

# Canada

## Corporate Governance Institutions, Practices and Developments

### 1. Key Institutional Features of Corporate Governance and Company Profile in Canada

#### 1.1 Background—Legal and institutional basis of the corporate governance framework

*i) Corporate Law:* For-profit Canadian companies may choose to incorporate either under the federal *Canada Business Corporations Act* or one of the similar provincial-territorial corporate statutes.<sup>47</sup> There are a variety of other statutes that impose duties on corporate directors such as federal insolvency laws, federal and provincial environment laws and provincial employment standard laws. Federal statutes governing certain sectors like banking, insurance and telecommunications impose further obligations.

*ii) Securities Law:* Publicly-traded companies (i.e., issuers of equities) are also governed by securities regulation, which is the responsibility of provincial-territorial governments, each having its own legislation and securities regulation authority. All of the provincial-territorial securities regulation authorities coordinate policy development and enforcement through a voluntary umbrella organization—the Canadian Securities Administrators (CSA)—with a view of developing a harmonized approach to securities regulation across the economy through the use of economy-wide policies and instruments.<sup>48</sup> In recent years, the CSA has developed a “passport system” through which a market participant has access to markets in all passport jurisdictions—all provinces and territories except Ontario—by dealing with its principal regulator and complying with one set of harmonized laws.

*iii) Stock Exchange Listing Requirements:* Canada’s senior issuers are listed on the Toronto Stock Exchange (TSX) and Canada’s junior issuers on the TSX Venture Exchange (TSXV).

To list on the TSX, a company must submit a listing application and supporting documents such as a Personal Information Form. Resource companies must also submit geological reports in compliance with regulatory guidelines, as prepared by an independent, qualified third party. The TSX Listing Committee is responsible for approving applicants. Successful applicants are charged a listing fee.

To list on the TSXV, a company’s application must be sponsored by a TSXV member, which has expertise in the public venture capital marketplace. To negotiate the complex listing process, the company requires the following professional advisors: a securities lawyer; an

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<sup>47</sup> Not-for-profit corporations are governed by the federal *Canada Corporations Act* and provincial-territorial not-for-profit statutes.

<sup>48</sup> See CSA website at <http://www.securities-administrators.ca/>

investor relations professional; and an external auditor. The company must file a prospectus and establish a business plan. Successful applicants are charged a listing fee.

*iv) Corporate Governance Guidelines:* The CSA employs a principles-based approach to corporate governance through the implementation of National Policy 58-201 and National Instrument 58-101, both introduced in 2005 in response to (a) the Saucier Report of 2001, which reviewed the state of corporate governance in Canada, and (b) the *Sarbanes-Oxley Act* (2002) in the United States. NP 58-201 is a set of Corporate Governance Guidelines, which issuers are encouraged to consider in developing their own corporate governance practices.<sup>49</sup> While compliance with the Guidelines is voluntary, NI 58-101—Disclosure of Corporate Governance Practices—imposes mandatory disclosure by issuers of their corporate governance practices, with a requirement that they disclose, through an annual information circular, whether their corporate governance practices adhere to or depart from those practices recommended in the Guidelines.<sup>50</sup> Additionally, the Canadian Coalition for Good Governance, a not-for-profit corporation founded in 2003 to represent the interests of institutional investors, has as its mission to promote good governance practices in Canadian public companies and, in this regard, has developed corporate governance guidelines entitled “Building High Performance Boards” that its members expect Canadian companies to develop and adopt over time.<sup>51</sup>

## 1.2 Trends—Number of publicly traded companies in Canada and their market capitalization over the past five years

The number of issuers and their market capitalization for the TSX and TSXV over the past five years is shown in Table 1.

Table 1. Number of Issuers and Market Capitalization, TSX and TSXV, 2005-2009

	<u>TSX</u>	<u>TSXV</u>	<u>Total</u>
<b>NUMBER OF ISSUERS</b> <sup>52</sup>			
2005	1,537	2,221	3,758
2006	1,598	2,244	3,842
2007	1,613	2,338	3,951
2008	1,570	2,443	4,013
2009	1,462	2,375	3,837
<b>MARKET CAPITALIZATION (C\$ BILLIONS)</b> <sup>53</sup>			

<sup>49</sup> NP 58-201 may be viewed at [http://www.osc.gov.on.ca/en/SecuritiesLaw\\_rule\\_20050617\\_58-201\\_corp-gov-guidelines.jsp](http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20050617_58-201_corp-gov-guidelines.jsp) CSA’s Corporate Governance Guidelines replaced the TSX’s “best practice guidelines”, which were introduced in 1995, following the recommendations of the Dey Report in 1994. While the Guidelines also apply to TSXV-listed issuers, the substantive corporate governance requirements set out in the TSXV Corporate Finance Manual continue to apply.

<sup>50</sup> NI 58-101 may be viewed at [http://www.osc.gov.on.ca/en/SecuritiesLaw\\_rule\\_20050617\\_58-101\\_disc-corp-gov-pract.jsp](http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20050617_58-101_disc-corp-gov-pract.jsp)

<sup>51</sup> See [http://www.ccg.ca/index.cfm?pagePath=CCGG\\_Policies\\_Best\\_Practices/Guidelines\\_Principles/Corporate\\_Governance&id=17595](http://www.ccg.ca/index.cfm?pagePath=CCGG_Policies_Best_Practices/Guidelines_Principles/Corporate_Governance&id=17595)

<sup>52</sup> Source: *Toronto Stock Exchange Yearly Trading Summary* and *TSX Venture Exchange Yearly Trading Summary*, at [http://www.tmx.com/en/news\\_events/media\\_kit/](http://www.tmx.com/en/news_events/media_kit/)

	<u>TSX</u>	<u>TSXV</u>	<u>Total</u>
2005	1,831	34	1,865
2006	2,061	55	2,117
2007	2,093	58	2,152
2008	1,279	17	1,296
2009	1,772	36	1,808

### 1.3 Key Corporate Governance Rules and Practices

Please see Key Corporate Governance Rules and Practices in Canada, p. 69.

## 2. Development, Enforcement and Assessment of Implementation of Corporate Governance Rules

### 2.1 Development of Corporate Governance Rules

In respect of corporate law, at the federal level, Corporations Canada, a branch within the federal Department of Industry, is responsible for corporate laws governing federal companies, except financial intermediaries. Provincial-territorial governments develop their own corporate governance rules.

Regarding securities law and stock exchange listing requirements, these are developed by provincial-territorial securities regulation authorities and their umbrella group, the CSA.

As for corporate governance guidelines, these are developed by the CSA, the private sector Canadian Coalition for Good Governance, and individual companies themselves.

### 2.2 Enforcement of Corporate Governance Rules

Canadian corporate law is mostly self-enforced by the corporation's shareholders, who will vote on resolutions and file them with their company, with the purpose of having them adopt certain corporate governance practices. These tend to relate to board of director independence (ensuring the chairman of the board and CEO positions are kept separate), director attendance at board and committee meetings, and executive compensation. In 2008 and 2009, 178 and 101 shareholder resolutions were filed with corporations in Canada, respectively.<sup>54</sup> Shareholders whose rights have been denied can seek resolution through the courts.

Canadian securities law enforcement is carried out by provincial-territorial regulatory authorities, who investigate suspected securities-related misconduct and may bring allegations of such misconduct to a hearing before a securities commission or an associated tribunal. Securities legislation authorizes that they may impose or seek administrative sanctions and prohibitions from market participation or access. They have no authority to order a term of imprisonment but they can establish "quasi-criminal" offences for contraventions of regulatory requirements and prohibitions of certain activities related to capital markets. Penalties for committing these types of offences can include a term of imprisonment and a significant fine. Depending on the jurisdiction, staff may either directly prosecute such cases in court or refer allegations of "quasi-criminal" offenses to a Crown attorney for prosecution in the courts.

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<sup>53</sup> *Idem.*

<sup>54</sup> Source: the Shareholder Association for Research and Education's (SHARE) database at <http://www.share.ca/fr/shareholderdb>

Securities-related offences under the federal *Criminal Code*, which establishes both specific securities-related criminal offences (such as market manipulation) and more general economic crimes (such as fraud), are investigated by the Royal Canadian Mounted Police and local and provincial police. The CSA assists in coordinating enforcement activities and the following self-regulatory organizations (SROs)—the Investment Industry Regulatory Organization of Canada (IIROC), the Mutual Funds Dealers Association (MFDA), and the Chambre de la Sécurité Financière (CSF)—which can discipline member investment dealers or their employees for breaching their rules. Sanctions include suspension and termination of membership or market access and monetary penalties. In 2008, CSA members concluded 123 cases, of which 55 were contested before a tribunal, 40 were settled by agreement, and 28 underwent a court proceeding; in 2009, 141 cases were concluded, of which 37 were contested before a tribunal, 69 were settled by agreement, and 35 underwent a court proceeding.<sup>55</sup> In 2008, C\$12.4 million was ordered in fines and administrative penalties, and C\$1.6 million in costs; in 2009, C\$153.7 million was ordered in fines and administrative penalties; and C\$5.7 million in costs.<sup>56</sup> In addition to monetary orders, courts in Ontario and Quebec ordered jail terms for four individuals, ranging from 30 days to 30 months.<sup>57</sup>

### 2.3 Assessment of Corporate Governance Practices

The TSX's study of Canadian corporate governance known as the Dey Report (1994) contained 14 recommendations to assist TSX-listed companies in their approach to corporate governance. The TSX adopted all 14 recommendations as part of its voluntary "best practice guidelines" in 1995. In 1999, the Institute of Corporate Directors and the TSX sponsored a report *Five Years to the Dey*, which evaluated how Canadian companies were complying with the Dey Report's best practice guidelines. The report concluded that, although most companies took the guidelines seriously, important areas remained where general practice fell short of the guidelines' intent. Subsequently the Canadian Institute of Chartered Accountants (CICA), the TSX and TSXV established a Joint Committee on Corporate Governance in July 2000 (the Saucier Committee). The Saucier Report of November 2001 recommended that the TSX amend its corporate governance guidelines to bring them into line with international developments such as the proposed Sarbanes-Oxley legislation in the US. This ultimately led to the CSA's Corporate Governance Guidelines in 2005, which replaced the TSX's "best practice guidelines."<sup>58</sup> The CSA began a review of its Corporate Governance Guidelines (NP 58-201) and Disclosure of Corporate Governance Practices (NI 58-101) in September 2007, and published for comment proposed changes in December 2008 and, based on the feedback it received, decided to maintain the status quo.

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<sup>55</sup> Source: *Canadian Securities Administrators 2009 Enforcement Report* at [http://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSAReportENG09\[FA\].pdf](http://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSAReportENG09[FA].pdf)

<sup>56</sup> Idem. Note: figures do not include amounts for restitution, compensation and disgorgement.

<sup>57</sup> Idem. Note: additional actions included preventative measures such as interim cease trade and asset freeze orders; reciprocal orders; and cases concluded by SROs (of which there were 55 in 2008 and 97 in 2009).

<sup>58</sup> See: [http://www.osc.gov.on.ca/en/SecuritiesLaw\\_pol\\_20040116\\_58-201\\_pro-multi-pol.jsp](http://www.osc.gov.on.ca/en/SecuritiesLaw_pol_20040116_58-201_pro-multi-pol.jsp)

## 3. Awareness and Advocacy for Good Corporate Governance

### 3.1 Company Directors

Canada has an Institute of Corporate Directors (ICD), which is a not-for-profit, member-based professional association representing Canadian directors and boards across the for-profit, not-for-profit and government sectors. It has more than 4,000 members and a network of nine chapters. The ICD promotes the professionalism and effectiveness of directors by providing professional development activities.

In Canada, there is no obligatory training required to be appointed to or remain a director of a corporation's board of directors. There are, however, three specific education programs for company directors that lead to designations attesting to an individual's competence to hold a director position.

- The ICD and the Rotman School of Management at the University of Toronto have jointly developed the following director education programs: Director Education Program (DEP), and Not-for-Profit Governance Essentials Program. The 12-day DEP course is offered at five universities across Canada. Completion of the DEP is the first step towards obtaining the ICD.D designation granted by the ICD. To date, more than 1,500 directors have earned their ICD.D designation.
- The Directors College, the DeGroot School of Business at McMaster University and the Conference Board of Canada have jointly developed the Chartered Director Program that consists of five modules over a total of 92 hours that leads towards the Chartered Director (C. Dir.) designation. Since it began in 2005, more than 380 directors, CEOs, CFOs and Corporate Secretaries have earned their C. Dir. designation.
- The Collège des Administrateurs de Sociétés of the Université Laval has a program that is delivered in French over 15 days that leads to the “Administrateur de sociétés certifiées” designation. Since it began in 2005, more than 250 individuals have earned their designation.

### 3.2 The Media

The Canadian media, particularly the financial news media, regularly reports on corporate governance issues in Canada and the United States. As an example, the Globe and Mail, an economy-level newspaper, annually publishes *Board Games*, which evaluates and ranks corporate governance practices in Canada.<sup>59</sup>

### 3.3 Educational System

In Canada, corporate governance is not typically in the curriculum of a secondary educational program. It is part of most university Masters of Business Administration and law programs.

### 3.4 The Stock Exchange

The ICD and the TSX collaborate to strengthen board performance by offering all TSX and TSXV issuers the opportunity to conduct searches for directors using the ICD Directors

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<sup>59</sup> See:

<http://www.theglobeandmail.com/report-on-business/board-games/board-games-methodology-corporations/article1374554/>

Register, an economy-level database of highly-skilled professionals who are qualified, available, and prepared to serve on boards.

The TMX Group, which owns the TSX and TSXV, supports the educational needs of its issuers, as well as other companies considering going public, through its TMX Learning Academy, which is an educational platform for information relevant to being or becoming a public company, including corporate governance.<sup>60</sup>

## 4. Corporate Governance of State-Owned and Family-Controlled Enterprises

### 4.1 State-Owned Enterprises

#### 4.1.1 Oversight

In the government of Canada, each Minister is responsible for overseeing the activities of federal Crown corporations within his or her portfolio. The Minister is responsible for: appointments and framework legislation, as applicable; review and approval of corporate plans; assessing the ongoing relevance of the corporation's mandate and its effectiveness as a policy instrument; and providing broad policy direction to the corporation. Though boards of directors are responsible for ensuring that the activities of their corporations are in line with its mandate, the Minister provides the corporation with guidance on the government's objectives and priorities. The Minister is ultimately answerable to Parliament for all of the corporations' activities.

Parliament also plays a significant role in the oversight of federal Crown corporations. It receives key reports (e.g., annual reports and corporate plan summaries) and has the ability to question Ministers on the Crown corporations within their portfolios, allowing it to assess roles, attributes and performance. In addition, parliamentary committees have the authority to invite chairs and CEOs to appear before them to explain the activities of their organizations.

A Cabinet committee, the Treasury Board, also holds certain responsibilities with respect to the governance of federal Crown corporations. Specifically, the Treasury Board: reviews corporate plans and recommends their approval by the Governor in Council; approves capital budgets, and, where required, operating budgets; approves budgetary appropriations to be put to a vote in Parliament; and, makes regulations for their general governance. In addition, the President of the Treasury Board tables in Parliament the *Annual Report to Parliament on Crown Corporations and Other Corporate Interests of Canada*, which provides information on their activities, as well as their compliance with tabling requirements for annual reports and summaries.<sup>61</sup>

#### 4.1.2 Specific Corporate Governance Requirements

The accountability structures and governance requirements for federal Crown corporations are defined by the *Financial Administration Act* and specific enabling legislation in some cases. However, there are other instruments that the government can use to influence their activities. These include the ability to: amend constituent legislation; review and amend corporations' mandates; review and approve corporations' corporate plans; and issue formal directives

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<sup>60</sup> See: <http://www.tmx.com/en/listings/learning/index.html>

<sup>61</sup> <http://www.tbs-sct.gc.ca/reports-rapports/cc-se/index-eng.asp>

requiring Crown corporations to perform a specified action or carry out a certain activity which meets the government's priorities.

In addition, the Treasury Board Secretariat, which, inter alia, is responsible for advising the Treasury Board on issues that affect federal Crown corporations, produces guidance for Crown corporations on a range of governance matters, including (but not limited to): directors' roles and responsibilities; audit committees; evaluating board effectiveness; corporate plans; and annual public meetings and outreach. Although the guidance is not legally required, Crown corporations are strongly encouraged to follow the best practices contained in it.

#### **4.1.3 Important Corporate Governance Issues**

In the past, the governance and activities of federal Crown corporations have come under scrutiny, often as a result of reports by the Auditor General of Canada identifying governance deficiencies. To address issues raised in the reports and to strengthen their overall governance regime, the government tabled in Parliament in 2005 the *Review of the Governance Framework for Canada's Crown Corporations: Meeting the Expectations of Canadians*.<sup>62</sup> The Review outlines 31 measures designed to improve Crown corporation governance by: clarifying accountabilities, enhancing board effectiveness, strengthening the audit regime, improving the appointment process, and increasing transparency. The majority of measures have now been implemented through legislation, publication of guidance, or by voluntary adoption by Crown corporations. Furthermore, the government has continued to introduce new measures designed to keep the Canadian system at the leading edge in terms of implementation of best practices.

#### **4.1.4 Are State-Owned Companies Good Examples of Corporate Governance?**

Federal Crown corporations have a robust system of governance, which has improved significantly over the past five years through, inter alia, the implementation of the *Review of the Governance Framework for Canada's Crown Corporations*. Consequently, the Crown Corporation governance system compares well with international standards, notably the *OECD Guidelines on Corporate Governance of State-Owned Enterprises*.<sup>63</sup>

The first OECD guideline recommends the establishment of an effective legal and regulatory framework for state-owned enterprises. In Canada, this is provided for by Part X of the *Financial Administration Act* (FAA).

The second OECD guideline advises that the state should act as an informed and active owner and establish a clear and consistent ownership policy, ensuring that the governance of state-owned enterprises is carried out in a transparent and accountable manner. In Canada, the FAA or, in some cases, individual enabling legislation, defines the ownership, lines of accountability and reporting requirements. Crown corporations have operational autonomy to achieve their defined objectives: they operate at arm's length from government in terms of the management of their financial, human and physical assets, and oversight is delegated to the board of directors. As per the OECD guideline, the board of directors is held accountable to Parliament, and each Crown corporation reports through their Minister to Parliament (with certain exceptions), Crown corporations also submit annually a corporate plan, a capital and an operating budget, and an Annual Report.

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<sup>62</sup> <http://www.tbs-sct.gc.ca/report/rev-exa/gfcc-cgse-eng.asp>

<sup>63</sup> <http://www.oecd.org/dataoecd/46/51/34803211.pdf>

The third OECD guideline calls for the equitable treatment of shareholders and equal access to corporation information. In Canada, federal Crown corporations are required by law to respond to public demands for information on their activities under the *Access to Information Act*. Other information on Crown corporations is available in the Annual Report to Parliament on Crown Corporations and Other Corporate Interests of Canada.

The fourth OECD guideline advises that state ownership policy fully recognizes state-owned enterprises' responsibilities towards stakeholders. In Canada, federal Crown corporations are required by law to hold annual public meetings to permit the public and stakeholders the opportunity to question the corporation's management.

The fifth OECD guideline calls for state-owned enterprises to observe high standards of transparency, including through the aggregate reporting on state-owned enterprises on an annual basis, the development of efficient internal audit procedures, and, in the case of large state-owned enterprises, being subjected to an independent external audit. In Canada, all Crown corporations are subject to annual financial audits and periodic special examinations (i.e., performance audits) carried out (solely or jointly) by the Auditor General of Canada. The independence of the audit function is protected by requiring that internal and external auditors report directly to the corporation's audit committee. Beginning in April 2011, all parent Crown corporations will also be required to publish quarterly financial statements. As per the OECD guideline, disclosure of material information on matters of significant concerns is observed and, in this regard, "whistleblower" employees who disclose wrongdoing in their organizations are protected under the *Public Servants Disclosure Protection Act*.

The sixth and last OECD guideline recommends that the boards of state-owned enterprises be given the necessary authority, competencies and objectivity to carry out their function of strategic guidance and monitoring of management. In Canada, the government has enacted legislative changes to strengthen Crown corporation board independence by: splitting the CEO/chairman role into two separate positions; and requiring the CEO to be the sole representative of management on a board of directors. The boards' effectiveness has also been enhanced by the establishment of board charters to guide their operations/mandate. Boards also perform regular assessments of their members' effectiveness. To further enhance Crown corporation directors' skills and help them better understand their role, the Canadian government offers orientation training to new directors and education programs are also available.

## 4.2 Family-Controlled Enterprises

Canadian corporate ownership is highly concentrated, with close to 55% of Canadian companies being family-controlled.<sup>64</sup> Historically, family-controlled companies, in their quest to gain capital but retain family control, have issued shares with dual voting rights, preserving high-voting stock for the family and selling restricted-voting shares to the public.<sup>65</sup> The Canadian Coalition for Good Governance supports the elimination of dual-class shares, believing that voting interest should be commensurate with economic interest. The issue is a minor one; however, as dual-class shares have their benefits too: some of Canada's best-performing companies have multiple-voting shares and their shareholders with restricted voting rights are generally unperturbed.

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<sup>64</sup> Morck, Randall, Michael Percy, Gloria Tian & Bernard Yeung. 2005, "The Rise and Fall of the Family Firm—A History of Corporate Governance in Canada", in R. Morck, ed. *A History of Corporate Governance around the World*.

<sup>65</sup> See: <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0526-e.htm>

There is no indication that family-owned enterprises consider corporate governance requirements a disincentive to becoming listed companies.

## 5. Role of Professional Service Providers in Corporate Governance

Professional service providers—particularly accounting and auditing firms, law firms and corporate governance consultants (e.g., Conference Board of Canada)—in addition to assisting companies in respect of corporate governance matters, often write articles or hold seminars on corporate governance issues that inform the public in general.

## 6. Recent Developments in Corporate Governance

### 6.1 Corporate Governance Developments

During the last three years, a notable corporate governance development has been the improvements in executive compensation disclosure and the gain in momentum on “Say on Pay” for Boards of Directors. The CSA made consequential amendments to NI 51-102 *Continuous Disclosure Obligations* in order to improve the communication of payments and awards to certain executive officers and directors, which took effect as of 2009. The Canadian Coalition for Good Governance established a *Shareholder Engagement and “Say on Pay” Policy* in April 2009, which supported regular, constructive engagement between institutional shareholders and the boards and board compensation committees of public corporations to explain their perspectives on governance, compensation and disclosure practices.<sup>66</sup> It followed up with a *Model Shareholder Engagement and “Say on Pay” Policy for Boards of Directors* in January 2010, following significant discussions with a variety of issuers who have publicly announced that they will be holding “Say on Pay” shareholder advisory votes in 2010.<sup>67</sup> To this point, 35 Canadian companies have adopted a “Say on Pay”.<sup>68</sup>

The Ontario Securities Commission (OSC), in its 2009 decision on the matter of HudBay Minerals’ acquisition of Lundin Mining Corporation that ultimately led to its withdrawal, pointed to a conflict of interest whereby an independent financial advisor providing a fairness opinion received a success fee. The decision is expected to change the manner in which financial advisors are retained and compensated for M&A transactions.

Corporate social responsibility (CSR) has become increasingly important in recent years, with many Canadian companies developing codes of conduct and best practices to guide their operations domestically and overseas.<sup>69</sup>

### 6.2 Enforcement of Corporate Governance Rules

A noteworthy CSA case was that pertaining to the Asset Backed Commercial Paper (ABCP) market failure—Canada’s home-grown financial failure during the financial crisis. Classified

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<sup>66</sup> See: [http://www.ccg.ca/site/ccgg/assets/pdf/CCGG\\_SOPP\\_Final.pdf](http://www.ccg.ca/site/ccgg/assets/pdf/CCGG_SOPP_Final.pdf)

<sup>67</sup> See: <http://www.ccg.ca/site/ccgg/assets/pdf/CCGG-Say-on-Pay-Final.pdf>

<sup>68</sup> See: <http://www.share.ca/pay>

<sup>69</sup> For more information, see: [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/activity-csr.aspx?menu\\_id=4&menu=R](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/activity-csr.aspx?menu_id=4&menu=R)

as a Misconduct by Registrants, eight non-bank financial institutions agreed to pay financial penalties for failing to respond adequately to emerging issues in this market, which seized up in 2007 and left investors holding illiquid payments. In particular, they did not disclose to all their clients an email dated 24 July 2007 from Coventree Inc.—the largest sponsor of ABCP in Canada—providing the subprime exposure of each Coventree ABCP conduit. In December 2009, Quebec’s Autorité des Marchés Financiers, OSC, and IIROC reached a settlement providing for a payment totalling almost C\$139 million in administrative penalties and investigative costs.<sup>70</sup>

## 6.3 Current Issues and Challenges for Corporate Governance

### 6.3.1 Challenges

Investor fraud cases increased during the financial crisis, with an increasing number of Ponzi schemes exposed.

### 6.3.2 Priorities for Reform

With the increase in investor fraud cases, fostering confidence in capital markets will be an essential component of securities law enforcement going forward, and early intervention to prevent harm a key priority.

The *Canada Business Corporations Act* is currently undergoing a five-year review by the House of Commons Standing Committee on Industry, Science and Technology. In its brief to the Committee, the Canadian Coalition for Good Governance in seeking greater protection for shareholders from the actions of management and directors, setting out 11 shareholder democracy recommendations.<sup>71</sup>

### 6.3.3 Financial Crisis

As the OECD has indicated, the central corporate governance question arising from the financial crisis is: what can be done to improve how financial firms operate?<sup>72</sup> In this regard, the OECD sees four areas for urgent action: corporate risk management; pay and bonuses; the performance of board directors; and the need for shareholders to be more proactive in their role as owners. Since the financial crisis impacted Canada relatively less than other OECD economies, the imperative to bring reform in these areas, while desired, is not as profound.

Nonetheless, the failure of Canada’s ABCP market exposed serious shortcomings in corporate governance that were underscored in the October 2008 IIROC regulatory study of the problem.<sup>73</sup> Essentially, dealer members did not consider third-party ABCP to be a new product requiring corporate governance oversight and risk management; instead, they viewed this risky product as an accepted form of commercial paper. The IIROC study made recommendations in respect of product due diligence, product transparency, conflicts of interest and clear disclosure to customers, and credit ratings. The January 2009 report of the Expert Panel on Securities

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<sup>70</sup> See: [http://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSAReportENG09\[FA\].pdf](http://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSAReportENG09[FA].pdf)

<sup>71</sup> See: [http://www.ccg.ca/site/ccgg/assets/pdf/Brief\\_to\\_Standing\\_Committee.pdf](http://www.ccg.ca/site/ccgg/assets/pdf/Brief_to_Standing_Committee.pdf)

<sup>72</sup> See: [http://www.oecdobserver.org/news/fullstory.php/aid/2931/Corporate\\_governance:\\_Lessons\\_from\\_the\\_financial\\_crisis.html](http://www.oecdobserver.org/news/fullstory.php/aid/2931/Corporate_governance:_Lessons_from_the_financial_crisis.html)

<sup>73</sup> See: <http://docs.iiroc.ca/DisplayDocument.aspx?DocumentID=3CAB660DB44E41C2875DD3DBD27FAD EA&Language=en>

Regulation (the Hockin Report), *Creating an Advantage in Global Capital Markets*, argued that the ABCP failure provided a strong reason for a single Canadian Securities Commission to replace the provincial-territorial structure currently in place, owing to the slow release of the CSA consultation paper that was published over a year after the failure.<sup>74</sup> The CSA consultation paper, inter alia, raised concerns about credit rating agency governance and proposed a new credit-rating agency regulatory framework.<sup>75</sup>

## Corporate Governance Rules and Practices in Canada

Element	Yes	No	Source(s) of Rule	Comments
<b>RIGHTS OF SHAREHOLDERS</b>				
1. Do shareholders add items to the agenda for shareholders' meetings?	X		CL	Rarely. A shareholder (or a group of shareholders) holding 1% of outstanding shares or C\$2,000 worth of shares can propose a matter be raised at a shareholders' meeting. The proposal can include nominations for director if signed by one or more shareholders holding in all 5% of shares.
2. Do shareholders ask questions of directors at shareholders' meetings and do they receive answers?	X		CL	Typically.
3. Must company transactions with its insiders be on a non-preferential basis?	X		SL	
4. Is a super majority vote required for major company acts affecting shareholder rights?	X		CL	
<b>COMPOSITION AND ROLE OF BOARDS OF DIRECTORS</b>				
5. Must boards have independent directors?		X	CGC	Typically. Having independent directors on boards is recommended by the Securities Commissions' Corporate Governance Guidelines.
6. Do independent directors have significant influence over (a) internal and external audit and (b) executive compensation?	X		CL, SL	The answer is yes with respect to (a) but uncertain with respect to (b). Regarding (b), it is considered a good practice but independent directors' oversight of executive compensation is not mandatory.
7. Do independent directors decide what information the board receives from management?	X			
8. Are the chairman of the board and chief executive officer different persons in the majority of listed companies?		X	CGC	Typically. Separation of positions of chairman of the board and chief executive officer is recommended by the Securities Commissions' Corporate Governance Guidelines
9. Are all board members elected annually?	X		GP	Typically. Corporate statutes allow directors to be elected for a maximum term of three years. However, most are elected for a one-year term.

<sup>74</sup> See: <http://www.expertpanel.ca/eng/reports/index.html>

<sup>75</sup> See: [http://www.lautorite.qc.ca/userfiles/File/projets-speciaux/turbulence-credit/11-405\\_ABCP\\_Cons\\_Paper\\_2008-10-10\\_ang.pdf](http://www.lautorite.qc.ca/userfiles/File/projets-speciaux/turbulence-credit/11-405_ABCP_Cons_Paper_2008-10-10_ang.pdf)

Element	Yes	No	Source(s) of Rule	Comments
10. Does the board oversee enforcement of a company code of conduct?	X		GP	Typically. Most large publicly-traded corporations have their own code of conduct.
<b>TRANSPARENCY AND DISCLOSURE OF INFORMATION</b>				
11. Do financial statements comply with International Financial Reporting Standards (IFRS)?	X		SL	Canada is incorporating IFRS in 2011. The changeover transition is currently underway.
12. Is the identity of the five largest shareholders disclosed?	X		SL	
13. Is compensation of company executive officers disclosed?	X		SL	
14. Are extraordinary corporate events disclosed?	X		SL	
15. Are risk factors disclosed in securities offering materials?	X		SL	
16. Are transactions of a company with its insiders disclosed?	X		SL	

*Note: CL – company law; SL – securities law; CGC – corporate governance code; SLR – stock exchange listing requirement, GP – general practice but not obligatory*