Canada Climate Law Initiative | L'Initiative canadienne de droit climatique

March 30, 2021

To: Corporations Canada
Innovation, Science, and Economic Development Canada
235 Queen Street, Floor 7
Ottawa ON K1A 0H5
ic.corporationscanada.ic@canada.ca

Re: Consultation on Bill C-97 an Act to implement certain provisions of amendments to the Canada Business Corporations Act concerning executive compensation and well-being of employees, retirees and pensioners.

Thank you for the opportunity to comment on the draft regulations for amendments to the *Canada Business Corporations Act* (*CBCA*),[1] aimed at encouraging corporate directors to take a comprehensive approach to assessing the long-term interests of the corporation. The Canada Climate Law Initiative is a collaboration of the faculties of law at the University of British Columbia and York University examining the legal basis for corporate directors, officers, pension fiduciaries, and asset managers to consider, manage, and report on climate-related financial risks and opportunities, advancing knowledge on effective governance. We work with over 70 Canadian Climate Governance Experts and 15 scholars across Canada, and are partners in the global Commonwealth Climate and Law Initiative.

We support Innovation, Science, and Economic Development's (ISED) efforts to bring transparency and more effective governance to federally-regulated companies. We support the amendments on disclosure of policies on say-on-pay, recovery of executive incentives, and policies that pertain to employees', workers' and pensioners' interests, as they align with directors' duties in the statute and at common law to act in the best interests of the corporation, "having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen."[2]

One technical point in your consultation document is that the proposed definition of pensioner should be clarified, as pension payments are rarely paid "from a corporation". We suggest defining pensioner as: "A person who receives regular payments from the assets of a fund accumulated in whole or in part from payments made by a corporation during that person's employment with the corporation, for the benefit of that person, or dependents of such a person receiving the payments after the spouse is deceased."

Our primary purpose in writing, however, is to recommend that the regulations also embed disclosure of climate-related financial risks pursuant to the 'environmental' part of the amendments to the *CBCA.* We believe that the federal government should be aligning with global efforts to report how climate-related risks are being managed if we are to continue to attract capital to Canada. Section 122 of the *CBCA* specifies:

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[1] *Canada Business Corporations Act, RSC 1985, c C-44,* as amended (*CBCA*).

[2] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 82. See also paras 66 and 81.

Duty of care of directors and officers
122 (1) Every director and officer of a corporation in exercising their powers and discharging their 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.

Best interests of the corporation
(1.1) When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors: (a) the interests of (i) shareholders, (ii) employees, (iii) retirees and pensioners, (iv) creditors, (v) consumers, and (vi) governments; (b) **the environment;** and (c) the long-term interests of the corporation.

[emphasis added]

As currently framed, the proposed regulation will enhance transparency in terms of the interests of shareholders, employees, retirees, and pensioners, but would benefit considerably from guidance on disclosure of corporate policies to identify and manage climate-related risks. Although climate change will have significant financial impacts over an extended time horizon, the risks require action in the short-term in order for directors to protect the long-term interests of the company and its stakeholders.

We recommend that the regulations direct *CBCA* corporations to disclose their policies and action plans to reduce greenhouse gas (GHG) emissions to net zero, including governance, risk management, strategy, targets, and metrics measuring progress, as recommended by the Taskforce on Climate-related Financial Disclosures (TCFD). To that end, we made the following recommendation to Deputy Prime Minister Freeland in February 2021:

1. **Adopt an omnibus regulation requiring disclosure of governance, risk management, strategy, and targets and metrics regarding climate-related risks and opportunities by federally-regulated companies, publicly-accountable enterprises, and Crown corporations that have commercial or investment functions.**

We attach the full submission for your information. The four factors – governance, risk management, strategy, and targets and metrics – are central to effective governance frameworks. By expressly adopting this four-part framework, the government will encourage effective disclosure of companies' strategies to move to a sustainable, net-zero carbon economy. The framework allows corporations to transition from qualitative disclosure to meaningful management of the risks and opportunities that the transition to net-zero emissions presents. Understanding, evaluating, and including climate risks and opportunities in a company's long-term strategy is part of the fiduciary obligation of corporate directors, as set out in an authoritative legal opinion by Hansell LLP.

The most effective means of adopting climate-related disclosure for *CBCA*-registered companies is a regulation to ensure consistency and transparency across multiple federally-regulated entities. *CBCA* companies are already required to report their financial statements to investors, and the existing regulations can be revised to embed the four-part framework. In this way, the federal government will be able to track progress towards Canada's goal of net-zero GHG emissions and will have the flexibility to refine the regulation as climate-related disclosure and accounting frameworks are tested and enhanced.

However, as an absolute minimum measure, the government's current draft regulations in respect of policies on recovery of incentives and employee/retiree/pensioner welfare should add mirror minimum requirements for the environment, encouraging companies to adopt policies expressly related to governance of climate change. Specifically, mirror provisions would state:

> The prescribed information should indicate whether or not the corporation has adopted a written policy relating to identification and management of climate-related risks and other environmental matters, and, if it has not adopted a written policy, the reasons why it has not adopted a policy;
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> if the corporation has adopted a written policy on climate action and protection of the environment, provide:
>
> - a summary of that policy with:
>   - the policy's objectives and key provisions,
>   - the various elements of the policy covering climate action towards net-zero GHG emissions,
>   - the extent to which the policy addresses governance, strategy, risk management, metrics and targets to reduce GHG emissions to net zero,
>   - a summary of the activities taken pursuant to the policy,
>   - a description of the corporation's progress in achieving the objectives of the policy,
> - an indication of whether or not the corporation measures the effectiveness of the policy and, if so, a description of how.

Given the urgency of climate change, we strongly recommend mandatory disclosure, but even the suggested mirror provisions would advance climate governance. As the Supreme Court of Canada recently held in the *Reference re Greenhouse Gas Pollution Pricing Act*:

> Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions.[3]

Institutional investors are increasingly expecting corporate boards to provide enhanced disclosure with respect to how they are exercising appropriate oversight of material environmental, social and governance (ESG) factors, including climate-related risks, with a view to creating sustainable long term value.[4] The proposed amendments to the *CBCA* regulations offer Canada an opportunity to incentivize corporations to take meaningful action on reduction of carbon emissions and effective corporate governance of climate-related risks and opportunities.

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[3] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para 2.

[4] See for example, United Nations Principles of Responsible Investment, *The Investor Guide to Climate Collaboration: From COP26 to Net Zero* (8 March 2021), The Investor Guide to Climate Collaboration: From COP26 to Net Zero | Reports/Guides | PRI (unpri.org); Marcia Moffat Chair, Canadian Coalition for Good Governance, CCGG, ICGN Member Consultation Revisions to ICGN Global Governance Principles Invitation to Comment (29 January 2021), CCGG-Comment-ICGN-Governance-Principles-Update-Final (1).pdf; Climate Action 100+ in which 545 investors with $52 trillion AUM are engaging the world's largest emitting companies to take action on climate change, Climate Action 100+; Partnership for Carbon Accounting Financials, The Global GHG Accounting and Reporting Standard for the Financial Industry | PCAF (carbonaccountingfinancials.com); Net Zero Investment Framework, Paris Aligned Investment Initiative – IIGCC; ICGN, Global Governance Principles (revised 2021), ICGN Global Governance Principles (flpbks.com).

We also attach, for your information, a recent report we wrote on the Canadian insurance sector and climate-related financial risks, which highlights in some depth the risks faced by companies in that sector and the need more generally for effective governance and disclosure of corporate actions to move to net-zero emissions.

Sincerely,

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CCLI acknowledges that it is situated on the traditional, ancestral, and unceded territory of the xwməθkʷəy̓əm (Musqueam peoples).