



September 29, 2004

Mr. Gilles Gauthier
Director of Corporate and Insolvency Law Policy
Corporate and Insolvency Law Policy Directorate
Industry Canada
235 Queen Street, 10th Floor
Ottawa, ON K1A 0H5

Dear Mr. Gauthier:

Re: Towards an Improved Standard of Corporate Governance for Federally Incorporated Companies – Proposals for Amendments to the *Canada Business Corporations Act*

The National Business Law Section of the Canadian Bar Association (CBA Section) is pleased to respond to the request for comments dated May 13, 2004 in respect of Industry Canada proposals: *Towards an Improved Standard of Corporate Governance for Federally Incorporated Companies – Proposals for Amendments to the Canada Business Corporations Act* (the Proposals).

The CBA is a national association representing over 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. Members of the CBA Section deal with law and practice affecting all aspects of business, commerce and trade. The CBA Section welcomes measures that seek to improve and strengthen the structures and processes that lead to good corporate governance in Canada.

National Approach

Improving corporate governance is an initiative whose time has come. In the CBA Section's view, however, the direction set out in the Proposals would not improve the law nor enhance corporate governance. It is critical that the initiative be implemented consistently across the country and in a manner that recognizes the national nature of the securities environment and of corporate Canada. Although corporate legislation is the subject matter of both federal and provincial powers depending on the mandate of the particular corporation, corporate governance is a broader issue that requires a national response. As the CBA Section has indicated in prior

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submissions relating to securities regulation in Canada, the approach should be a national approach and consistent throughout the country.

Our concern with adopting certain standards currently being proposed by securities regulators is two-fold. Firstly, if the federal government adopts the standards of one jurisdiction, it may be in disharmony with the rest, creating additional inconsistency. The adoption of a standard imposed by a province is also subject to change by the province, and the federal legislation could then become out of step very quickly with any provincial initiatives. This will certainly create a regulatory burden and may create conflicts of law and interpretation of the law governing a particular enterprise. Finally, to incorporate provincial legislation on a go-forward basis would be effectively a delegation of powers to the provincial government and would serve no useful purpose.

Proposed Amendments to *CBCA*

The CBA Section strongly recommends that the provisions relating to corporate governance not be implemented in the *CBCA* as envisaged in the Proposals. Although a significant number of businesses, including one half of the hundred largest corporations in Canada, are incorporated under the *CBCA*, the other half of the hundred largest corporations and significantly more businesses are not subject to the *CBCA*. The patchwork already created through provincial legislation would be exacerbated by additional changes made by the federal government through the *CBCA*.

If the federal government does proceed with the adoption of corporate governance standards in the *CBCA*, it is our strong recommendation that it harmonize as much as possible with current legislation. Provision should be made for the appropriate exemptions for small versus large reporting companies as well as for reporting companies from recognized jurisdictions such as the United States.

Implementing Corporate Governance Measures through an Appropriate National Body

The CBA Section believes the more appropriate response is a national initiative on corporate governance through an appropriate body, such as the Canadian Securities Administrators (CSA), which represents securities regulators across Canada. Canadian public companies are already subject to recently-adopted CSA requirements relating to the role and composition of audit committees (Multilateral Instrument 52-110), certification of financial statements and other corporate disclosure (Multilateral Instrument 52-109) and auditor oversight (Multilateral Instrument 52-108).

We understand that the CSA will soon publish for comment additional corporate governance proposals to be endorsed by provincial and territorial securities regulators across Canada. The federal government should work with the securities regulators on the policy underlying this regulatory initiative.

There is an additional advantage to implementing corporate governance measures through instruments and policies adopted by the CSA on a national basis. There is generally greater

capacity to obtain exemptions from such rules (and to implement amendments where required) than when the requirements are included in corporate legislation. In our view, this additional flexibility would be useful given the dynamic nature of developments in corporate governance and the need to tailor requirements to individual circumstances. In addition, CSA members should be in a better position to ensure compliance with such requirements, given their existing enforcement capabilities.

We would be pleased to discuss our comments with you. Please feel free to contact me at 604-806-3865, if you wish further input on this issue.

Yours very truly,

(Original signed by Trevor Rajah on behalf of Catherine Wade)

Catherine Wade
Chair
National Business Law Section.