adopt a majority voting policy. Such a policy requires that, in an uncontested election, a director candidate for whom more votes are “withheld” than are voted “for” must immediately tender their resignation to the board, which the board shall accept within 90 days absent exceptional circumstances.

CCGG considers the TSX’s listing requirement to be a “work around” for the problems inherent in the plurality voting system, but a better outcome would be the adoption in the corporate statutes of a principled majority voting system, which would obviate the need for such a “work around” in the first place.

CCGG also notes that there is no comparable requirement to adopt a majority voting policy for the over 1,600 issuers listed on the TSX Venture Exchange. Each of these listed issuers has the privilege of access to the public capital markets, and CCGG’s view is that with this privilege should come the corresponding responsibility to be answerable to shareholders through meaningful director elections.

Canadian corporate law is evolving

Significantly, the federal Parliament has recognized the importance of true majority voting to fundamental shareholder rights and enshrined a majority voting system in the Canada Business Corporations Act (“CBCA”) in 2018 through Bill C-25. The entrenchment of majority voting in the CBCA was a cross-partisan effort: it was signalled in the former Harper government’s final budget and proceeded with by the current Trudeau government. At both third reading in the House, and when voting to approve the Senate’s amendments to the bill, MPs voted unanimously in favour of Bill C-25.

With the adoption of Bill C-25, we understand that the Canadian provinces and territories and the United States are now the only developed jurisdictions in the world where true majority voting is not in place. It is incumbent upon the Ontario government to align itself with global best governance practices when modernizing the OBCA.
View of the current and past Chairs of the Ontario Securities Commission

We believe that the Ontario government’s view on majority voting should be in alignment with the publicly stated views of both the current Chair and immediately past Chair of the Ontario Securities Commission (“OSC”) – that is to say, the government should be supportive of majority voting being enshrined into law, and in particular into the corporate statute.

Maureen Jensen, OSC Chair, stated as follows in her closing comments at the Shareholder Rights Conference at the University of Toronto on October 28, 2016, in reference to Bill C-25:

...corporate and securities law must work in a complementary fashion to improve the governance of our public companies. I am very pleased that recent amendments to the CBCA will mandate majority voting... and we look forward to seeing how it will be implemented.8

CCGG agrees. The next step will be for the OBCA and other corporate statutes in Canada to be amended to align with the CBCA’s majority voting provisions. In that regard, CCGG strongly endorses the following statement made in February 2018 by Senator Howard Wetston, past OSC Chair, during debate over Bill C-25 in the Senate:

Colleagues, the corporate statute is the legitimate place to enshrine majority voting. Shareholders deserve to have this improvement to corporate governance. My hope is that other provincial corporate statutes will eventually be amended to align with the CBCA. Historically that has been the case.9

Consequential changes to securities laws

CCGG believes that reporting issuers subject to National Instrument 51-102 Continuous Disclosure Obligations will be unable to comply with, on the one hand, sections 9.4(4) and 9.4(6) of NI 51-102 and, on the other, a corporate statute that provides for a majority voting system, which the CBCA already does (subject to being

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9 Senate Debates, 42nd Parl, 1st Sess, Vol 150, Iss 179 (8 February 2018), online: <https://sencanada.ca/en/content/sen/chamber/421/debates/179db_2018-02-08-e> (Sen. Howard Wetston).
brought into force) and which the OBCA should. Accordingly, NI 51-102 should be amended to accommodate a majority voting system in the corporate statute.

Advisory Vote on Executive Compensation (Say-on-pay)

In Ontario, currently neither corporate nor securities law provides any meaningful opportunity for shareholders to weigh in on executive compensation. This inability for shareholders to effectively oversee executive compensation has resulted in Ontario being increasingly perceived as an outlier among developed jurisdictions. This includes the United States, where say-on-pay votes have been mandatory since 2011 under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Say-on-pay generally works as follows: at each annual meeting where a say-on-pay vote is to be held, the company’s shareholders vote on whether they support the approach to executive compensation employed by the board of directors over a past period. The vote is non-binding, but if a large enough number of shares are voted in the negative, the company’s board is normally motivated to determine the reasons behind the low level of support through shareholder engagement, and to do what is necessary to respond and avoid further escalation.

CCGG believes that the OBCA should require an annual say-on-pay advisory vote for all public companies governed thereunder. Such a change would promote the attraction of investment capital into Ontario public companies and a prosperous business climate.

In 2019, the federal government proposed amendments to the CBCA in Bill C-97 to provide for an annual say-on-pay advisory vote. The bill received royal assent in June of 2019 but has not yet been brought into force. As with majority voting, the OBCA should be amended to stay aligned with the best practices being introduced into the CBCA.

While say-on-pay has been broadly adopted by the largest Canadian public issuers (80% of constituents of the S&P/TSX 60 Index and approximately 70% of the S&P/TSX Composite Index) and is considered a best practice among them, it is not currently required under the OBCA or any other Canadian corporate statute other than the CBCA.

To align with global governance best practices, all Canadian public companies should be required to submit to an annual say-on-pay vote. Shareholders should have the right to

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According to one research paper, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Italy, Japan, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, the UK, and the US have all adopted either a non-binding or binding say-on-pay vote. See: Fabrizio Ferri and Robert F. Göx, “Executive Compensation, Corporate Governance, and Say on Pay”, Foundations and Trends in Accounting: Vol. 12: No. 1, pp 1-103 (2018), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171385>.
signal, in general terms, their support, or lack thereof, for a board’s approach to executive compensation. The right to this particular form of engagement flows from the critical nature of executive compensation to a company’s success, and the corresponding importance of ensuring alignment of interests between executives and shareholders. Additionally, it is generally accepted that say-on-pay votes lead to increased engagement between boards and shareholders and enhanced disclosure of executive compensation practices, which is also supported by CCGG’s experience.

CCGG has urged legislators and regulators to require annual say-on-pay advisory votes as part of corporate law and securities regulation, and similarly continues to advocate for voluntary adoption among those public companies that have not yet done so. We encourage the Ontario government to take the opportunity to introduce this important shareholder mechanism into the OBCA and help to level the playing field so that all Canadian reporting issuers and their shareholders can enjoy its benefits.

CONCLUSION

CCGG supports the Ontario government’s efforts to ensure that Ontario has modern laws that facilitate a prosperous business climate (such as improvements to public company governance) and reduce burden on business (such as eliminating the director residency requirement from the corporate statute).

In particular, the Ontario government should seize the opportunity to modernize the OBCA to further enshrine the principles of shareholder democracy into Ontario’s corporate law and bring it in line with global best practices. Majority voting and say-on-pay rights are highly valued by institutional shareholders and figure into their capital allocation decisions. Adopting our recommended governance reforms in the OBCA will allow Ontario the opportunity to become a governance leader, thus encouraging the flow of capital to its public companies and the more efficient use of that capital once invested.

11 There is also empirical evidence that say-on-pay advisory votes serve to “better align executive and shareholder interests and to more closely tie compensation to firm performance”; see Ricardo Correa and Ugur Lel, “Say on Pay Laws, Executive Compensation, CEO Pay Slice, and Firm Value around the World” (2016) 122:3 J of Financial Economics 500.
We thank you again for the opportunity to provide you with our comments. Please feel free to contact our Executive Director, Catherine McCall, at (416) 868-3582 or cmccall@ccgg.ca or our Director of Policy Development, Sarah Neville, at (416) 847-0523 or s Neville@ccgg.ca if you would like to discuss the matters in this letter further or if we can be of any assistance.

Yours very truly,

Marcia Moffat
Chair of the Board of Directors
Canadian Coalition for Good Governance
CCGG Members

- Alberta Investment Management Corporation (AIMCo)
- Alberta Teachers’ Retirement Fund (ATRF)
- Archdiocese of Toronto
- Aviva Investors Canada Inc.
- BlackRock Asset Management Canada Limited
- BMO Global Asset Management Inc.
- Burgundy Asset Management Ltd.
- Caisse de dépôt et placement du Québec
- Canada Pension Plan Investment Board (CPPIB)
- Canada Post Corporation Registered Pension Plan
- CIBC Asset Management Inc.
- Colleges of Applied Arts and Technology Pension Plan (CAAT)
- Connor, Clark & Lunn Investment Management Ltd.
- Desjardins Global Asset Management
- Fiera Capital Corporation
- Forthlane Partners Inc.
- Franklin Templeton Canada Corp.
- Galibier Capital Management Ltd.
- Healthcare of Ontario Pension Plan (HOOPP)
- Hillsdale Investment Management Inc.
- IGM Financial
- Investment Management Corporation of Ontario (IMCO)
- Industrial Alliance Investment Management Inc.
- Jarislowsky Fraser Limited
- Leith Wheeler Investment Counsel Ltd.
- Letko, Brousseau & Associates Inc.
- Lincluden Investment Management Limited
- Manulife Investment Management Limited
- NAV Canada Pension Plan
- Northwest & Ethical Investments L.P. (NEI Investments)
- Ontario Municipal Employee Retirement System (OMERS)
- Ontario Teachers’ Pension Plan (OTPP)
- OPSEU Pension Trust
• PCJ Investment Counsel Ltd.
• Pension Plan of the United Church of Canada Pension Fund
• Pier 21 Asset Management Inc.
• Public Sector Pension Investment Board (PSP Investments)
• QV Investors Inc.
• RBC Global Asset Management Inc.
• Régimes de retraite de la Société de transport de Montréal (STM)
• Scotia Global Asset Management
• Sionna Investment Managers Inc
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