

March 14, 2008

M. Maurice Lalancette
Directeur général de l'encadrement du
secteur financier et des personnes morales
Ministère des Finances du Québec
8 rue Cook, 4e étage
Québec, (Québec) G1R 0A4

Dear M. Lalancette

Re: Submission in response to Reform of the Québec *Companies Act*,
Finances Québec Working Paper dated December, 2007

SHARE is a national, not-for-profit organization working with institutional investors to promote responsible investment practices through corporate engagement, research, education activities and advocacy. SHARE has been involved with consultations on reforms to the BCBCA (2000), the CBCA (2001), the ABCA (2003) and the OBCA (2006) as well as similar legislation in other jurisdictions. Our recommendations and comments set out below reflect SHARE's direct experience participating in corporate law reform efforts over the past several years.

We reviewed the Working Paper produced by Finances Québec with great interest and have the following recommendations to offer in response to the document.

1. Shareholder Proposals

General Recommendation: Enact provisions in the Québec *Companies Act* and its regulation(s) that will enable shareholders of public companies incorporated under the Act to file non-binding proposals.

We note that the Québec *Companies Act* (QCA) is the only statute of its kind in Canada that does not provide shareholders with the right to submit a non-binding proposal for inclusion in a company's annual shareholder meeting materials and proxy ballot.¹

¹ See *Bank Act* (Canada), s. 143; *Canada Business Corporations Act*, s. 137; *Alberta Business Corporations Act*, s. 136; *British Columbia Business Corporations Act*, ss. 187-191; *Manitoba Corporations Act*, s. 131; *New Brunswick Business Corporations Act*, s. 89; *Newfoundland and Labrador Corporations Act*, ss. 224-231; *Northwest Territories Business Corporations Act*, s. 138; *Nova Scotia Companies Act*, Third Schedule, s. 9; *Nunavut Business Corporations Act*, s. 138; *Ontario Business Corporations Act*, s. 99; *Saskatchewan Business Corporations Act*, s. 131 *Yukon Territory Business Corporations Act*, s. 138.

Shareholders of companies incorporated under the “management friendly”² Delaware Code also have the right to file shareholder proposals by virtue of Rule 14a-8 of the United States *Securities Exchange Act of 1934*. The shareholder proposal mechanism is therefore universally available under corporate law in Canada and United States with the sole exception of Québec.

Practical Implications of Shareholder Proposals

As indicated in your Working Paper, provisions of the QCA governing shareholder proposals exist, but are currently not in force. We recommend that you move forward with enacting provisions that will allow shareholders of companies incorporated under the Act to file non-binding proposals.

SHARE assists institutional investors in their efforts to engage public companies in dialogues regarding a broad range of environmental, social and corporate governance issues. In some instances, a company and a shareholder are not able to resolve an issue to their mutual satisfaction. Without a proposal mechanism, a shareholder involved in a failed dialogue has no efficient way to canvas the views of other shareholders on the matter of concern, and therefore neither the company nor the shareholder can put the matter to rest.

The level of vote support for a shareholder proposal provides the company and all its shareholders with a good sense of the relative merit of the position advocated by the shareholder who filed the proposal.

The proposal mechanism is almost universally available in Canadian corporations legislation, which reflects its effectiveness in addressing shareholder concerns when dialogue reaches an impasse. SHARE strongly recommends that the Government of Québec provide for shareholder proposals in its updated *Companies Act*.

Specific Parameters of Shareholder Proposal Provisions

For the purposes of our discussion and recommendations regarding the specific rules that govern shareholder proposals, we refer to sections 98.1 to 98.12 of the QCA. As noted in the Working Paper, these sections provide for a shareholder proposal mechanism, but are currently not in force.

Deadline for the submission of shareholder proposals

Recommendation: Establish the deadline for the submission of shareholder proposals with reference to the date of the previous Annual General Meeting.

² Finances Québec, Working Paper, p. 16.

Section 98.2 of the QCA is substantively similar to section 137(5)(a) of the CBCA, establishing the deadline for filing shareholder proposals with reference to the date the notice of the previous year's annual meeting was sent to shareholders. No other Canadian statute or regulation governing shareholder proposals uses this reference date. Other statutes and regulations use the previous annual shareholder meeting date as the reference date for filing shareholder proposals to appear on the following year's agenda. SHARE believes that date of the annual meeting of shareholders is the more appropriate and workable date of reference for filing a shareholder proposal.

The 2003 CBCA Regulatory Impact Analysis Statement³ noted that the use of the Notice of Meeting as a reference date for calculating filing deadlines would cause confusion, which could be avoided, it anticipated, by s.57(z.9) of the *Canada Business Corporations Regulations*. This requires corporations to provide the deadline for filing shareholder proposals for the following year in their management proxy circulars.

Since 2001, SHARE has noted significant non-compliance with s. 57(z.9). In addition, there is no fixed date upon which a company must send its shareholders a notice of annual meeting, and therefore the time afforded to a shareholder to file a proposal will vary considerably among corporate issuers. Use of the date that notice of the annual meeting is sent to shareholders incorporates unnecessary complexity and undesirable variability into the determination of a proposal submission deadline.

Definition of "shareholder"

Recommendation: Include "beneficial owner" in the definition of "shareholder" in the section governing individuals or institutions that may file a shareholder proposal.

We note that in section 98.1 of the QCA, the definition of "shareholder" for the purposes of identifying who may file a shareholder proposal does not include a beneficial owner of shares.

This provision is very outdated. Many investors do not hold equity or other securities directly. For example, shares that are purchased by a mutual, pooled or pension fund are commonly held by a custodian, and those bought by individuals are often held by a broker in street name. If beneficial holders are not included in the definition of "shareholder" for the purposes of filing a proposal, a significant proportion of shareholders will not have access to the proposal mechanism.

³ <http://www.ic.gc.ca/epic/site/cd-dgc.nsf/en/cs01381e.html>. Accessed March 12, 2008.

Jurisdictions that have amended their corporate legislation in recent years have each elected to include beneficial holders in the definition of shareholder.⁴

Minimum share and time-holding requirements

Recommendation: Apply no minimum share and time-holding requirements in the statute or regulations governing the filing of shareholder proposals.

A minority of Canadian statutory and regulatory shareholder proposal provisions apply minimum share and time-holding requirements to the filer or filers⁵. We note that in 2006, when Ontario finalized amendments to its *Corporations Act*, it considered but ultimately rejected the inclusion of holding requirements for shareholder proposals.

In addition, the inclusion of minimum holding and time requirements is unjustifiably discriminatory. These requirements divide the owners of corporations into two classes: those that have the right to place issues on the agenda of annual general meetings via proposals and those that do not. Further, a minimum share holding quantum (threshold?) set with reference to percentages of voting shares (i.e. the shareholder must have 1 percent of shares) means that a shareholder investing exactly the same amount of money in two corporations may have shareholder proposal rights in a smaller corporation and no such rights in a larger company. Similar objections can be made to the minimum time holding requirement.

Holding requirements undermine the cornerstone governance principle of the equality of all shareholders. The exclusion of some with an equity interest in a corporation from the opportunity to file shareholder proposals is inequitable.

Word limitations applicable to the proposal and/or supporting statement

Recommendation: Apply a reasonable word limitation to filers of shareholder proposals under the QCA, and apply this same limitation to the corporate response to each proposal in the proxy materials.

The British Columbia *Business Corporations Act* currently provides shareholders with the most liberal word limitation provision in Canada at a maximum of 1,000 words for a shareholder's proposal and supporting statement. A common but outdated approach is to impose a limit of 200 words for the supporting statement, but place no

⁴ CBCA s. 137(1); ABCA s. 136(1); BCBCA s. 187(1); OBCA s. 99(1); Bank Act s. 143(1).

⁵ CBCR s. 46; ABCR s. 18.1; BCBCA s. 187; Meetings and Proposals (Banks and Bank Holding Companies) Regulations to the Bank Act, s. 4(1).

limitation on the proposal itself. Recent amendments to corporate statutes and regulations in Canada have incorporated a total limit of 500 words for the proposal and supporting statement.

It is SHARE's view that, in the interests of fairness, the word limitation applicable to each shareholder proposal set out in proxy materials apply to the response of the corporation in those materials.

Grounds for the exclusion of a shareholder proposal

Recommendation: Incorporate reasonable grounds for the exclusion of a shareholder proposal into the QCA.

It is SHARE believes that the grounds for exclusion of a shareholder proposal set out in section 98.6 of the QCA are reasonable, provided that the vote thresholds required in order to resubmit a proposal that are ultimately established mirror those set out in the CBCA.⁶

Disputes regarding circulation of shareholder proposals

Recommendation: Adopt an administrative system for resolving disputes regarding circulation of shareholder proposals.

An efficient and effective mechanism for dealing with shareholder proposals requires a quick and inexpensive arbitral mechanism to mediate disputes between shareholders and management in cases where management refuses to circulate a shareholder proposal. Without such an alternative, a shareholder must resort to the courts and bear the associated financial burden in order to dispute a company's refusal to circulate a proposal. In practice, this has limited the ability of shareholders to exercise their rights and to participate fully in dialogues on corporate governance and corporate sustainability.

SHARE recommends the inclusion of an ad-hoc administrative review system in the QCA to deal with such disputes at minimal cost and with maximum effectiveness. This should be done in coordination with the federal government and other provinces. By working cooperatively to develop an ad-hoc panel to adjudicate disputes, we believe that a nationally harmonized framework can be implemented.

Limit on the number of proposals submitted

⁶ See CBCA s. 137(5)(d) and CBCR s. 51(1), (2). These provisions indicate that in order to resubmit a proposal within a five year period, it must receive the support of at least 3% of total shares voted on its first appearance on the ballot, 6% on its second appearance and 10% at its third appearance.

Recommendation: Eliminate the reference in QCA section 98.2 to a limitation on the number of proposals a shareholder may submit, as determined “by regulation of the Government”.

There are sufficient restrictions and requirements as to the timing and substance of a shareholder proposal set out above to encourage shareholders to file only proposals that they consider to be of genuine merit. An overall limitation to the number of proposals that a shareholder may submit is therefore not necessary or advisable.

2. Electronic Participation in Shareholder Meetings

Recommendation: Corporate legislation should allow for the participation of shareholders in shareholder meetings by electronic means, but not permit management to limit participation to this forum alone.

The advent of electronic communications technology should facilitate communication between directors, management and shareholders, not reduce it. The annual general meeting of shareholders is the sole opportunity for shareholders to meet management, directors and their fellow shareholders face-to-face to discuss the business and affairs of the corporation.

Thank you for the opportunity to comment on the Working Paper. Should you require any clarification of the points raised above or additional supporting information, please do not hesitate to contact the undersigned.

Sincerely,



Laura O'Neill CFA
Director of Law and Policy
SHARE