

December 12, 2015

Business Law Policy
Consumer and Business Policy Unit
Ministry of Government and Consumer Services
6th Floor, 56 Wellesley Street West
Toronto, ON M7A 1C1

Sent by email to: businesslawpolicy@ontario.ca

Re: Business Law Report

We are writing in response to the Government of Ontario's request for comments on the *Business Law Advisory Council Fall 2016 Report*.¹

With approximately C\$6 billion in assets under management, NEI Investments' approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will build long-term sustainable value for all stakeholders and provide higher risk-adjusted returns to shareholders. NEI responded to an earlier request for comments on the *Business Law Agenda: Priority Findings and Recommendations Report* in 2015.² Our previous submission discussed a wide range of issues that we would like to see considered under the business law agenda. In this letter we focus on the topics that we believe could be addressed most effectively through amendments to the Ontario Business Corporations Act (OBCA).

Key recommendations

- We welcome the recommendation to facilitate re-submission of shareholder proposals that have achieved a minimum level of support.
- Shareholders should have the right to vote for or against individual director nominees on an annual basis under a majority voting requirement, as proposed in the amendments to CBCA currently before Parliament.
- All vote results should be disclosed and presented in a fair and consistent way.
- The advisory vote on executive compensation should be mandated.
- The OSC's diversity disclosure requirements should be integrated to OBCA, as proposed in the amendments to CBCA, and these provisions should be subject to review and enhancement if diversity objectives are not being achieved within a reasonable timeframe.
- There should be further consultation on clarifying the purpose of the corporation and the role of directors, to support the imperative of long-term sustainable value creation and take into account wider stakeholder interests.
- Consideration should be given to establishing requirements for strategic ESG disclosure from all larger companies formed under OBCA, to support responsible investment and wider sustainability objectives while ensuring a level playing field between listed and non-listed companies.

¹ Ontario Business Law Advisory Council (2016). Report to Minister of Government & Consumer Services, Fall 2016. <http://www.ontariocanada.com/registry/showAttachment.do?postingId=23184&attachmentId=33271>

² NEI Investments (2015). Consultation on Business Law Agenda. <https://www.neiinvestments.com/documents/PublicPolicyAndStandards/2015/Business%20Law%20Agenda%20-%20Priority%20Findings%20and%20Recommendations%20Report.pdf>

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Comments on the Report

Recommendation 2: Allowing shareholders to continue to advance proposals if support is growing

In our earlier submission, we had suggested that OBCA should allow for re-submission of shareholder proposals that have not passed but have achieved a minimum level of support at earlier meetings, as is the case under the Canada Business Corporations Act (CBCA). We are pleased to see this recommendation taken up in the Fall 2016 report.

Director elections

We are concerned that the recommendations for amendment of OBCA do not include measures to advance the objective of allowing shareholders to "effectively determine the composition of their board of directors", which was highlighted in 2015 report.³ As a minimum, shareholders must be given the right to vote for or against individual director nominees on an annual basis under a majority voting requirement. The interests of a company are best served by allowing shareholders to target precisely any director candidates that they consider to be unsuitable or under-performing, and by making negative votes meaningful. We welcomed the decision of the Toronto Stock Exchange (TSX) to enact director elections requirements for listed companies in 2014, but in our view the most appropriate and impactful place for these rights to be enshrined is in the various statutes under which Canadian companies are formed, and which set out the basic requirements for the conduct of annual meetings and director elections. In this context we note that proposed amendments to CBCA currently before Parliament would address these rights.

NEI Investments is a member of the Canadian Coalition for Good Governance (CCGG). We refer you to CCGG's submission of December 9, 2016 for further discussion on the question of majority voting.⁴

Voting disclosure

We note that TSX also enacted requirements on director vote results disclosure in 2014. Prompt and accurate vote result disclosure should be an expectation at all public companies, regardless of size. We would support requirements aimed at ensuring that the outcome of voting on all ballot items is not only disclosed, but presented in a fair and consistent way. OBCA states currently that the result of a vote on a proposal "*shall be decided by the majority of votes cast*" (s.97). This is less straightforward than it seems. It is our understanding that the way in which different types of votes are added together to determine the outcome of a vote is set out in bylaws, and may vary from company to company. We would prefer to see a consistent approach to disclosure across all companies, setting out clearly the number and percentage of votes cast "for", "against" and (where applicable) "abstain".

In general, we are opposed to the creation of multiple share classes with different voting rights. Where this situation exists, we would also favour a requirement for separate disclosure of the vote results for each class of shares. This would make transparent any divergence in the perspectives of shareholders in each class.

³ Ontario Business Law Advisory Council (2015). Business Law Agenda: Priority Findings & Recommendations Report, 2015. <http://www.ontariocanada.com/registry/showAttachment.do?postingId=18942&attachmentId=33251>

⁴ <http://www.ccg.ca/index.cfm?pagepath=Submissions&id=17585>

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Once again, we believe it would be appropriate to address voting disclosure issues through OBCA, because it sets out procedure on the conduct of annual meetings. We favour the adoption of similar provisions in CBCA and other statutes under which Canadian companies are formed.

Advisory vote on executive compensation

We believe the advisory vote on executive compensation should be mandated, at least for larger publicly-traded companies. This right gives shareholders a targeted and nuanced way to provide feedback to companies on a key issue. Internationally, a number of jurisdictions have mandated some form of "say-on-pay", including the U.S., the U.K. and Australia. Although more than 160 companies held advisory votes on a voluntary basis in 2015,⁵ we are concerned that Canada may be seen as lagging on this issue.

As the advisory vote is an agenda item and proposal at the annual meeting, it may be appropriate to address this issue through OBCA, which sets out procedure on proposals, voting and the conduct of annual meetings. In this case, we would like to see similar provisions in CBCA and other statutes under which Canadian companies are formed. If "say-on-pay" is not taken up within OBCA, we would welcome action on this matter by the Ontario Securities Commission (OSC) or by TSX.

Board diversity

Once again, we would like to commend the Government of Ontario for its role in initiating regulatory efforts on gender diversity of boards and senior management, leading to the adoption of diversity disclosure requirements by securities regulators that in practice apply to all large listed companies in Canada. It seems likely that these requirements will form the basis for regulation to operationalize the proposed diversity amendments to CBCA that are currently before Parliament. We believe there may be value in integrating the OSC diversity disclosure requirements to OBCA, as this could encourage other provinces to follow suit.

Our view has been that integrating diversity to the Canadian Securities Administrators' (CSA) corporate governance frameworks would allow the issue to be addressed within a context already familiar to boards and management of public companies, and would cover all larger TSX-listed companies. The rate of increase in the representation of women on boards in Canada has accelerated somewhat since consultation on the requirements first began. Nevertheless, according to 2016 research⁶ by the CSA into the disclosure of 677 companies, 45% still had no women directors; only 21% clearly disclosed the existence of a policy on board diversity; and only 9% had set targets for representation of women on the board. Although these statistics are improving, and the research excludes some diversity leadership companies whose year-end falls outside the scope of the study, progress remains slow.

Should diversity disclosure requirements be integrated to OBCA and CBCA, in both cases we suggest that provision could be made for a review if significant progress towards the achievement of actual gender diversity on boards and in senior management is not achieved within a reasonable timeframe.

⁵ Meridian Compensation Partners (2015). Client Update. <https://www.meridiancp.com/wp-content/uploads/2015-Say-on-Pay-Results1.pdf>

⁶ Canadian Securities Administrators (2016). CSA Multilateral Staff Notice 58-308 -Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20160928_58-308_staff-review-women-on-boards.pdf

The purpose of the corporation and the role of directors

We continue to believe that the purpose of the corporation and the role of directors should be articulated more clearly in OBCA and other corporate statutes, focusing on the imperative of creating sustainable value over the long term for the benefit of stakeholders, including shareholders. We do not think it is in the interest of companies or the province to allow the misapprehension to be perpetuated that the sole purpose and obligation of a publicly-traded company, and by extension the key duty of its directors, is to maximize the share price over the short term.

Section 134 (1) of OBCA states: *“Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”*⁷ Nowhere does OBCA state that the interests of shareholders are to be placed above all others. Legal precedents relating to the Canada Business Corporations Act (CBCA), which contains a very similar definition of the duty of directors, seem to support this interpretation. In Peoples Department Stores Inc. (Trustee of) v. Wise, the Supreme Court of Canada ruled: *“[I]t is clear that the phrase the ‘best interests of the corporation’ should be read not simply as the ‘best interests of the shareholders’... We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment.”*⁸ In BCE Inc. v. 1976 Debentureholders, the Supreme Court of Canada reiterated that the interests of stakeholders beyond shareholders might be taken into account, and also found that *“[w]here the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”*⁹

Although the current language of OBCA appears consistent with a stakeholder approach, and the Supreme Court rulings on CBCA cases appear to reinforce this interpretation of similar language, much discourse on the purpose of the corporation and the role of directors continues either to promote shareholder primacy, or to support managerial entrenchment at the expense of shareholders. We see value in a description of the duties of directors that is more specific, encompassing a long-term perspective and the need to consider the interests of a range of stakeholders. Once again, we believe there would be value in opening discussion on the purpose of the corporation and the role of directors not only under OBCA, but also CBCA and other statutes under which Canadian companies are formed.

Disclosure on strategic environmental, social and governance issues

It is critical to our investment process that listed companies should provide regular updates on environmental, social and governance (ESG) issues, as well as financial information. We are not alone in seeking this information. In 2013, 31% of Canadian assets were managed under some form of responsible investment mandate.¹⁰ Globally, an increasing number of investment institutions are

⁷ Government of Ontario. Business Corporations Act, R.S.O. 1990, c. B.16 <http://www.ontario.ca/laws/statute/90b16>

⁸ CanLII. Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68, [2004] 3 SCR 461.

<http://www.canlii.org/en/ca/scc/doc/2004/2004scc68/2004scc68.html>

⁹ CanLII. BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, [2008] 3 SCR 560.

<http://www.canlii.org/en/ca/scc/doc/2008/2008scc69/2008scc69.html>

¹⁰ Responsible Investment Association (2015). Canadian Responsible Investment Trends Report. https://riacanada.ca/wp-content/uploads/2015/01/RI_Trends_Report2015_EN.pdf

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adopting responsible investment practices and beginning to consider ESG risks and opportunities in their decision-making. Almost 1500 investment institutions representing assets of US\$60 trillion are signatory to the UN Principles for Responsible Investment, which include a commitment to advance ESG reporting.¹¹

Based on precedents in Canada and other jurisdictions, we see scope for some aspects of ESG disclosure to be mandated under Canadian corporate statutes, at least for larger companies. This would support responsible investment and wider sustainability objectives, while ensuring a level playing field between listed and non-listed companies. Many of Canada's largest publicly-traded companies already provide corporate responsibility reporting, or integrate corporate responsibility information to their annual report, on a voluntary basis. Corporations under the Bank Act, the Insurance Companies Act and the Trust and Loan Companies Act are already required to publish Public Accountability Statements including information on specified corporate responsibility matters.¹² Under the U.K. Companies Act, larger publicly-traded companies must publish an annual strategic report including information on a range of environmental, social and employee issues.¹³ In 2014 the European Union adopted a directive on disclosure of non-financial information that will apply to around 6000 of Europe's largest companies and groups, reporting from 2017 onwards.¹⁴

We suggest that approaches to advancing mandatory ESG disclosure could best be explored in close coordination with CSA, TSX and other Canadian jurisdictions.

Contact

If you have any questions regarding this letter, please do not hesitate to contact **Michelle de Cordova, Director, Corporate Engagement & Public Policy** (mdecordova@neiinvestments.com 604-742-8319).

Sincerely,
NEI Investments



John Kearns
Chief Executive Officer



Robert Walker
Vice President, ESG Services and NEI Ethical Funds

CC:

Board of Directors, NEI Investments
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¹¹ <http://www.unpri.org/about-pri/about-pri/>

¹² Public Accountability Statements (Banks, Insurance Companies, Trust and Loan Companies) Regulations SOR/2002-133. <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-133/FullText.html>

¹³ The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 <http://www.legislation.gov.uk/ukxi/2013/1970/contents/made>

¹⁴ European Commission (2014). Statement. [http://europa.eu/rapid/press-release STATEMENT-14-291_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-291_en.htm)

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