Memorandum

To: Robert G. Eccles, Professor of Management Practices, Harvard Business School

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Re: Information for Canada Concerning Legal Perspectives on an Annual Board “Statement of Significant Audiences and Materiality”

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The following is an academic contribution of the authors in response to a questionnaire developed by Robert G. Eccles, Professor of Management Practices at the Harvard Business School, to assist Professor Eccles in analyzing the viability of an Annual Board Statement of Significant Audiences and Materiality. The information provided is general in nature and based solely on the laws of Canada. It is neither legal advice nor a full and comprehensive legal report on the subjects covered.

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For the purposes of the responses set forth below, we have generally limited our response, unless otherwise noted, to corporations incorporated under the Canada Business Corporations Act, R.S.C. 1985, c. C-44 (the “CBCA”), which permits the incorporation of Canadian federal limited liability corporations. Most provinces (except Québec) have similar “modern” corporate statutes pursuant to which Canadian provincial corporations can be incorporated. Québec, being a civil law jurisdiction, has a different legislative regime and corporate statute which will not be addressed herein.

SETTING THE LEGAL LANDSCAPE:

1. Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether its primary duty is or is not to shareholders over all other stakeholders.

For boards of directors of CBCA corporations, the CBCA sets out the statutory duties of the directors of the corporation. A board’s role is to manage, or to supervise the management of, the business and affairs of the corporation.
In the performance of this role, the directors have a “duty of care” and a “fiduciary duty”:

- The duty of care being a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

- The fiduciary duty being, to act honestly and in good faith with a view to the best interests of the corporation.

In the case of BCE Inc. v. 1976 Debentureholders (the “BCE Case”), the Supreme Court of Canada considered the duties of the directors to the corporation and described it as a “broad, contextual concept”. The Supreme Court of Canada held that the fiduciary duty of the directors is not confined to short-term profit or share value and that where the corporation is an ongoing concern, its directors must look to the long-term interests of the corporation. In this regard, the Supreme Court of Canada stated that directors “acting in the best interests of the corporation” may be obliged to consider the impact of their decisions on corporate stakeholders, not just shareholders.

REGULATORY FRAMEWORK:

2. **To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?**

The Canadian legal system is based on the English common law in all provinces except Québec.

Federal statutes based on common law are applicable and in force in Québec. However, the legal system in Québec is based on the French civil law system.

3. **Are corporate/securities laws regulated federally/nationally, provincially or both?**

Corporate law in Canada is regulated at both the federal and provincial/territorial levels. Accordingly, corporations may be incorporated provincially, territorially or federally. Securities laws are regulated at the provincial/territorial level.

4. **Who are the government corporate/securities regulators and what are their respective powers (in summary only)?**

The thirteen securities regulators in Canada – ten provincial and three territorial – derive their power from statutes and generally have the power to make and to enforce rules and standards of conduct that apply to individuals and firms that sell securities and provide advice in the subject province or territory, public companies, investment funds and marketplaces, as well as overseeing activity within the capital markets through a comprehensive compliance and enforcement program. They are the:

- British Columbia Securities Commission
- Alberta Securities Commission
The Ontario Securities Commission (the “OSC”) regulates Ontario’s capital markets and has broad powers to enforce the Securities Act (Ontario) and the Commodity Futures Act (Ontario). It also investigates allegations of misconduct in Ontario’s capital markets. Enforcement staff pursues individuals and companies alleged to have perpetrated fraud and other misconduct in administrative proceedings before the Commission tribunal and quasi-criminal matters before the Ontario Courts of Justice.

In OSC administrative proceedings, the tribunal can impose monetary sanctions, order individuals firms to disgorge ill-gotten gains and ban individuals from trading or from leadership roles either temporarily or permanently, among other sanctions.

In quasi-criminal proceedings, the Courts can impose jail sentences for violations of the Securities Act (Ontario) and breaches of Commission orders, make orders for interim relief, including freeze directions for preservation of property, for appointment of a receiver, and orders for compensation restitution.

The OSC may take other actions, including:

- conducting hearings on other regulatory matters, such as takeover bids and reviews of decisions made by OSC staff, self-regulatory organizations, exchanges and clearing agencies;
- issuing warning letters;
- requiring undertakings relating to future conduct;
- requiring changes to disclosure documents or marketing materials;
- issuing management cease trade orders;
- providing staff guidance or notices; and
• initiating policy changes to address any identified gaps in regulation.

Efforts by the federal government to establish a national securities regulatory system were complicated and delayed by a Supreme Court of Canada decision in late 2011, which determined that a then-proposed federal statute governing securities was unconstitutional. Together with the federal government, British Columbia, Ontario, New Brunswick, Saskatchewan, Prince Edward Island and the Yukon are currently pursuing a co-operative capital markets regulatory system, and have published draft legislation and regulations in this regard.

5. **Does the jurisdiction have a stock exchange(s)?**

Yes. The Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSXV) are the two major Canadian public stock exchanges. The TSX is Canada’s senior equities market, while the TSXV is a junior listings market. Lately, there have also been an increasing number of junior issuers listing on the Canadian Securities Exchange (CSE).

**INCORPORATION AND LISTING:**

6. **Do the concepts of “limited liability” and “separate legal personality” exist?**

The concepts of “limited liability” and “separate legal personality” do exist in Canada. A CBCA corporation has the capacity and, subject to the Act, the rights, powers and privileges of a natural person. It can own property, carry on business, borrow, lend, sue and be sued. Once incorporated, a CBCA corporation’s legal status as an active corporation will continue until it is dissolved, discontinued, amalgamated with another corporation, or bankrupt. Shareholders of a CBCA corporation do not own the business or assets of the corporation and are generally not personally responsible for its debts and liabilities unless they expressly agree to do so. Their liability is limited to their investments in the shares of the corporation. The circumstances in which shareholders can become personally liable generally relate to malfeasance or fraud by the shareholders. These circumstances are extremely fact specific. For example, a court will “pierce the corporate veil” when a corporation is incorporated for an illegal, fraudulent or improper purpose and, if when incorporated, those in control expressly direct a wrongful thing to be done.

7. **Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company’s social or environmental impacts, or to respect its stakeholders?**

Neither incorporation nor listing on the TSX or TSXV require recognition by the corporation or its directors of a duty to society, nor do they impose any legally enforceable obligation to take into account the corporation’s social or environmental impacts.

8. **Do any stock exchanges have a responsible investment index, and is participation voluntary?** (See e.g. FTSE4Good, Dow Jones Sustainability Index, the Johannesburg Stock Exchange’s Socially Responsible Investment Index.)
The TSX has the S&P/TSX 60 Environment, Social and Governance (ESG) Index. This index is designed to track the performance of the constituent companies of one of the S&P/TSX headline indices, the S&P/TSX 60. The index combines the experience of an established index provider with the expertise of a specialist in sustainability investing to provide investors with objective investible benchmarks for managing their sustainability investment portfolios. The TSXV does not have a responsible investment index.

**DIRECTORS’ DUTIES**

9. **To who are directors’ duties generally owed?**

The directors’ duties are owed to the corporation, but directors may take into account the interest of shareholders, employees, creditors, consumers, governments and the environment.

10. **What are the duties owed by directors – please state briefly. Please indicate if there are express or implied duties to avoid damage to the company’s reputation?**

Directors owe the following duties: The duty to manage; the fiduciary duty of loyalty and good faith; and the duty of care, diligence and skill. More specifically:

- the directors have the duty to manage, or supervise the management of, the business and affairs of a corporation; and.
- in exercising their powers and discharging their duties, every director 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.

It might be reasonable, in certain circumstances, to interpret the duty to act in the best interests of the corporation as a duty to avoid damage to the corporation’s reputation.

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3 [https://www.jse.co.za/services/market-data/indices/socially-responsible-investment-index](https://www.jse.co.za/services/market-data/indices/socially-responsible-investment-index)
11. More generally, are directors required or permitted to consider the company’s impacts on non-shareholders, including impacts on the individuals and communities affected by the company’s operations? Is the answer the same where the impacts occur outside the jurisdiction? Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006, and in particular, ss. (1)⁴)?

In the BCE case, the Supreme Court of Canada stated that “in considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions”. It also noted that courts should give deference to the business judgment of directors who take into account these stakeholder interests, as reflected by the business judgment rule. That being said, the Supreme Court of Canada left no doubt that the directors owe a fiduciary duty to the corporation, and only to the corporation.

As noted above, directors are permitted to consider the corporation’s impacts on non-shareholders, including impacts on the individuals and communities affected by the corporation’s operations, when determining what is in the best interests of the corporation. The geographic location of these impacts, whether they be inside or outside the corporation’s jurisdiction of incorporation, may be relevant but jurisdiction is not determinative. Directors are not precluded from considering impacts on non-shareholders resulting from the actions or inactions of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction of incorporation.

12. If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to balance different factors including such impacts? What, additional liabilities, if any, do the board or individual directors assume in exercising such discretion?

The directors may consider the interests of stakeholders in their exercise of the “business judgment” rule. In the course of such consideration, the directors do have full discretion in determining how to balance different factors including such impacts, provided that they are fulfilling their fiduciary duties as directors when exercising such discretion.

13. What are the legal consequences for failing to fulfill any duties described above; and who may take action to initiate them? What defenses are available? Can these issues given rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its actions?

**Oppression Remedy**

Directors may face an action under the “oppression” remedy in the CBCA if the powers of the directors are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer. The remedies available include:

a) an order restraining the conduct complained of;
b) an order appointing a receiver or receiver-manager;
c) an order to regulate a corporation’s affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
d) an order directing an issue or exchange of securities;
e) an order appointing directors in place of or in addition to all or any of the directors then in office;
f) an order directing a corporation, in certain circumstances, or any other person, to purchase securities of a security holder;
g) an order directing a corporation, in certain circumstances, or any other person, to pay to a security holder any part of the moneys that the security holder paid for securities;
h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
i) an order requiring a corporation, within a time specified by the court, to product to the court or an interested person financial statements in the form required under the CBCA or an accounting in such other for as the court may determine;
j) an order compensating an aggrieved person;
k) an order directing rectification of the registers or certain other records of a corporation;
l) an order liquidating and dissolving the corporation;
m) an order directing an investigation under Part XIX of the CBCA to be made; and
n) an order requiring the trial of any issue.

**Derivative Action**

To the extent that a breach of director’s duties has caused harm to the corporation itself, a derivative action could be brought in the name of the corporation. Such an action may only be brought with leave of the court and requires, inter alia, that the action appears to be in the interests of the corporation or its subsidiary that the action be brought, persecuted, defended or discontinued.
Defences

Among defences available in response to an allegation of a breach of directors duties, would be the directors’ exercise of their business judgment – i.e. reliance on “business judgment” rule. This is, in many cases, the strongest and most comprehensive defense of an allegation of a breach of director’s duties in making decisions. In the BCE case, the Supreme Court of Canada made it clear that the “business judgment rule” accords deference to a business decision, so long as it lies within a range of reasonable alternatives”. It reflects the reality that directors, who are mandated under the CBCA to supervise or manage the corporation’s business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders’ interests, as much as other directorial decisions.

Under Canadian case law, courts will look to see that directors have made a reasonable decision, not a perfect decision. Provided the decision is within a range of reasonableness, the view is that the court ought not to substitute its opinion for that of the board even though subsequent events may cast doubt on the board’s determination.

Directors will not be held to be in a breach of the duty of care if they acted prudently and on a reasonably informed basis.

These are the primary causes of action pursuant to which a stakeholder can exert pressure on a corporation. There are other regulatory avenues, for example, where a public company director has breached an obligation imposed by applicable securities legislation, where a securities commission may investigate and seek to pursue a remedy under applicable securities legislation.

14. Are there any other directors’ duties that are relevant to the interests of stakeholders?

Yes. Directors have specific statutory duties, obligations and liabilities under a variety of employment, environmental, taxation and other Canadian federal and provincial statutes including securities legislation.

15. For all of the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures? What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?

Two tier board structures do not exist under the CBCA. Senior management who serve as officers of the corporation have the same fiduciary duties and duty of care under the CBCA as directors have.
REPORTING

16. Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary.

Private corporations are not required to disclose the impacts of their operations, including stakeholder impacts, on non-shareholders.

Public companies in Canada are required to disclose impacts of their operations on non-shareholders, as well as any action taken or intended to address those impacts, to the extent that such information is material. In effect, the question is whether such an impact would likely be considered to be material in relation to a reasonable investor’s decision of whether or not to buy, sell or hold securities of the issuer. To provide guidance to reporting issuers (other than investment funds) on existing continuous disclosure requirements relating to environmental matters under securities legislation, the Ontario Securities Commission published CSA Staff Notice 51-333 Environmental Reporting Guidance October 27, 2010. Voluntary disclosure of impacts of operations on non-shareholders is not prohibited under Canadian law.

Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

The extractive sector is subject to regulatory standards for compliance and transparency. In Canada, the Extractive Sector Transparency Measures Act (the “ESTM Act”), effective since June 1, 2015, now requires extractive companies to publicly report any payment exceeding $100,000 made to a provincial, federal or foreign government, or to a local community. Under the ESTM Act, these annual reporting requirements apply to companies listed on a Canadian stock exchange or having a place of business in Canada if they meet at least two of the three following conditions: (i) own at least CAD$20 million in assets; (ii) generate at least CAD$40 million in revenue; (iii) employ an average of at least 250 workers. The ESTM Act applies to all companies involved in exploration, development, extraction activities or in the acquisition of mining titles.
17. Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

Canadian public company legal reporting obligations required under applicable securities legislation would not be dependent upon the jurisdiction in which the impact occurs, and possibly could extend to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction of incorporation.

18. Who must verify these reports; who can access reports; and what are the legal or regulatory consequences of failing to report or misrepresentation? Is there a regulator tasked with investigating complaints of misreporting?

All reporting required to be made under applicable securities legislation can be viewed by the public. Failure to comply with applicable securities legislation may result in fines, imprisonment and regulatory sanctions depending on a number of factors including the specific provision or obligation with which the accused failed to comply, etc.

19. What is the external assurance regime for reporting on a company’s impacts on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance.

There is no mandatory external assurance regime to be used for reporting on a public company’s impacts on stakeholders.

STAKEHOLDER ENGAGEMENT

20. Are there any restrictions on circulating shareholder proposals that deal with impacts on non-shareholders, including stakeholder impacts?

There are no such restrictions on the circulation of shareholder proposals that deal with impacts on non-shareholders, including stakeholder impacts. Shareholders holding voting shares equal to 1% of the total number of outstanding voting shares or whose fair market value is at least CAD$2,000 are entitled to submit shareholder proposals. However, a CBCA corporation is not required to include a proposal or a supportive statement of the person who submitted the proposal in the information circular for a meeting of shareholders if it clearly appears (i) that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders, or (ii) it clearly appears that the proposal does not relate in a significant way to the business and affairs of the corporation.
21. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is legal duty that pension funds owe with regard to investment decisions in this regard?

How does the legal duty of the fund align with term and contractual performance criteria of fund managers – does this facilitate or deter consideration of such impacts?

Yes, in certain limited circumstances. For example as of January 1, 2016, administrators of registered pension plans in the Province of Ontario must include in their Statements of Investment Policies and Procedures a statement about whether environmental, social and governance factors are incorporated into the plan’s investment policies and procedures, and, if so, how have they been incorporated.

For example, the Ontario Pension Benefits Act provides that the administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person. As well, the administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator’s profession, business or calling, ought to possess.

The Canadian Association of Pension Supervisory Authorities has published “Pension Plan Governance Guidelines” to assist pension plan administrators in fulfilling their governance responsibilities by achieving and maintaining good governance practices.

The plan administrator has fiduciary and other responsibilities to plan members and beneficiaries and may also have fiduciary and other responsibilities to other stakeholders. The plan administrator and delegates must act in good faith and in the best interests of plan members, beneficiaries and other stakeholders of the pension plan when carrying out their fiduciary responsibilities. However, in this context, “stakeholder” generally means a party who has an interest in decisions and actions about the plan. It includes plan members and beneficiaries, and may include others who may be entitled to plan benefits in circumstances such as marriage breakdown.

22. Can non-shareholders address companies’ annual general meetings? What is the minimum shareholding required for a shareholder to raise a question at a company’s AGM?

No, non-shareholders cannot address companies’ annual general meetings. The minimum shareholding required for a shareholder to raise a question at a company’s annual general meeting is one share.
OTHER ISSUES OF CORPORATE GOVERNANCE

23. Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the UN Global Compact, the OECD Guidelines for Multinational Enterprises etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?

Yes, in certain circumstances. For example, in the extractive industries, Canadian corporations are encouraged to participate in “Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad” pursuant to which corporations are to align their practices the following international guidance:

- OECD Guidelines for Multinational Enterprises.
- Voluntary Principles on Security and Human Rights.
- International Finance Corporation’s Performance Standards on Social & Environmental Sustainability.
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.
- Global Reporting Initiative.

24. Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?

There are no laws in Canada that would impose a requirement to have a particular stakeholder constituency represented on the board of a CBCA corporation. However, generally 25% of the directors must be resident Canadians.

25. Are there any laws requiring gender, racial/ethnic, religious or other stakeholder representation; or non-discrimination generally, on company boards?

The CBCA does not impose any such mandatory representation or non-discrimination requirements. In 2014, the securities regulatory authorities in the provinces of Manitoba, Newfoundland and Labrador, New Brunswick, Ontario, Québec, Nova Scotia and Saskatchewan, and the territories of Yukon, Nunavut and Northwest Territories implemented amendments to National Policy 58-101 Disclosure of Corporate Governance Practices that require non-venture issuers to disclose on an annual basis:
- the number and percentage of women on the issuer’s board of directors and in executive officer positions;
- policies relating to the identification and nomination of women directors;
- consideration of the representation of women in the director identification and nomination process and in executive officer appointments; and
- any targets for women on boards and in executive officer positions.

In the Province of Québec, there is a law that requires that 50% of the directors of Québec Crown corporations be women.

26. In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups? Are there any serious proposals to impose such responsibility?

Generally, as noted above, CBCA corporations have separate legal existence and personality. As such parent corporations generally are not responsible for the acts, omissions, liabilities and obligations of their subsidiaries. Absent a proven agency relationship between a parent corporation and a subsidiary or conduct of a nature supporting a decision by a court to “pierce the corporate veil”, the foregoing will govern. In addition, in considering the liability of a Canadian parent company for the impacts of a foreign subsidiary or stakeholders, in a recent interlocutory proceeding, an Ontario court refused to strike out a claim by Guatemalan mine workers against the Canadian parent company of a Guatemalan mine operator. The claim relates to human rights abuses which are alleged to have occurred at the mine site in Guatemala. The Ontario Court ruled that the plaintiffs had pleaded all of the material facts required to attempt to pierce the corporate veil and to establish the claim of direct negligence against the parent corporation and it was not plain and obvious that the claims would fail. The actions have been allowed to proceed against the parent and its subsidiaries in the Ontario courts.
27. Are you aware of any incoming law or proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.

We are not aware of any incoming law or proposals that would be relevant to the issues raised in this questionnaire.