HOUSE OF COMMONS

CANADA

# STATUTORY REVIEW OF THE CANADA BUSINESS CORPORATIONS ACT

## Report of the Standing Committee on Industry, Science and Technology

**Hon. Michael D. Chong, MP**
**Chair**

**JUNE 2010**

**40th PARLIAMENT, 3rd SESSION**

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has the honour to present its

**FOURTH REPORT**

Pursuant to the Order of Reference from the House of Commons of Wednesday, April 22, 2009 and section 136 of the Canada Business Corporations Act, the Committee has studied the statutory review of the Act and has agreed to report the following:

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# INTRODUCTION

On April 22, 2009, a motion in the House of Commons gave the Standing Committee on Industry, Science and Technology (hereinafter "the Committee") the responsibility for a statutory review of the *Canada Business Corporations Act* (hereinafter "the CBCA").

The statutory review is mandated under section 136 of the Statutes of Canada, 2001, Chapter 14, a stand-alone section of a bill which passed in 2001. Bill S-11 of the 37th Parliament, 1st Session, received Royal Assent on June 14, 2001, and subsequently came into force on November 24, 2001. Section 136 reads as follows:

> Review of *Canada Business Corporations Act*
>
> 136. A committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established for the purpose shall, within five years after the coming into force of this section, and within every ten years thereafter, undertake a review of the provisions and operations of the *Canada Business Corporations Act*, and shall, within a reasonable period thereafter, cause to be laid before each House of Parliament a report thereon.

According to this section, a five-year review of the CBCA and its operation was due to take place in 2006, but it was delayed at the time, and reached the Committee in 2009.

# THE *CANADA BUSINESS CORPORATIONS ACT*

The CBCA sets out the legal and regulatory framework for corporations in Canada, including the basic rules for corporate governance. The companies incorporated under this *Act* include large as well as small and medium-sized businesses. They also include both private companies and companies that issue publicly-traded shares. In Canada, corporations have the option of incorporating at either the federal or the provincial level and the CBCA operates in parallel with the corporate laws of the provinces and territories.

The predecessor to this statute was the *Canada Corporations Act*, a longstanding piece of legislation which became the CBCA in 1975. An amendment permitting unanimous shareholder agreements was also added in 1975, but since then there has been only one set of substantive amendments to the legislation, which were passed in 2001 through Bill S-11, including the Parliamentary review requirement.[1]

Bill S-11 was the result of a process that began as early as 1994, when consultations were held across the country in order to determine what changes should be made to the CBCA. A set of discussion papers was then released in order to obtain comments from stakeholders. Afterwards, more consultations were held to develop a consensus on reform proposals. The Standing Senate Committee on Banking, Trade and Commerce also played a role with the presentation of its report on corporate governance and its interim and final reports on modified proportionate liability.[2]

The CBCA was significantly amended by Bill S-11 to improve the legal framework for federal corporations by enhancing shareholder input into decision making and by providing corporations with greater flexibility to pursue marketplace opportunities. For instance, the amendments allowed a stronger international representation on the boards of CBCA corporations.[3]

The main amendments made to the CBCA in 2001 by Bill S-11 were in the following areas:

- harmonizing certain definitions with those in provincial laws;

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1 Gérald Lafrenière and Margaret Smith, *Bill S-11: An Act to Amend the Canada Business Corporations Act and the Canada Cooperatives Act and to Amend Other Acts*, LS-389E, Library of Parliament, February 23, 2001, revised June 11, 2001.

2 Ibid.

3 Industry Canada, Regulatory Impact Analysis Statement – *Canada Business Corporations Act* (CBCA), http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs01381.html.

- creating simpler administrative procedures for forms and filings;
- repealing the prohibition on corporations providing financial assistance to directors, officers, employees and shareholders
- allowing the use of electronic documents and meetings to communicate with shareholders;
- reducing the proportion of a board that must have directors resident in Canada;
- allowing subsidiaries to acquire shares of parent companies in order to facilitate global transactions;
- replacing the good faith defence with the due diligence defence for directors' liability
- changing the regime and definitions for what constitutes insider trading;
- introducing new rules regulating unanimous shareholder agreements;
- adding rules related to shareholder proposals;
- updating the rules for proxy solicitation and proxy circular exemptions;
- harmonizing merger and acquisition rules with provincial regimes; and
- introducing modified proportionate liability.[4]

The requirement for a statutory review introduced in 2001 pertains to the CBCA as a whole, not just to the updated sections added by Bill S-11. The current CBCA includes 268 sections and covers all aspects of corporate governance and structure at the federal level.

Since the 2001 amendments, Industry Canada has put out two discussion papers on possible further amendments to the CBCA, and heard back from stakeholders in consultations, but has not issued any additional proposals for changes.

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4 Gérald Lafrenière and Margaret Smith, *Bill S-11: An Act To Amend The Canada Business Corporations Act and The Canada Cooperatives Act and To Amend Other Acts*, LS-389E, Library of Parliament, February 23, 2001, revised June 11, 2001.

The first Industry Canada discussion paper, in 2004, was titled "Towards an Improved Standard of Corporate Governance for Federally Incorporated Companies: Proposals for Amendments to the *Canada Business Corporations Act*".[5] It contained proposals for strengthening corporate governance mechanisms, although the proposals were targeted at the segment of CBCA companies that are publicly-traded only. The intent of the proposals was to strengthen accountability and transparency, with the aim of maintaining investor confidence. The paper also referred to a possible exemption for Canadian corporations who are operating internationally and already meet the governance requirements for foreign jurisdictions, such as the American *Sarbanes-Oxley Act*.[6]

The second discussion paper in 2007[7] was issued jointly by Industry Canada and the Department of Finance and did not present any proposals per se, but sought feedback on the following specific consultation questions:

- whether the provincial securities transfer acts are providing the right level of certainty for their securities-related activities and whether there are any outstanding gaps;
- whether the modernization of federal securities transfer law should take the form of a comprehensive stand-alone federal securities transfer act, the repeal of federal securities transfer provisions, or an update of existing securities transfer provisions;
- whether there is a need to accommodate the concept of security entitlement holders into federal legislation and how this could be accomplished;
- where the federal corporate statutes should facilitate dematerialized issuances by these entities or whether they should continue to provide shareholders with the right to obtain a share certificate and/or be recorded on the issuer's share register;
- how the *Depository Bills and Notes Act* should be reformed to minimize overlap and inconsistency with provincial securities transfer legislation; and

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5 Industry Canada, "Towards an Improved Standard of Corporate Governance for Federally Incorporated Companies: Proposals for Amendments to the *Canada Business Corporations Act*", May 2004, http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/corporategovernance.pdf/$FILE/corporategovernance.pdf

6 Ibid., p. 4

7 Industry Canada and Finance Canada, "Modernizing the Legal Framework for Financial Transactions: Reforming Federal Securities Transfer Rules", June 2007, http://www.fin.gc.ca/activty/consult/modsectr_1-eng.asp.

- what amendments would be desirable to enhance the effectiveness and efficiency of the legislative and regulatory regime governing the issuance of federal Crown debt.[8]

During their testimony to the Committee as part of the CBCA statutory review, Industry Canada officials gave a general summary of the stakeholder feedback they had received on both discussion papers. With respect to the 2004 paper on corporate governance, the officials stated that there was little consensus on the proposals, but since they all related only to publicly-traded corporations, the majority, at that time, felt that they concerned matters that should be dealt with under provincial securities legislation. With respect to the 2007 paper on securities transfer rules, the officials stated that the majority of feedback they received at that time was that regulation should be left to the provinces, and that the federal government should not introduce its own legislation in this area.[9]

8 Ibid.

9 Testimony of Colette Downie, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009, at 15:40

Currently, the CBCA covers 192,000 corporations, of which the vast majority (over 99%) are private rather than publicly-traded. However, despite the fact that fewer than 1% of corporations under the CBCA are publicly-traded, those which are still publicly traded make up a large chunk of the Canadian marketplace—39% of the TSX Composite Index companies, and 56% of the TSX 60 Index, excluding banks and financial institutions.[10]

Witnesses from Industry Canada testified that the current incarnation of the CBCA has been working well. Colette Downie of Industry Canada described the CBCA as a "well-functioning statute", which is "responsive" and "flexible", and noted that there has been "little substantive or significant demand for amendments."[11] Ms. Downie also noted that Canada ranks high on international lists of places to do business, partly as a result of the rules governing its corporate environment. The World Bank's publication *Doing Business 2009 and 2010* placed Canada second on its list of best places to start a business, and the World Economic Forum's most recent *Global Competitiveness Report* ranked Canada fourth for efficiency of its corporate boards of directors, and eighth for the protection of minority shareholder interests.[12]

Industry Canada officials also stated that the CBCA is the original model used by many of the provinces for their own statutes on incorporation. Ms. Downie explained that the CBCA is a "framework statute" which provides the basic structure to support certain functions, but does not otherwise prescribe how corporations should be run:

> It sets out the basic features and structure of a corporation, establishes corporate governance standards, codified principles of transparency and accountability, and provides a framework for the interaction of various interested parties, directors, management, shareholders and creditors. It is not prescriptive about the way that a corporation runs its internal and external business. It actually facilitates the ability of a corporation to arrange those structures in the ways that it sees fit and to adapt as the economy and as the business adapts over time.[13]

However, the officials stated that further modernization of the CBCA might be required to keep up with the "continuing evolution of the marketplace."[14]

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10 Testimony of Cheryl Ringor, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009, at 15:35.

11 Testimony of Colette Downie, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009 at 15:40.

12 Ibid., at 15:35.

13 Ibid.

14 Testimony of Colette Downie, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009 at 15:40.

Industry Canada also testified about its own innovations in support of CBCA processes, especially its system for on-line corporate filings. According to the officials, 90% of federal incorporations are done online, as well as 81% of returned filings. (Industry Canada continues to offer paper filing for those who want to use it.)[15]

When asked what concerns stakeholders had raised with Industry Canada about the CBCA in recent years, Industry Canada listed four, all of which were subsequently discussed in more detail by the other witnesses:

- executive compensation;
- shareholder rights and the election of directors;
- securities regulation; and
- shareholder rights and approval of mergers and acquisitions.[16]

Industry Canada also indicated that they had recently heard about a new issue, which was later introduced by another witness, with regard to whether a hybrid social enterprise structure for incorporation that is available for charities and not-for-profit corporations to use in the United Kingdom and the United States could be introduced in Canada.[17]

**Executive Compensation**

Some witnesses provided views on executive compensation and whether restrictions or shareholder approval in this area should be required by law. Industry Canada officials noted that some compensation information is already available for public scrutiny, since the provincial securities laws already require disclosure of salaries, compensation packages and the design of compensation systems for publicly-traded companies.[18] The officials also raised the concern that this type of amendment would be a more prescriptive approach to include in a statute that was designed to be a framework

15 Testimony of Cheryl Ringor, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009 at 15:35.

16 Testimony of Colette Downie, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009 at 15:50.

17 Testimony of Colette Downie and Wayne Lennon, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009 at 16:30.

18 Testimony of Colette Downie, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009 at 16:30.

only.[19] Finally, they noted that if section 125 of the CBCA, which currently allows corporations to set their own compensation levels, was amended to introduce this type of requirement, companies would likely just switch to incorporating under provincial statutes instead of the federal statute.[20]

The other witnesses also referred to the disclosure rules on compensation under the provincial securities laws. Both Laura O'Neill of the Shareholder Association for Research and Education (SHARE) and Judy Cotte of the Canadian Coalition for Good Governance (CCGG) indicated that the companies which disclose compensation information do not always do so in a comprehensible format, and that both their organizations are working with companies to improve this situation. (CCGG testified that it has recently published a guideline for companies to help make compensation disclosure clearer.) Both organizations support the concept of giving shareholders an advisory vote[21] on compensation issues. CCGG has also solicited public comments on and published a plain language draft model board policy and resolution for companies to use if they wish to provide their shareholders an opportunity to vote on this issue.[22] Ms. Cotte indicated that this model was issued to avoid a situation she said occurs in the United States where companies are required to hold an advisory vote but the resolution to do so uses confusing non-standard language. CCGG has so far worked with 12 Canadian companies that have agreed to hold this type of advisory vote and use the CCGG's model policy and resolution.[23]

Wayne Gray of McMillan LLP[24], testifying on his own behalf, noted that the trend in the area of disclosure of executive compensation is in fact to move it from federal regulation to that of the provinces. Previous CBCA regulations on executive disclosure had been taken out and replaced with the adoption by reference of a uniform national standard for disclosure developed by the various provincial securities regulators together.[25]

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19 Ibid., at 16:55.

20 Ibid., at 16:35.

21 An advisory vote is a form of shareholder vote on a non-binding resolution.

22 These are available on-line at CCGG's web site: http://www.ccgg.ca/index.cfm?pagePath=CCGG_Policies_Best_Practices/Engagement_and_Say_on_Pay&id=17578.

23 Testimony of Judy Cotte, CCGG, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 16:30 and 16:35.

24 Testimony of Wayne Gray, McMillan LLP, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 16:35.

25 This policy is National Policy 51-102 on Continuous Disclosure Obligations, the English version of which can be found on the web site of the Ontario Securities Commission at the following link: http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20040402_51-102-cont-disc-ob.pdf.

## Shareholder Rights

The witnesses from SHARE and CCGG had several proposals for strengthening shareholder rights in the CBCA. Ms. Cotte of the CCGG gave her views on the importance of these rights:

> As the providers of capital and the ultimate owners of the company, shareholders delegate powers to the board of directors, including the power to set corporate strategy, to hire and fire executives who are supposed to implement that strategy, and to deal with risk management and crisis management. Directors really are the cornerstone of good governance for public companies. There's growing evidence that good governance leads to more efficient uses of capital and better returns.[26]

SHARE testified that it would like to see requirements for disclosing more information about the environmental, social and governance (ESG) profiles of corporate activities. Ms. O'Neill noted:

> Socially responsible investors aren't alone in this anymore. Around the world and here at home, so-called mainstream investors are learning that with respect to realities such as climate change, they need to know if companies are paying attention and preparing their operations to minimize risk exposure. Investors need to be able to compare the ESG risks of various investments to determine which ones will best help them protect and grow the assets with which they've been entrusted.
>
> What they need is relevant and detailed information and they aren't getting enough right now under either Canadian Securities or stock exchange disclosure requirements.[27]

SHARE subsequently provided a written brief to the Committee which proposed expanding section 102 of the CBCA to require that directors of a corporation disclose the board's understanding of the impacts and potential impacts of social and environmental matters on the company's operations. The brief noted that most publicly listed companies, with the exception of TSX Venture Exchange companies, are already required to make disclosures on selected issues in this area, but according to a study by the Ontario Securities Commission (OSC), the detail and depth of mandated environmental reporting varies widely from company to company. SHARE's proposal was to expand these requirements and ensure that directors are responsible for fulfilling them.[28]

The Committee was not provided with a cost-benefit analysis of this proposed measure or a discussion of its pros and cons.

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26 Testimony of Judy Cotte, CCGG, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:55.

27 Testimony of Laura O'Neill, SHARE, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:50.

28 SHARE, "Brief for the House of Commons Standing Committee on Industry, Science and Technology Regarding the Statutory Review, *Canada Business Corporations Act*", Submitted January 2010, p. 3.

Another proposal from both SHARE and CCGG was to remove the option to hold shareholder votes via a show of hands under section 141 of the CBCA, and instead require a recorded vote on a ballot for public companies.[29] SHARE testified that a vote done by a show of hands is not informative because it does not record how many different numbers of shares are represented by each vote.[30] Ms. O'Neill testified that this proposal would not be an onerous requirement, since most shareholders vote by proxy anyway, and all that would be required would be to add the votes of those actually present at the meeting to the tabulation total. She noted that in the United States and United Kingdom, public corporations must provide numerical tallies of their vote results.[31] In its subsequent written brief, SHARE stated that almost 40% of S&P/TSX Composite Index companies reported that their directors were elected by a show of hands in 2009.[32]

Following its testimony to the Committee, CCGG also provided a written brief in which it enumerated several issues of concern with the current practice of show-of-hands votes. CCGG's view was that a report that states only whether a matter was passed or defeated does not give shareholders information on which they can base an assessment on the level of shareholder support for ballot matters, or any changes in that support. CCGG also noted that companies are not under any obligation to confirm to shareholders who submit proxy votes that their votes have been received and/or tabulated, so there is no independent way to confirm all the votes were counted. CCGG indicated that while it supports the practice of show-of-hands voting for routine procedural matters related to the conduct of the meeting, in its view, companies should have to provide detailed reports of the voting on all matters listed on the proxy. CCGG suggested this could be accomplished without any additional administrative burden since a scrutineer already attends meetings to tabulate votes and his or her tally could be made public.[33]

In an additional proposal, SHARE recommended that subsection 132(5) of the CBCA be amended to withdraw the ability to hold electronic or virtual shareholder meetings for publicly-traded companies—Ms. O'Neill's position was that this type of annual meeting is not appropriate in public companies since the owners and managers of the company are not usually the same people, and the annual meeting should give them a chance to

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29 Testimony of Laura O'Neill, SHARE, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:50.

30 Under subsection 142(3) of the CBCA, the company is currently only required to record and disclose that a resolution was carried or defeated, without disclosing the vote tally. (This was highlighted in CCGG's subsequent written brief to the Committee: CCGG, "Brief to Standing Committee on Industry, Science and Technology re: Five Year Review of CBCA", Submitted February 2010, pp. 7-8).

31 Testimony of Laura O'Neill, SHARE, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:50.

32 SHARE, "Brief for the House of Commons Standing Committee on Industry, Science and Technology Regarding the Statutory Review, *Canada Business Corporations Act*", Submitted January 2010, p. 4.

33 CCGG, "Brief to Standing Committee on Industry, Science and Technology re: Five Year Review of CBCA", Submitted February 2010, pp. 7-8.

communicate directly about company matters.[34] However, the subsequent brief from SHARE noted that no S&P/TSX Composite Index company, which is governed under the CBCA, appears to have actually held a virtual meeting yet, although some have amended their by-laws to permit one. The position given in the SHARE brief is that the CBCA should continue to allow for participation in shareholders meetings by electronic means, but not permit publicly-listed companies to limit participation to an electronic-only or virtual format.[35]

SHARE noted that the existing CBCA framework permitting shareholder proposals was working well, but also proposed an amendment to section 137 of the CBCA to imitate a new provision that has been introduced in Québec's legislation, which requires that shareholders presenting proposals are given a reasonable period of time to speak. Ms. O'Neill testified that currently many shareholders are rushed through their presentation, often being timed with a large clock.[36]

In its subsequent written brief, SHARE also suggested that the CBCA's filing deadlines for shareholder proposals are out of step with the parallel provisions in provincial legislation. According to SHARE, a better model would be the provincial approach of using the date of the most recently held annual meeting of shareholders (rather than the notice date of that meeting) as the reference point for calculating upcoming filing deadlines, a change which could be achieved by amending paragraph 137(5)(a) of the CBCA. SHARE noted that section 55(2)(d) of the *Canada Business Corporations Regulations, 2001* (hereinafter "the CBCR") requires that notice of filing deadlines be included in the management's proxy circular each year, but that more than 20% of the CBCA corporations on the S&P/TSX Composite Index did not include it in their proxy materials in 2009.[37]

CCGG supported SHARE's proposals for strengthening shareholder rights and also had several additional ones.[38] One was to give shareholders the right to vote for each director separately, instead of just a slate of directors. Ms. Cotte testified that approximately 25% of Canada's largest public companies still use slate voting for directors, and that an amendment to the CBCA to prohibit it should be introduced to stop this practice.[39] The Committee did not receive information on whether such a restriction might impact corporate managerial performance.

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34 Testimony of Laura O'Neill, SHARE, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:50 and 15:55.

35 SHARE, "Brief for the House of Commons Standing Committee on Industry, Science and Technology Regarding the Statutory Review, *Canada Business Corporations Act*", Submitted January 2010, pp. 6-7.

36 Testimony of Laura O'Neill, SHARE, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 16:00.

37 SHARE, "Brief for the House of Commons Standing Committee on Industry, Science and Technology Regarding the Statutory Review, *Canada Business Corporations Act*", Submitted January 2010, pp. 7-8.

38 Testimony of Judy Cotte, CCGG, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:55 and 16:00.

39 Ibid., at 15:55.

Another CCGG proposal was to amend the CBCA to require that directors be elected by a majority vote. Under both the CBCA and provincial securities legislation, shareholders of public companies do not have the power to vote against directors by proxy.[40] They may only vote for directors by proxy or withhold their vote, which under certain circumstances allows directors to be elected even if they've only received one vote, which can be their own if they are also a shareholder. Although CCGG has developed a model majority voting policy which it indicates has been adopted by 98 of the 209 largest Canadian companies (including banks[41]), it still took the position that this type of voting needs to become mandatory.[42]

In its written brief, CCGG provided more details on these proposals. In its view, there is a lack of accountability on the part of directors if shareholders "have no meaningful way" to remove them from the board. It cited an American report by Risk Metrics that found that as of September 2009, 91 directors at 49 different companies in the United States failed to receive majority support in shareholder voting, but none of them resigned from the board.[43]

CCGG also noted in its written brief that the current restrictions on shareholder proxy voting for directors are essentially now set by the Canadian Securities Administrators (CSA), since the prohibition on proxy votes which was originally in section 54 of the CBCR, was recently replaced with a simple requirement of conformity to section 9.4 of NI 51-102, a CSA instrument. CCGG gave an opinion that the CSA would not change this standard because "the structure of director elections has historically been a matter of corporate law." CCGG also objected to this delegation of the law on the grounds that this CSA instrument appears to conflict with subsection 106(3) of the CBCA providing that shareholders can elect directors by "ordinary resolution", i.e. using for or against votes. CCGG recommended that subsection 106(3) be amended to state that directors must be elected by majority vote, notwithstanding any provisions to the contrary in other acts or regulations.[44]

CCGG raised an argument against this proposal in its written brief and provided countering views. It stated that opponents of majority voting often argue that requiring directors to obtain majority support before they are elected could lead to "failed elections", i.e., those where an insufficient number of directors are elected to achieve the required quorum for the board. In CCGG's view, this scenario is unlikely since shareholders are very reluctant to block the election of a director without a compelling reason to do so, and if a

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40 CCGG, "Brief to Standing Committee on Industry, Science and Technology re: Five Year Review of CBCA", Submitted February 2010, pp. 4-5.

41 Testimony of Judy Cotte, CCGG, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 16:40.

42 Ibid. , at 15:55.

43 CCGG, "Brief to Standing Committee on Industry, Science and Technology re: Five Year Review of CBCA", Submitted February 2010, p. 5.

44 Ibid.

shareholder was planning to block the election of a director, he or she would likely have alternative candidates to propose. CCGG also was of the opinion that all CBCA public companies already operate with the risk that they will lose directors to the point where they have less than quorum or none at all, through such events as resignation *en masse*. CCGG noted that section 111 of the CBCA already establishes a process to follow if one or more directors are not re-elected at an annual meeting, which requires that a special shareholder meeting be called if the quorum of directors is not filled by the vote for any reason. It also noted that section 109 of the CBCA allows any vacancy created by the removal of a director at a special meeting to be filled by a resolution of the shareholders at that same meeting or by following the section 111 process.[45]

CCGG stated that, to the best of its knowledge, Canada and the United States are the only jurisdictions that do not use a majority voting system for director elections. CCGG recommended that if its proposal for majority voting was adopted, then any new provisions of the CBCA to create it should address how a majority will be achieved when multiple nominees are put forward for a smaller number of vacancies.[46]

CCGG also proposed adding to the CBCA a requirement that directors be elected annually, replacing the current three-year limit and eliminating the potential to stagger boards with directors of different term lengths.[47] Ms. Cotte testified in response to questions that she did not think this would disrupt business continuity, since Canadian ownership tends to be concentrated towards long-term shareholders that have the company's ongoing operations in mind and would continue to vote for directors who were doing a good job. She indicated that in her view it would simply give the shareholders a mechanism to intervene before the three-year mark if there were serious problems.[48]

In its written brief, CCGG stated that "all large Canadian companies" have already voluntarily moved to annual director elections. It added that directors at the 127 S&P/TSX Composite companies that report the results of annual director elections received an average of 96.8% votes in their favour. (The CCGG also noted that this percentage was even higher at the 78 companies out of this group who have a majority voting policy.) The CCGG opined that this voluntary shift has not so far "caused any disruptions to boards or their ability to engage in long-term planning."[49]

SHARE indicated support for CCGG's suggestions in its subsequent written brief and proposed amending section 106 of the CBCA to require individual election of directors

45 Ibid., pp. 5-6.

46 Ibid., p. 6.

47 Testimony of Judy Cotte, CCGG, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:55

48 Ibid., at 16:10 and 17:10.

49 CCGG, "Brief to Standing Committee on Industry, Science and Technology re: Five Year Review of CBCA", Submitted February 2010, pp. 6-7.

and require majority voting in the election of directors, as well as amending subsection 106(3) of the CBCA to eliminate the availability of terms greater than one year for directors.

SHARE gave its view that the fears that giving shareholders the power to reject director nominees would result in destabilization of corporate boards were "not supported by election outcomes in Canada."[50] SHARE indicated in its written brief that withholding of votes, which is currently the only way for a shareholder to express disapproval of a director choice, was used by less than 3% of shareholders in S&P/TSX Composite Index elections, and that there were no situations in which the majority of votes were withheld.[51]

CCGG also had two proposals with respect to governance. The first was to require separation of the functions of the Chief Executive Officer (CEO) of a company and the Chair of the company's Board. Ms. Cotte noted: "If the chair of the board is also the CEO, it is impossible for the board to properly carry out that supervisory function. Good governance requires the chair to be independent of management."[52] She noted that only 72 of 157 of the largest issuers of shares in Canada currently have this separation.[53] The Committee did not receive any information about why the other corporations have not implemented this separation, or the pros and cons of the joint governance model.

The second governance proposal from CCGG was to give shareholders the right to approve dilutive acquisitions. Currently the CBCA allows shareholders the right to approve the sale, lease or exchange of substantially all of the assets of a corporation. CCGG would extend this to approval of significant acquisitions paid for in shares that will dilute the holdings of existing shareholders in excess of 25%. Ms. Cotte noted that the TSX had recently changed its listing requirements to mandate shareholder approval in those circumstances, and it was her view that the CBCA should also be amended to include this requirement.[54] The Committee did not receive data on whether this type of innovation might impact corporate managerial performance.

CCGG concluded its presentation by testifying that in three major pieces of legislation that have been introduced in the United States following the financial crisis, two will eliminate staggered boards, and all of them will require majority voting for directors and the separation of the CEO and Board Chair functions.[55]

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50 SHARE, "Brief for the House of Commons Standing Committee on Industry, Science and Technology Regarding the Statutory Review, *Canada Business Corporations Act*", Submitted January 2010, p. 6.

51 Ibid., pp. 5-6.

52 Testimony of Judy Cotte, CCGG, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 16:00.

53 Ibid.

54 Ibid.

55 Ibid.

In its written brief, CCGG introduced four more recommendations relating to shareholders. The first was that the CBCA be amended to give “significant shareholders” access to the management proxy circular.[56]

CCGG gave the opinion that it is currently too difficult and expensive for a shareholder to propose alternative directors for election and to actively solicit other shareholders to vote for their nominees. A regular shareholder can prepare and mail their own dissident proxy circular in advance of the annual meetings (which CCGG posited would cost a minimum of $500,000 once legal fees, printing and mailing costs are tabulated), can ask the company to agree to include alternative director nominees in the management proxy circular (a request CCGG speculated would not likely be granted), or can, depending on a company’s bylaws, attend the annual meeting and propose alternative directors (although most shareholders vote their shares in advance of the meeting by proxy so in CCGG’s view this approach would rarely attain results).[57]

Shareholders who hold more than 5% of the shares, the group CCGG terms “significant shareholders”, can either request that the management circular include a shareholder proposal calling for the election of different directors, although a shareholder’s options for soliciting or communicating about this proposal are limited, or they can requisition a special meeting to elect new directors and issue a proxy circular at the shareholder’s own expense, which will be reimbursed provided expenses are reasonable.[58]

CCGG recommended that the CBCA be amended to allow significant shareholders to require a company to include a shareholder’s alternative nominee for directors in its management proxy circular, along with a description of their backgrounds and a statement from the shareholder about why they should be elected, and to allow the shareholders to freely solicit the support of other shareholders for their candidates without having to file a dissident proxy circular. It also recommended that the shareholders should be able to do this at no cost, or to be reimbursed for solicitation costs unless the shareholders resolve otherwise. CCGG noted that in the United States, the idea of requiring significant shareholders to hold their shares for a minimum period of time before they are allowed to propose their own directors is being debated. [59]

The Committee did not receive any information about the potential drawbacks of this model.

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56 CCGG, “Brief to Standing Committee on Industry, Science and Technology re: Five Year Review of CBCA”, Submitted February 2010, p. 8.

57 Ibid., pp. 8-9.

58 Ibid., p. 9.

59 Ibid.

The second additional proposal in CCGG's written brief was that the CBCA should contain a positive obligation on corporations to send proxy related material to all of their shareholders, regardless of whether they choose to protect their personal information. The brief contained a discussion of how provincial securities laws handle mailings with respect to securities held through an intermediary such as a brokerage firm or custodian, and noted that shareholders who object to their personal information being disclosed have risen from 38% in 2005 to approximately 50%.[60]

This proposal did not contain any information on the current federal and provincial privacy laws that govern the private sector's disclosure of personal information, nor an examination of how they would impact on such a proposal.

The third additional proposal in CCGG's written brief was that the CBCA should facilitate "notice and access". This refers to a proposal being developed by the CSA whereby shareholders will be able to access and download documents from company websites to facilitate proxy voting. CCGG noted that a similar system has been moving forward in the United States, where it is seen to have the advantages of encouraging proxy voting, lowering costs and making the proxy system more efficient. CCGG raised concerns that the current CBCA may need updating to avoid interfering with the CSA proposal, since it contains various provisions which require that documents be forwarded to shareholders in writing.[61]

The fourth additional proposal in CCGG's written brief was to amend the CBCA to give shareholders "more meaningful" ways to resolve claims under the oppression remedy currently found in section 241 of the CBCA. CCGG praised the nature of the remedy, but presented several process-related critiques. The first was that the cost of bringing a court application under this section is "prohibitively expensive" even for large institutional shareholders; the second was that the court process typically involves lengthy delays, and the third was that even the CBCA's provisions allowing companies to be ordered to pay interim costs by the courts do not fully address the first two problems. CCGG proposed that perhaps a form of arbitration for those claims could be introduced instead.[62]

## Securities Regulation

Industry Canada officials indicated that stakeholders may have views on whether the security transfer provisions in the CBCA should be removed, given that provincial legislation already deals with the transfer of securities. Wayne Lennon of Industry Canada indicated that similar provisions in the federal *Bank Act*, the *Trust and Loan Companies*

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60 Ibid., p. 10.

61 Ibid., pp. 10-11.

62 Ibid., pp. 12-13.

*Act, and Insurance Companies Act* would also need to be removed at the same time if such a change were to go ahead.[63]

Mr. Gray of McMillan LLP explained that the Canadian Bar Association (CBA) had responded to Industry Canada's 2007 discussion paper about securities transfers with a paper it submitted on the modernization of securities laws.[64] (Mr. Gray in fact coordinated the ad hoc CBA working group which produced the paper.[65]) The CBA had concluded that securities law was mainly under provincial jurisdiction and that the provinces had produced modernized and comprehensive statutes, so there was no longer any need to regulate securities matters in corporate statutes or at the federal level at all.[66]

In his testimony, Mr. Gray made note of several areas where the CBCA was not as modern, in his view, as the provincial securities statutes. The first was with respect to the definition of an issuer's jurisdiction as it relates to dematerialization, or the power of a corporation to issue its shares without having a security certificate. Mr. Gray indicated that Ontario and British Columbia grant this power to corporations, and Québec soon will, but the CBCA does not. This means that corporations in some provinces have the option not to go through the formal procedures for obtaining share certificates if the investors indicate that they do not need or want them, whereas federal corporations must obtain them nonetheless.[67]

Mr. Gray also raised the issue of trust indentures,[68] which are currently regulated under Part 8 of the CBCA. He explained that the Uniform Law Conference of Canada is about to start a project to study the various laws on trust indentures across the country, with a view towards harmonization. The current CBCA regime regulates a federal issuer unless the trust indenture is subject to the laws of another jurisdiction that provides comparable protection. Jurisdictions that do provide this protection include Ontario, British Columbia, and the United States, but they do not include other countries such as England,

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63 Testimony of Wayne Lennon, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009 at 16:55.

64 Canadian Bar Association – National Business Law Section, "Modernizing Securities Transfer Rules in Federal Statutes", November 2007.

65 Biography of Wayne Gray, McMillan LLP, http://www.mcmillan.ca/AboutUs.aspx?Section1=AboutUs&Section2=LawyerPopup&BioID=35d705dc-d7be-409b-81e3-ea39b7c4590a&RequestLanID=1.

66 Testimony of Wayne Gray, McMillan LLP, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:35.

67 Ibid.

68 A trust indenture is the document containing the terms and conditions that govern the conduct of the trustee and the rights of the beneficiaries. It is commonly used when a corporation floats bonds. (Securities Law Institute, *Glossary of Securities Terms*, http://www.securitieslawinstitute.com/Glossary%20of%20Securities%20Terms.html ).

so a federal issuer may be subject to the CBCA requirements even when operating in a foreign jurisdiction.[69]

Another securities issue raised was board residency. The Canadian residency requirements for board composition in the old CBCA were reduced from 51% to 25% following the 2001 amendments, but there are now several jurisdictions in Canada which do not have any Canadian residency requirements at all, including Nova Scotia, New Brunswick, P.E.I., British Columbia and Québec. Mr. Gray was of the view that there are grounds to question whether any board residency requirements need to remain in the CBCA.[70] The Committee did not receive information on the pros and cons of retaining the current distinctions in the legislation between Canadian and non-Canadian directors.

Mr. Gray also flagged an issue with respect to CBCA regulation of insider trading. He noted that the CBCA imposes liability for insider trading and tipping[71] on both publicly- and privately-held companies, even though it is not especially relevant to private companies without public stock. Mr. Gray testified that the current structure for attempting to regulate these issues even for publicly-held companies is out-of-date. Liability is imposed on the basis of a match between buyer and seller,[72] but securities are now generally traded using the indirect holding system where people trade into the market online, without knowing who their buyer will be. This means that it is difficult to prove the match which is a prerequisite for a finding of liability under the CBCA. Mr. Gray used the following analogy to describe the problem:

> I would analogize it to people throwing dirty water in the lake, and the person who takes the dirty water out of the lake needs to be able to identify who put that water in there. It's very difficult, as a matter of proof, and unnecessary.[73]

Mr. Gray's view is that there are solutions to this problem; he testified that trading records could reveal whether entitlement holders have disposed of shares within a key time frame, and sellers could be revealed from instruction orders obtained from brokers. He indicated that a form of class action might be most suitable for obtaining civil damages in such a situation:

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69 Ibid.

70 Ibid.

71 Insider tipping refers to the practice of an insider providing stock tips via disclosure of material non-public information. (Securities Law Institute, *Glossary of Securities Terms*, http://www.securitieslawinstitute.com/Glossary%20of%20Securities%20Terms.html ).

72 Mr. Gray testified that this structure is also used in most of the provincial legislation provisions on insider trading as well, and recommended looking at the models used in Australia. (Testimony of Wayne Gray, McMillan LLP, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 17:15).

73 Testimony of Wayne Gray, McMillan LLP, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:40.

> You can define a class by the time frame around which the insider has traded, and the people in a time frame on the opposite side of the transaction can be part of the class. So it would be kind of a class concept that would be matched. Rather than an individual trading match, it would be a class match, and the damages would then go to be shared among all the members of the class, rather than just one individual who may not even be traceable through the indirect system.[74]

While Mr. Gray praised the non-prescriptive framework approach of the CBCA in other areas, he indicated that it did not seem to be working with respect to insider trading:

> There is not a lot of civil litigation against insiders, and I think there ought to be, because it's clear that there is insider trading going on. You can tell that by the fact that there is often a spike in prices before there is favourable news, or the reverse. So somebody is trading. There could be class actions, for example. Treble damages could be awarded. There are ways the civil law could be used.
>
> The CBCA is largely self-enforcing. The genius of this *Act* is that largely the enforcement of the *Act* has been privatized to give private parties the incentive to pursue their remedies. And this is one area where I think that's failed. There has been no case since 1994 that I could find on insider trading liability. There has never been a case under the CBCA with respect to criminal liability, and very few cases at all under the civil liability regime, and none since the 2001 amendments.[75]

Mr. Gray's comments were mostly limited to the civil remedies that could be sought with respect to insider trading, since, as CCGG's Ms. Cotte noted, the provincial securities commissions can investigate insider trading and levy administrative penalties. However, both witnesses seemed to agree that criminal prosecution of insider trading was not occurring. Ms. Cotte gave her views on the reasons why:

> The problem right now is that prosecution of insider trading under the Criminal Code is left to provincial Crowns, who have maybe ten murders ahead of an insider trading case. They have neither the time nor necessarily the expertise to pursue the cases.[76]

Ms. Cotte suggested that there might be a particular role for a national securities regulator in this area:

> We think that securities regulators do a fairly good job in obtaining administrative penalties for insider trading. Where we think the Canadian system is woefully inadequate is in the criminal prosecution of insider trading.
>
> As you well know, there's movement to create a national securities regulator in Canada. We made a submission to the expert panel looking at that issue, and we advocated that

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74 Ibid., , at 17:10.

75 Ibid.,, at 16:45.

76 Testimony of Judy Cotte, CCGG, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, 16:55.

> as part of a national securities regulator, that a new agency be created that has an administrative branch and a criminal branch. The criminal side could develop the right people with the right expertise who are properly incentivized to pursue these kinds of cases.[77]

The last issue identified by Mr. Gray with respect to federal regulation of securities was the modified proportionate liability regime, i.e. the liability attached to secondary market disclosure by parties like auditors. This is another area where the CBCA's requirements are not the same as those of the provinces, creating a patchwork of different laws. Mr. Gray indicated that the primary reason for this patchwork is that the liability of professionals such as auditors involves negligence and therefore falls fully under the provincial jurisdiction over property and civil rights and is regulated by negligence statutes in each province. The CBCA regime is only able to regulate the audited financial statements issued by companies that are federally incorporated, an area Mr. Gray described as a "very limited scope provision" and one which has not given rise to any case law in the courts. Mr. Gray noted that this issue is currently being studied by the Law Commission of Ontario.[78]

### Special Incorporation Structure for Socially Responsible Enterprises

One witness, Tim Draimin of Social Innovation Generation, proposed that the CBCA be amended to facilitate the incorporation of a special kind of enterprise with both profit-making and non-profit goals. Mr. Draimin described this structure as a "hybrid public benefit corporation" or "community enterprise"[79] and explained it as follows:

> ...any hybrid corporate structure for business serving public benefit. By hybrid I mean a blend of an organization that would have the social purposes of a non-profit, like benefiting the community, with the business model of the for-profit sector.[80]

Mr. Draimin testified that Canada's non-profit and charity sector includes over 161,000 organizations that generate revenues in excess of $100 billion and employ over 1.5 million people. He described how their operations have been changing during a period of declining revenue from government and donations, and now often include limited socially responsible business ventures. Such ventures have multiple aims which may include promoting fair trade or training underprivileged youth, while making money at the same

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77 Ibid.

78 Testimony of Wayne Gray, McMillan LLP, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:40.

79 Testimony of Tim Draimin, Social Innovation Generation, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 43, 40th Parliament, 2nd Session, November 16, 2009, at 15:40

80 Ibid.

time. He testified that "earned income" now accounts for 35% of the total revenues of non-profits and that this proportion is growing.[81] As he described it:

> Canada's community non-profit and social sector has challenges accessing capital and diversifying their sources of operating income because of restrictive tax regulations and capitalization options. These financial barriers are unnecessary obstacles for a new breed of social entrepreneur that is emerging and limits the potential impact of their innovations. The sector needs the flexibility to explore new forms of social finance.[82]

Mr. Draimin noted that such models have been introduced in both the United States, where they are called Low Profit Limited Liability Corporations (L3Cs), and the United Kingdom, where they are called Community Interest Companies (CICs).[83] He testified that in the United Kingdom, the term "CIC" is used after the names of these structures to identify them, and they have their own separate regulator, with annual reporting requirements and a set of public interest and community benefit requirements they must meet to be able to incorporate as a CIC.[84] According to his information, there are currently 3,200 CICs in the United Kingdom, and they are being created at a rate of several hundred a month.[85]

The idea is that a charity or not-for-profit corporation could use the new structure to set up a separate profit-making arm with a community aim that is primarily funded by investors. According to Mr. Draimin, under the U.K. model, charitable foundations can make grants to these special enterprises if their aims are charitable. Under the American model, foundations can make program-related investments.[86]

Mr. Draimin indicated that he was not sure whether this type of structure could be simply introduced in Canada under the CBCA, or whether it would require a new completely separate act along the lines of the *Canada Cooperatives Act* or the *Canada Not-for-Profit Corporations Act*.[87] He suggested that such ventures, in their role as side operations of not-for-profits, could also benefit from being included in government programs for small and medium-sized enterprises (SMEs).[88]

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81 Ibid.

82 Ibid.

83 Ibid.

84 Ibid. at 16:40.

85 Ibid., at 16:50

86 Ibid., at 17:20

87 Ibid., at 16:10

88 Ibid., at 17:05

Under this structure, revenues could be returned to the charitable side of the organization up to a certain amount, after which the excess would be taxed.[89] Investors could also purchase shares in a social enterprise, following a model in the United Kingdom which allows a limited dividend to be paid out.[90] The shares can depreciate in value, but are not allowed to appreciate above their issuing price[91]:

> There's a thing called an asset lock, which means that somebody can't benefit for private purposes, so basically there's a control on the size of the dividend: the assets can't be stripped out of the organization, but there is an annual dividend. Basically, somebody would be purchasing these as an analogous form to some kind of low-performing investment that they had, which might in one sense be somewhat secure.[92]

Mr. Draimin described the structure as being "almost like putting out a bond and breaking it up into little pieces and calling each of them a share."[93] The idea would be that investors who ended up with a depreciated value on their investment could sell it and claim it as a capital loss in their tax return.[94]

Mr. Draimin testified that the availability of this kind of structure would also solve some of the problems charities and non-profits currently have in that successful operations often mean that they are considered to have "enough" money from a declining donor pool, rather than being able to attract more money for their operations:

> To the enterprising charities that have created smart modes of operation, a lot of their funders will say, "You're doing really well, so I'm not going to give you any more."
>
> It's kind of perverse. Successful organizations, if they were in a marketplace, would get more capital attracted to them because they were successful, as opposed to the non-profit sector where, if they're successful, they can have less capital. That's one of the anomalies of the current system.[95]

In Mr. Draimin's view, the availability of such a structure would also benefit enterprise in Canada in general over the long term:

> If we think that these organizations that have mandates to house the homeless or train marginalized people or take care of the vulnerable are doing a good job that nobody else is doing and that a gap is being created because the market isn't serving them, but they

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89 Ibid., at 16:15 and 16:20

90 Ibid., at 16:25

91 Ibid., at 16:50

92 Ibid., at 16:25

93 Ibid., at 17:20

94 Ibid.

95 Ibid., at 16:30

> come up with an ingenious way to leverage market forces to help them do what they're doing, my sense is that society should be saying it's a really good thing for that innovation to happen. If it turns out that innovation generated by that enterprising charity is such a good idea that it is picked up by the private sector, which copies and emulates it and carries it out successfully, that's even a better solution. That means that an idea that has been incubated in non-profits addressing community needs actually gets to go farther.[96]

Industry Canada responded briefly to the proposal for this type of hybrid enterprise structure by indicating that they had only recently heard of it, and were of the view that such a hybrid corporation might actually already be able to incorporate under the CBCA. Ms. Downie of Industry Canada testified that the current roadblocks to such a model might lie more in the tax rules than in actual incorporation.[97]

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96 Ibid., at 16:15.

97 Testimony of Colette Downie and Wayne Lennon, Industry Canada, to the Standing House of Commons Committee on Industry, Science and Technology, Meeting No. 42, 40th Parliament, 2nd Session, November 4, 2009 at 16:30.

# CONCLUSIONS

The Committee recommends that a broad public consultation be conducted by the government within two years on the following issues:

**A. Executive Compensation**

1) **The issue of whether disclosure of compensation rules should be left to the provincial jurisdictions. (Industry Canada, Wayne Gray)**

2) **The issue of whether shareholders should have an advisory vote on compensation packages. (SHARE, CCGG)**

**B. Shareholder Rights and Governance**

3) **The issue of whether section 102 of the CBCA should be expanded to require that the directors of a distributing corporation shall disclose the board's understanding of the impacts and potential impacts of social and environmental matters on the company's operations.[98] (SHARE)**

4) **The issue of whether section 141 of the CBCA should be amended to require that voting on all resolutions considered at a meeting of shareholders be conducted by ballot. The CBCA should require public companies to disclose the detailed results of shareholder votes for matters on the ballot.[99] (SHARE, CCGG)**

5) **The issue of whether section 106 of the CBCA should be amended to require the individual election of directors. The**

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98 SHARE confirmed that it recommends section 102 for amendment on this issue. Section 102 of the CBCA currently reads as follows:

Duty to manage or supervise management

**102.** (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

Number of directors

(2) A corporation shall have one or more directors but a distributing corporation, any of the issued securities of which remain outstanding and are held by more than one person, shall have not fewer than three directors, at least two of whom are not officers or employees of the corporation or its affiliates.

99 Currently show-of-hands voting is allowed under section 141 of the CBCA instead of a recorded vote.

**CBCA should prohibit slate voting and require a director by director vote. (SHARE, CCGG)**

6) **The issue of whether section 106(3) of the CBCA should be amended to eliminate the availability of terms of greater than one year for directors and whether the CBCA should require annual director elections for all CBCA public companies.[100] (SHARE, CCGG)**

7) **The issue of whether section 106 of the CBCA should be amended to require majority voting in the election of directors. (SHARE, CCGG)**

8) **The issue of whether section 132(5) of the CBCA should be amended to exclude publicly-traded corporations from its application.[101] (SHARE)**

9) **The issue of whether section 137(5)(*a*) of the CBCA should be amended to establish the reference date for determining the filing deadline for a shareholder proposal as the anniversary date of the previous annual meeting of shareholders.[102] (SHARE)**

10) **The issue of whether section 137 of the CBCA should be amended to require that shareholders presenting proposals are given a reasonable period of time to speak. (SHARE, CCGG)**

11) **The issue of whether the CBCA should be amended to give significant shareholders access to the proxy circular.[103] (CCGG)[104]**

12) **The issue of whether the CBCA should require all shareholders to be treated equally in the proxy process,**

100 Director elections currently must be held once every three years.

101 This section currently enables companies to hold shareholder meetings in an all-electronic or all-virtual format.

102 The current reference date in the CBCA is the date that notice for the previous annual meeting was given.

103 The CCGG defines “significant shareholders” as those who hold more than 5% of the shares of a company.

104 A specific amendment was not proposed. The current provisions dealing with circulation of shareholder proposals are at section 137 of the CBCA. The current provisions dealing with dissident proxy circulars are at sections 150 to 155 of the CBCA.

**irrespective of whether they want to protect the privacy of their information.[105] (CCGG)**

13) **The issue of whether the CBCA should facilitate "notice and access," i.e. allowing shareholders to access and download document from the company website to facilitate proxy voting.[106] (CCGG)**

14) **The issue of whether the CBCA should generally require the separation of the roles of the Chief Executive Officer (CEO) and the Chair of the board.[107] (CCGG)**

15) **The issue of whether the CBCA should require shareholder approval for significantly dilutive acquisitions.[108] (CCGG)**

16) **The issue of whether the Committee should devise ways to give shareholders more meaningful ways to resolve claims under the oppression remedy.[109] (CCGG)**

## C. Securities Regulation

17) **The issue of whether the portions of the CBCA that relate to securities transfers should be removed and regulation of this area left to the more modernized provincial statutes.[110] (Wayne Gray)**

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105 A specific amendment was not proposed. The current provision on communications via intermediaries is at section 153 of the CBCA. The submissions of CCGG did not address the role of the federal and provincial privacy laws governing communication of personal information.

106 Section 252.5 of the CBCA already does create equivalency for electronic documents. CCGG did not provide evidence about which further amendments might be needed to the CBCA in this area.

107 No proposals regarding how to incorporate this requirement into the CBCA were presented.

108 CCGG defined these as acquisitions that would dilute the holdings of the shareholders by more than 25%. The current rights of shareholders in this area are limited to approving the sale, lease or exchange of substantially all the assets of a corporation, under sections 189(3) to (9) of the CBCA.

109 CCGG proposed introducing a mechanism under section 241 of the CBCA to settle such claims by means of arbitration rather than litigation, but did not provide a more specific proposal.

110 A specific amendment was not proposed, but securities transfers are currently dealt with mainly under Part VII of the CBCA, with some additional dependent references elsewhere in the legislation.

**Alternatively:**

18) **The issue of whether the requirement for corporations wishing to issue shares to obtain a security certificate should be removed.[111] (Wayne Gray)**

19) **The issue of whether the requirements that the CBCA rules on trust indentures be followed by all federal issuers operating in jurisdictions that do not have comparable protection should be removed.[112] (Wayne Gray)**

20) **The issue of whether the 25% Canadian residency requirement for boards should be removed.[113] (Wayne Gray)**

21) **The issue of whether imposition of liability for insider trading and tipping on privately-held companies should be removed, since it is only relevant to publicly-held companies.[114] (Wayne Gray)**

22) **The issue of whether the approach of matching buyer and seller to determine insider tipping/trading liability should be removed, and replaced with a class action approach.[115] (Wayne Gray)**

23) **The issue of whether a new national securities regulator should be given a role in enforcement on the criminal side in insider tipping/trading cases.[116] (CCGG)**

24) **The issue of whether modified proportionate liability should be addressed in some manner—currently negligence issues with professionals such as auditors are under provincial jurisdiction, so this limits the applicability of the CBCA's**

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111 Share certificate requirements are in Part VII of the CBCA.

112 Trust indentures are regulated in Part VIII of the CBCA.

113 This 25% Canadian residency requirement was reduced from its prior level of 51% Canadian residency during the 2001 amendments to the CBCA. The current provisions governing residency of directors are at sections 105(3), (3.1), (3.2), (3.3) and (4) of the CBCA.

114 The current provisions concerning insider trading and tipping are in Part XI of the CBCA.

115 No specific proposals for amendments were presented to the Committee.

116 The CCGG did not address jurisdictional issues in its submissions.

**provisions with respect to negligence in this area.[117] (Wayne Gray)**

**D. Proposal for Special Incorporation Structure for Socially Responsible Enterprises**

**25) The issue of whether the CBCA should be amended and a separate regulator possibly created to support a special kind of hybrid enterprise with both profit-making and non-profit goals, similar to a Low Profit Limited Liability Corporation (L3C) in the United States and a Community Interest Company (CIC) in the United Kingdom. (Social Innovation Generation)**

**Alternatively:**

**26) The issue of whether this kind of enterprise can already be incorporated under the existing CBCA, and whether or not amendments are needed.[118] (Industry Canada)**

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117 No specific proposals for amendments were presented to the Committee.

118 Industry Canada officials gave the view during their testimony to the Committee that it may in fact be the tax legislation which needs amending to facilitate the operation of this kind of structure in Canada, rather than the CBCA.

# APPENDIX A
# LIST OF WITNESSES HEARD IN THE SECOND SESSION OF THE 40TH PARLIAMENT

| Organizations and Individuals | Date | Meeting |
| --- | --- | --- |
| **Department of Industry** | 2009/11/04 | 42 |
| Colette Downie, Director General, Marketplace Framework Policy Branch | | |
| Coleen Kirby, Manager, Policy Section, Corporations Canada | | |
| Wayne Lennon, Senior Project Leader, Corporate and Insolvency Law Policy and Internal Trade Directorate | | |
| Cheryl Ringor, Director, Compliance and Policy Branch, Corporations Canada | | |
| **As an individual** | 2009/11/16 | 43 |
| Wayne D. Gray, Partner, McMillan LLP | | |
| **Canadian Coalition for Good Governance** | | |
| Judy Cotte, General Counsel and Director , Policy Development | | |
| **Shareholder Association for Research and Education** | | |
| Laura O'Neill, Director, Law and Policy | | |
| **Social Innovation Generation** | | |
| Tim Draimin, Executive Director | | |

# APPENDIX B
# LIST OF BRIEFS RECEIVED IN THE SECOND SESSION OF THE 40TH PARLIAMENT

| Organizations and individuals |
| --- |
| **Canadian Bar Association** |
| **Canadian Coalition for Good Governance** |
| **Department of Industry** |
| **Gray, Wayne** |
| **Shareholder Association for Research and Education** |

# MINUTES OF PROCEEDINGS

A copy of the relevant Minutes of Proceedings (Meetings Nos. 4, 12 and 17*)* is tabled.

Respectfully submitted,

Hon. Michael D. Chong, MP
Chair

## **NDP Opinion on the Statutory Review of the *Canada Business Corporations Act (CBCA)***

After hearing from stakeholders representing a diverse range of interests the need to modernize and update the *CBCA* was made readily apparent. While the recommendations put forward by witnesses appearing at the committee were not able to obtain a consensus or even a majority of the committee members' support, the NDP has determined to recommend the following changes to be incorporated into the *CBCA.*

### Recommendations

*Executive Compensation*

(1) Shareholders should have an advisory vote on compensation packages.

*Shareholder Rights and Governance*

(2) That section 102 of the CBCA be expanded to require that the directors of a distributing corporation shall disclose the board's understanding of the impacts and potential impacts of social and environmental matters on the company's operations

(3) That section 141 of the CBCA be amended to require that voting on all resolutions considered at a meeting of shareholders be conducted by ballot. The CBCA should require public companies to disclose the detailed results of shareholder votes for matters on the ballot.

(4) That section 106 of the CBCA be amended to require the individual election of directors. The CBCA should prohibit slate voting and require a director by director vote.

(5) That section 106(3) of the CBCA be amended to eliminate the availability of terms of greater than one year for directors. The CBCA should require annual director elections for all CBCA public companies.

(6) That section 106 of the CBCA be amended to require majority voting in the election of directors.

(7) That section 132(5) of the CBCA be amended to exclude publicly-traded corporations from its application.

(8) That section 137(5)(*a*) of the CBCA be amended to establish the reference date for determining the filing deadline for a shareholder proposal as the anniversary date of the previous annual meeting of shareholders.

(9) That section 137 of the CBCA be amended to require that shareholders presenting proposals are given a reasonable period of time to speak.

(10) The CBCA should be amended to give significant shareholders access to the proxy circular

(11) The CBCA should require all shareholders to be treated equally in the proxy process, irrespective of whether they want to protect the privacy of their information

(12) The CBCA should facilitate “notice and access,” i.e. allowing shareholders to access and download document from the company website to facilitate proxy voting

(13) The CBCA should generally require the separation of the roles of the Chief Executive Officer (CEO) and the Chair of the board

(14) The CBCA should require shareholder approval for significantly dilutive acquisitions

(15) The Committee should devise ways to give shareholders more meaningful ways to resolve claims under the oppression remedy

*Securities Regulation*

The NDP recommends that the Government of Canada work with the provinces to harmonize securities regulation.

*Proposal for Special Incorporation Structure for Socially Responsible Enterprises*

(16) Amend the CBCA and possibly create a separate regulator to support a special kind of hybrid enterprise with both profit-making and non-profit goals, similar to a Low Profit Limited Liability Corporation (L3C) in the United States and a Community Interest Company (CIC) in the United Kingdom.