Proposals for modifying the law

These proposals were developed with the aim of affording a better protection to the interests of the small shareholder. We propose three principal means of reaching this goal: strengthening the board of directors, promoting a greater transparency on the part of management and facilitating shareholder participation in the running of their company.

The Board of Directors

The shareholders elect a Board of Directors which, in the name of and on behalf of the shareholders, is responsible for supervising the activities of, motivating and evaluating management as well as deciding on the strategic orientation of the company. The objective of the following proposals is to augment the effectiveness of the board in carrying out these responsibilities.

Proposal No. 1

The designation of the Chairman of the Board should be made from those members of the board who are not a member of company personnel. This measure would apply only to companies who have been trading shares on the stock exchange for more than five years and wherein no one shareholder holds more than 10% of voting stock.

The aim of this proposal is to ensure that the Board of Directors is able to operate entirely independently from management. The Toronto Stock Exchange report on corporate governance (the Dey Report) judges that this independence is crucial to adequate corporate governance since one of the important roles of the Board of Directors is to appoint and to supervise members of management. While it stopped short of making a firm recommendation the Dey Report did "express a preference for the board appointing a non-executive chair."

In its report on corporate governance (the Kirby Report) the Senatorial Committee on Banking and Commerce was convinced that the principle of the separation of roles was well founded and stated, "Allowing the same person to act as Chairman of the Board and Chief Executive Officer will inevitably lead to a conflict in the exercise of this person's responsibilities (page 41)".

It is acknowledged that the interests of a manager who acts as an appointee and those of the shareholder (who appoints) are, on some occasions, divergent ("agency theory"). Keeping this in mind, the naming of a member of management as the chairman of the council which is responsible for regulating management in the name of the shareholders, is not the most effective way of assuring that the board adequately fulfills its role.

The five year clause is a means of exempting growing companies who choose to take an uncommon direction.

Proposal No. 2

Make a place for the small shareholders on the board of directors of joint-stock companies.

The existing dispositions (article 137 (4a) of the Business Corporations Act and article 143(4) of the Bank Act) limit the right of proposing candidates for election as administrators to shareholders who hold at least 5% of shares or, to a category of share which allows a vote at a meeting during which proposals are to be presented. This restriction, in conjunction with the system of votes by power of attorney in favor of management, eliminates de facto the possibility of the small shareholder reaching the board room of a joint-stock company. If we consider that in the majority of joint-stock companies, the small shareholder collectively represents a non-negligible portion of total shares, it would seem equitable that representatives of this category be in a position to sit on the board. Aside from the principle of a better equity in its representation, such a presence could change the chemistry of the board in favor of a greater transparency and a more marked concern for the interests of the small shareholder.

Putting this proposal into effect would require defining "small shareholder" and developing a mechanism which would allow the election, by this group, of one of its members to the board of

directors. The determination of the system which would best attain this objective and thereby make our boardrooms more representative is a task which would be best left to the representatives of our legislative assembly.

Proposal No. 3

Ineligibility of a major service supplier to a seat on the board of directors.

In a special edition of the magazine Finéco devoted to corporate governance, Daniels and Morek reveal that "If external administrators in Canada seem to have little influence it is because they are not necessarily independent." The authors also point out the gray area in the law concerning the definition of "external".

The aim of this proposal is to assure the independence of members of the board in their dealings with company management. The Dey Report, while conceding that the absence of a business relationship between a board member and the company is not sufficient to ensure independent judgment, recommends that boards of directors be made up of a majority of members who have no ties to the company (recommendation 5.8). The report defines an independent member as one who is independent with regards to company management and free of all business ties which could affect his capacity to act in the best interests of the company (and therefore its shareholders).

Proposal No. 4

The obligation on the part of the company to divulge all commercial ties, direct and indirect between itself (and/or its principle shareholders) and its administrators.

Such an obligation would afford a greater degree of transparency and would allow shareholders to better evaluate the independence (and therefore the ability to represent them) of all administrative candidates.

Proposal No. 5

A limit of the term of office of all board members, other than management members, to a maximum of ten years.

This proposal aims at promoting the renewal of both men and ideas on the board of directors and to avoid a club-like atmosphere of career board members. A ten year maximum would allow each member to contribute fully to company affairs and yet promote an orderly renewal of board membership. This orderly renewal would also afford a widening of the base for the selection of new administrators.

Shareholder participation

Existing laws and commercial practices act as a braking mechanism to the participation of shareholders in the life the companies of which they are the owners. The shareholders of major corporations are often considered as simple sources of revenue that the professional managers prefer to keep at a safe distance. The small shareholder is more and more informed on economic matters and their contribution to the prosperity of large corporations and to society must not be underestimated. Porter underscored that the complacent atmosphere that reigns within Canadian firms does not promote the pursuit of efficiency. Porter referred to the availability of natural resources, an internal atmosphere which is not very demanding, weak internal competition, and inter-provincial barriers. The tendency towards a world marketplace demands a change of mentality. We feel that shareholders who are more aware, more vigilant and more influential will act as catalysts contributing to a higher quality of management within Canadian companies. The proposals which follow are intended to promote shareholder contribution in the growth of our Canadian companies.

Proposal No. 6

Make the list of shareholders available to the company.

The majority of shares are held in trust by brokers and it is the broker who appears as the registered shareholder. These intermediaries are the only ones who have the list of the actual shareholders and the company, not knowing the names of its true owners, cannot communicate directly with these unlisted shareholders. This measure

would facilitate communication between the company and its shareholders.

Proposal No. 7

Extend to the true shareholders (non-registered), the right to deposit proposals for debate at shareholder meetings.

The Kirby report recommends improving communications between shareholders so that they may freely debate company affairs. Existing law (the power of attorney rules), by favoring management and limiting communication between shareholders, is an obstacle to the active participation of shareholders in the affairs of their company. We feel that the law should facilitate the deposition by shareholders of proposals intended for debate at shareholder meetings and ease the rules governing communications between shareholders. Whether the shareholder be the one listed or the actual owner is a purely administrative distinction that does not justify the segregation sanctioned by present law concerning the right of these shareholders to participate in the affairs of their company.

Proposal No. 8

Modification of paragraph 5 of article 137 of the Business Corporations Act and article 143 of the Bank Act to remove the phrase "(...) in order to serve the ends of economic, political, racial, religious, social and like orders."

The justification for this proposal is in the fact that the above reasons contravene the Charter of Rights and Liberties, and, by the abuse that they allow. Suffice it to recall that their use by three well reputed law firms representing banks in order to justify the refusal to include certain proposals on the management circular in the Michaud case was judged abusive by the courts in two separate instances.

The important criteria upon which should be based the decision to include a proposal made by a shareholder on the management circular or not, is whether or not it concerns the operations of the company. We recommend that the above articles be amended to reflect this proposal.

Proposal No. 9

Delegation of the responsibility of judging the appropriateness of a management decision to reject shareholder proposals to an administrative committee.

One must only recall the numerous measures that shareholders Verdun and Michaud were forced to take before the courts in order that, in the case of Michaud, Canadian banks be forced to include discussions, during the annual shareholders meeting, which were aimed at improving practices in corporate governance. This proposal aims at reducing the necessary steps and the costs that shareholders most assume when they feel that their rights have been encroached upon. This committee, which could be responsible to the Superintendent of Financial Institutions, would study the nature of the rejected proposal as well as the reasons for its refusal by company management and would render its verdict according to the criteria established by law (see proposal no. 8). This measure, initiated by the shareholder, should be without cost to him and should not affect his right to go to court if he is not satisfied with the decision of the administrative committee.

Proposal No. 10

Ex officio power of attorney in favor of an agent who is not a member of company management.

Existing practice is that the power of attorney forms for shareholder meetings usually solicit powers of attorney in the name of company management. We propose that these forms solicit powers of attorney in favor of members of the board who are not members of company management. This proposal would allow those shareholders who do not wish to name a third party as their agent at the shareholder meeting, to delegate their voting rights to members of the board (who would be named on the power of attorney form) other than members of management. In this way the shareholder would turn over his voting rights to his true representatives on the board.

Proposal No. 11

A separate vote on the power of attorney form for each of the administrative candidates.

At the present time the shareholder, whether he name an agent or not, can vote directly on the power of attorney form for the election of administrators. However, the choice offered is to vote for the slate of candidates presented by management or to abstain. This proposal would modify this practice to allow the shareholder to cast a separate vote for each position, choosing from a list of candidates.

Proposal No. 12

Revision of article 5 of the statute concerning the power of attorney form (DORS/82-925), which authorizes the management of banks to deny shareholders the possibility of voting on certain resolutions submitted at a shareholders meeting, particularly resolutions submitted according to article 143 of the Bank Act.

As we mentioned earlier, shareholders who are concerned about improving the quality of corporate governance and who want to take advantage of article 143, are faced with two major obstacles (compulsory registration of the shareholder and the reasons which the company may invoke for refusing to include proposals in the management circular).These obstacles have, for all practical purposes, prevented the application of this section of the law until recently. Article 5 of the regulations presently in force constitutes a third barrier to shareholder participation in company affairs.

We observed this fact when we brought to the attention of the Superintendent of Financial Institutions what we considered to be a major fault in the power of attorney form of the Laurentian Bank. This bank, after having acquiesced to the inclusion of shareholder proposals in the management circular, decided not to have them appear on the solicitation form, which had the effect of depriving the shareholders of the possibility of expressing opinions which may differ from those of management. The Laurentian Bank management actually used this form to state that this power of attorney would be used to vote AGAINST each of the proposals which came from its shareholders.

In order to illustrate the scope of this article, we take the liberty of including a copy of the official response of the Superintendent to the petition made by Mr. Yves Michaud in this matter:

Paragraph 4(1) of the regulation stipulates that, subject to the conditions of article 5, the power of attorney form "[...] affords each shareholder the right to stipulate that the voting rights of the shares held in his name must be exercised for or against each question or group of related questions […] which are identified in the meeting notice, in a circular originating from management or from a dissident, or in a proposal of article 65 (now article 134) of the Act […]."

However, article 5 of the regulation states that the power of attorney form "[…] may indicate that the signature apposed thereon by or for the shareholder authorizes the agent to act on a question or group of related questions for which a choice is not offered according to article 4(1) if it states, in bold print, the way in which the agent must exercise the voting rights [of this shareholder]."

By the fact that the Laurentian Bank indicated on the power of attorney form that "[…] the voting rights attendant to ordinary shares represented in this power of attorney will be exercised by voting AGAINST these resolutions (the shareholder proposals submitted according to article 143)", the OSFI ruled that the Laurentian Bank had conformed to article 5 of the regulation.

The Laurentian Bank's recourse to this provision of the regulation effectively deprived the majority of the bank's shareholders from any possibility of intervening on these proposals. In actual practice, very few shareholders can be present at an annual assembly which is held during business hours (working hours for most shareholders) and it is through the bias of powers of attorney, that all the matters upon which the law allows them to act, are decided.

It is the right of the shareholder to debate the affairs of their company and the documents that the company regularly send to them (annual reports, convocations to shareholder meetings, power of attorney forms and others) are excellent opportunities for promoting communications between shareholders during these debates. Since the cost of preparing and sending these documents is adsorbed by the shareholder-owner of the company, it would be only normal and more effective if these documents served to support communications between shareholders rather than serving the sole ends of company management.

Article 5 of the regulation effectively limits this right which is so clearly established in the law, recognized by the Supreme Court and by two courts of law. We therefore request the recision of article 5 of the regulation concerning power of attorney forms (DORS/82-925), as well as its equivalent included in the Business Corporations Act.

Proposal No. 13

Adoption of a code of procedures for shareholder meetings.

The aim of this proposal is to facilitate the active and effective participation of shareholders during meetings and to avoid the possibility of an arbitrary chairperson who is in a rush to dispose of shareholder interventions. We propose that each company prepare a code of procedures governing the conduct of shareholder meetings and that this procedure be approved by the appropriate Securities Commission. This code would then be approved by shareholders within a reasonable delay. We include in the annex a formula for such a regulation which could be used as a model.

Proposal No. 14

Submission of management remuneration policies, as well as the parameters upon which this policy is based, to a vote at shareholder meetings.

Large corporations divulge the remuneration of the five upper management members whose remuneration is the highest. The divulging of this information is an important step towards transparency in the management of joint-stock companies. This should, however, be taken one step farther by allowing shareholders to debate and decide upon the parameters of the policy dictating upper management's remuneration. The remuneration policy determines the means whereby upper management's performance is measured. This measure should reflect the objectives set for management and, as such, the remuneration policy constitutes an important method of transmitting the principal objectives of the company. Since such is the case, it is the responsibility of the board of directors to set the guide lines and of the shareholders to sanction them.

Proposal No. 15

Modification of article 135(5) of the Business Corporations Act and of article 141(1) of the Bank Act following; "the examination of the financial statement and the auditor's report" to include, "after their deposit at the shareholder meeting".

This proposal aims at clarifying the text of the law in order that the agenda of the annual shareholder meeting allow for a specific item for the examination, and not simply the deposit as is often the case, of the financial statement and auditor's report. In this respect, the term "examine", according to Webster's Dictionary, signifies more than the simple deposit but rather, "to look into critically or methodically ...." The financial statement is the best measuring stick in evaluating management's handling of company affairs. The examination of and the discussion of this document is a fundamental right of the shareholder-owners; even in the case of banks.