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Waitzer, Sarro – Corporate Law Reform: Focusing on Issues that Matter

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Intelligence MEMOS

From: Edward Waitzer and Douglas Sarro

To: The Hon. Navdeep Bains, Minister of Innovation, Science, and Economic Development

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Re: **Corporate Law Reform: Focusing on Issues that Matter**

A striking feature of corporate governance law reform is the steady flow of new controversies and consequential regulatory proposals.

Corporate law has spawned a governance reform industry that has become adept at feeding itself, most often with regulatory initiatives that are, at best, symbolic – as outlined by Marcel Kahan and Edward Rock, they certainly cannot be explained by their relevance to improving either corporate governance or performance.

Historically, such reforms have been effected through regulatory policy or "soft law." Actually, amending corporate (and other commercial) law statutes in Canada has been a rare occurrence, as there tends to be little political currency in such efforts.

The current federal government has proven to be an exception to the rule when it comes to amending the *Canada Business Corporations Act* (CBCA), having done so three times over its mandate.

The latest initiative was embedded in Bill C-97, the sprawling budget implementation bill that was the last legislation out of the Senate before the pre-election recess. It amends the CBCA to encourage directors to consider the interests of certain prescribed stakeholders, the environment and the long-term interests of the corporation. While well-intentioned, it may have the opposite effect.

The amendment appears to be born out of a single sentence in a consultation document focused on enhancing retirement security, and is aimed at codifying an influential 11-year-old Supreme Court of Canada decision, *BCE Inc. v 1976 Debentureholders*. That ruling said directors owe their statutory duty of loyalty to the corporation itself and that, in considering the best interests of the corporation, the board may consider the impact of corporate decisions on "shareholders or particular groups of stakeholders," including, among others, "employees, suppliers, creditors, consumers, governments and the environment" to ensure that they are treated fairly.

The government has not articulated why its amendment is necessary or how it clarifies the *BCE* decision, which has been frequently applied by the courts in the last decade. Regrettably, it is unlikely to have that effect.

While the Supreme Court viewed the long-term interests of the corporation as an essential element of directors' duties, the amendment appears to make such consideration permissive. In addition, by specifying certain types of stakeholders whose interests' directors may consider, the amendment risks relegating other stakeholders to a lesser status.

Why the government chose to step back from these two clear requirements set out by the court is unclear and, most likely, unintended. Both concerns would almost certainly have surfaced in a more robust consultation process – as opposed to introducing it as part of an omnibus budget bill where it was unlikely to receive much attention.

Another consequence of little consultation is a lack of attention to nuances and new ideas. We recently outlined one statutory amendment that would help codify the *BCE* decision.

In that decision, the court was focused on the fair resolution of conflicting interests in the context of the CBCA's oppression remedy. It characterized the remedy as giving the courts "broad, equitable jurisdiction to enforce not just what is legal but what is fair." The oppression remedy has been widely recognized as one of the broadest and most open-ended in the common law world, allowing certain corporate stakeholders to seek relief for breaches that amount to "oppression," "unfair prejudice" or "unfair disregard" of their interests or reasonable expectations. By definition, "reasonable expectations" means something more than the current law. As the court noted in *BCE*, reasonable expectations "look … beyond legality to what is fair, given all of the interests at play" to address conduct that is "wrongful, even if it is not actually unlawful."

It has long been recognized that the statutory language describing which stakeholders can access the remedy is muddled. While the definition of "complainant" is open-ended, the wording suggests that the harm complained of must be suffered by a "security holder, creditor, director or officer" of the corporation.

A simple fix would be to replace the words "security holder, creditor, director or officer" with the word "stakeholder" – an open-ended concept that has been judicially defined in the *BCE* decision. This would supplement the "rights" created by *BCE*, thereby unlocking an effective accountability mechanism.

The government (or its successor) should reconsider its recent amendment and use the opportunity to solve an old problem by providing a more effective remedial discipline. This would better enable the Supreme Court's articulation of corporate purpose to continue to adapt over time to reflect evolving social norms and expectations about the proper role of the corporation in society.

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