

Canadian Securities Administrators Corporate Governance Proposals

HOWARD J. KAUFMAN
CHAIR, ETHICS CENTRE CA

In its role of serving as a forum and catalyst for constructive discussion of ethics and ethics related issues, the Ethics Centre CA has championed good governance principles. With that in mind, the EthicsCentre CA submitted comments to the CSA in respect of its recent Proposals respecting corporate governance of public issuers in Canada.

The following is a summary of the principal comments of its submission:

- The CSA Proposals are a good attempt at improving corporate governance standards in Canada.

- While the voluntary approach contemplated by certain of the Proposals is workable, **issuers should be required to have a Code of Conduct.**

- Issuer Codes of Conduct should be, at a minimum, summarized in the Issuer's public filings.

- To enhance a Board's ability to satisfy itself as to a CEO's and other senior officers' creation of a culture of integrity within the Issuer, Board mandates should include a provision requiring the creation of an independent internal reporting system that reports up to the Board. Regular discussion of ethics issues raised by the system should occur at the Board meetings.

- Directors should be required to receive regular orientation updates on the Issuer's Code of Conduct.

- Boards should undertake regular reviews of the Issuer's Code of Conduct with a view to determining its adequacy and effectiveness and make recommendations as to improvement.

Board mandates should include a provision requiring the creation of an independent internal reporting system that reports up to the Board.

A copy of the EthicsCentre CA's submission to the CSA can be obtained by calling the EthicsCentre CA or by visiting its website: www.ethicscentre.ca

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Editorial

SALLY GUNZ



By those mysterious quirks of newsletters, especially those in the not-for-profit sector, I write this in early summer, and it will be available for reading perhaps as late as early fall. But there is no faking it. The sun is beckoning, the world professes to be mellow, and some of us remain lashed to our normal routines. So, in keeping with an annual tradition of at least one year, this editorial is a collection of random thoughts.

Undoubtedly the call of summer has been amplified this year by the completion of a hard-fought election battle. We have been inundated with post-mortems, and each party claims the other was nastier than ever before. But they both sank low and perhaps survived as a result. The mystery remains why all editorial writers (and most unsuccessful politicians) assume the electorate is not particularly sophisticated – as if it takes sheer genius to understand the need for strategic voting when your particular riding has two dominant parties going neck and neck and a few others hanging in there. All the folks I talked to, of whatever political persuasion, either held their nose or thumbed their nose. But they did so in the full understanding of the consequences of their actions. Grade 10 education or PhD, they could work it out. As one of my kids was wont to shriek in frustration, “Stop patronising me,” political pundits!

My town, like most others, remains torn by the need for lower-cost housing versus the desire of much of its population not to bear the social burden of its impact. The latest display of good citizenship has come at the expense of Habitat for Humanity, surely one of the more worthy organizations out there. Here is a challenge. Do you give money to such organizations? Do you give of your time? These actions are undoubtedly to be commended. But do you also know where your shelters or your group homes or your low-cost rental units are located? The absurdity and arrogance of opposing a Habitat for Humanity project is self-evident: Habitat leads to home ownership for people whose commitment to their new dwelling and community will be at least as great as our own, if not far greater. Likewise, most group homes are equally unobtrusive and easy to live with. Other projects do not make for the best of neighbours. The marginalized in society, the mentally ill, the drug addicted can be highly disruptive. The troubling issue is: how do we integrate these people into our society without hurting others? The short answer, unfortunately, is to concentrate them in parts of our cities where we, the middle class, do not live. But concentrating services fails the goal of integration. It also can do real harm to existing communities and users of services alike. The plea to all of us who have a genuine desire to help others is to find a way of sharing the true cost of the needy in our society in a fair and equitable manner.

And finally, on behalf of all of us whose jobs continue throughout the summer, here’s a scream of anguish aimed directly at the editors of national newspapers and the smug Globe and Mail in particular. First, most Canadians do not own a cottage, nor will they be putting in docks and drinking beer on said docks once they are installed. Indeed, as bizarre as it might seem, most Canadians will not spend a single moment in the Muskokas this summer. We will dutifully punch real or metaphorical clocks and resent time not spent with children and friends. But we will love our summers the best way we can. The real secret pleasure of summer? The traffic reports as we sit back in our yards or our balconies. Here’s a tip for politicians. You want to lower taxes? Keep those highways down to four or even two lanes and maximise the summer pleasure for the rest of us. Thus spoken by the owner of a warped and twisted mind.

Ethics Centre CA and Sheldon Chumir Foundation Combine to Offer an Outstanding Program on Whistle Blowing in Calgary and Toronto

Last fall, the Ethics Centre CA and the Sheldon Chumir Foundation combined resources to host two outstanding half-day programs in Calgary and Toronto entitled *Blowing the Whistle on Ethical Lapses: Accountability, Responsibility and Stewardship*. Those designing the program worked to move beyond describing the events that have led to whistle blowing and examined the more fundamental issue of “the need for ethics and integrity to be at the foundation of all actions and decisions, regardless of whether they are individual or collective, within a corporate, institutional or public context.” The objective was to allow participants to explore the issues and challenges associated with whistle blowing as it relates to these issues.

The expert speakers had a vast wealth of experience coming from both senior positions in management and the personal experience of whistle blowing. The event Chairperson was Mr. Jon Grant, Chair of CCL Industries and former Chair of Canada Lands, where he had a major role in exposing a number of improper practices.

The Expert Panel included, in addition to Mr. Grant, Rose Patten, Executive VP, Human Resources, Bank of Montreal; Larry Brown, Secretary Treasurer, National Union of Public and General Employees (in Toronto); Douglas Mah, Secretary & General Counsel, Workers’ Compensation Board (in Calgary); Eduard Keyserlingk, Public Service Integrity Officer, Government of Canada; and Joanna Gualtieri, Fair Canada, who, as

an employee of the Government of Canada, exposed overspending in Canada’s foreign affairs department. These speakers, together with Mr. Grant, were able to address a broad range of issues, and the debate that ensued was both lively and informative.

The meeting broke into four groups: one on managing risk by MARSH Canada, risk consultants; another on creating an accountable organization by The Hay Group; a third exploring a case study on the GE experience by Centre Director Michael Davies (former Vice President, General Counsel and Secretary of GE Canada); and the last on the legal and regulatory landscape by Alister Bryden of PricewaterhouseCoopers and Joyce Mitchell of Fasken Martineau.

An article by Michael Davies on whistle blowing appears elsewhere in this newsletter. His case study explored the importance of creating a culture where employees who believe a wrong has or may occur will have the confidence to raise the issue internally. The team exploring the regulatory landscape described the internal processes required to ensure sound record keeping and effective follow-up of complaints. They also outlined sound risk assessment practices, including the appropriate roles for all relevant personnel. They described a whistle blowing policy that would be in compliance with the regulatory framework and stressed the need for prioritising good ethical practices. Finally, they provided their audience with a complete review of current regulations and case law in Canada.

WHISTLE BLOWING

MICHAEL N. DAVIES, QC

Michael Davies is a Director of the Ethics Centre CA. He is former Vice President, General Counsel and Secretary of GE Canada and for several years has been a member of the ICC Commission on Anti-Corruption. The article that follows is excerpted with thanks from a chapter written by Mr. Davies for the ICC corporate practices manual "Fighting Corruption".

Business faces a new environment following the publicity surrounding high profile whistle blowers in the last few years. Companies have to recognize that whistleblowers are more likely to come forward. If whistleblowers face a hostile internal environment they may well go public – to regulators, prosecutors or the media. Thus the prudent course for management is to establish a positive climate for whistleblowers that encourages them to report internally without fear of retribution.

An internal whistleblowing system has major advantages for a company. It usually gives it the opportunity to address the problem and take corrective and other remedial measures, and thereby also avoid the adverse publicity, investigation and prosecution that usually follows "after-the-fact" external whistleblowing. If the whistleblower reports early enough – and hopefully that will happen if the company encourages whistleblowers – this should allow the company to prevent the bribery or other wrongdoing from taking place. Even if the company finds out about a problem too late to prevent it from happening, the company will still be in a position to take

disciplinary and other remedial measures designed to prevent a reoccurrence. That will also put the company in a much better position to deal with the authorities and the media.

From the employee's standpoint, if the company deals responsibly with the issues disclosed and provides meaningful protection and support, a good relationship can likely be maintained between the company and the whistleblower. This is seldom the case where the whistleblowing is external.

External whistleblowing can be very detrimental, often leading to investigation and prosecution of the company, resulting in bad publicity, the imposition of fines and possibly jail terms for executives and employees. It is also usually very detrimental to the whistleblowing employee, severely impairing his or her ongoing relationship with the company and other employees. Frequently it leads to the whistleblower deciding to leave the company (even if protected by statute) and seeking other employment, which may be difficult to find. Having an internal reporting system in place does not eliminate, but certainly reduces the risk that an employee will blow the whistle outside the company.

Responsible enterprises need to be made aware of actual or potential wrongdoing, such as bribery, fraud and accounting improprieties, by one of their employees or agents. And it is other employees within the enterprise who are most likely to become suspicious or aware of any proposed or actual unlawful activity and who are therefore in the best position to bring it to the company's attention. However, potential whistleblowers will not report internally if they fear reprisals from within the enterprise or suspect that management may condone or may even have participated in or approved the illegal activity. In that event the company's ability to take appropriate remedial measures will be severely impaired. If it is not perceived as "safe" to blow the whistle internally, a conscientious employee with concern for the public interest will report the wrongdoing to the authorities or the press.

It is therefore essential that companies create a culture where employees who believe that a wrongdoing has occurred or is about to occur, have the confidence to raise their concerns internally. Such a culture enables a company to become aware of serious problems at an early stage of their development and take appropriate remedial measures. The opportunity for detection that such a culture provides should also act as a major deterrent to those within the company who might con-

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template engaging in unlawful activity. Finally, when unlawful activity has occurred, internal reporting enables the company to notify the authorities and to be perceived in a more favourable manner way in any investigation or prosecution that might ensue.

Only in recent years has the potential value of employees' raising concerns about wrongdoing in the workplace given rise to legislation designed to protect whistleblowers from reprisal. Initially such legislation only applied to public sector employees, (encouraging them to report wrongdoing and protecting them from retribution, irrespective of the disclosure route used). More recent whistleblower legislation, such as the Sarbanes-Oxley Act of 2002, tends to provide protection also for private sector employees with respect to disclosures made in good faith. Some of this legislation, such as that in New Zealand and the Public Interest Disclosure Act of 1999 in the UK also recognizes the potential benefit to all concerned of internal versus external disclosure and creates incentives for employers to put in place internal reporting procedures.

In summary, it is very much in the best interests of an enterprise that wishes to prevent bribery and other forms of corruption to establish a whistleblowing policy under which employees will feel comfortable reporting concerns without fear of retribution. Having an effective internal whistleblower process is highly preferable to external whistleblowing, which can be more detrimental to the company and its employees.

In order to establish such a process, a company should:

- establish an internal disclosure programme that encourages employees to identify concerns ("whistleblow") within the company about what is or might be a possible violation of the company's "no bribery" policy;
- not limit the reporting obligation to information relating

to actual breaches of the policy but extend the obligation to concerns or suspicions relating to actions which might lead to the payment of a bribe in order that bribery may be prevented;

- require that concerns be reported promptly, again so that the company may stop the bribery before it occurs;
- establish effective mechanisms, such as hotlines and ombudsmen, that can deal confidentially with employee reports and with which an employee will feel comfortable communicating;
- guarantee that there will be no recrimination or repercussions regarding issues raised or information provided in good faith;
- allow reports to be made anonymously and undertake make the best effort to honour an employee's desire for confidentiality;
- establish a process within the enterprise for effectively dealing with concerns that are raised;
- take appropriate steps to respond to problems that are identified, including education, modifying processes and disciplinary action, when required;
- comply with laws relating to external reporting to relevant authorities; and
- ensure that, wherever possible, the reporting employee receives appropriate feedback.

The Times Are A Changing...

The nature of communications is changing. Many of our members prefer the convenience of viewing our reports, updates and newsletters on our website at <http://www.ethicscentre.ca>. We would like to encourage more of our members to do the same, not only because it reduces paper use, which ultimately helps the environment, but also it allows us to put more funds into programs by reducing our administrative and mailing costs.

If you would like to receive your future Management Ethics publications electronically, please email the Centre at admin@ethicscentre.ca with the subject line: EMAIL MANAGEMENT ETHICS.

SPEAKERS' CORNER

The Centre hosted three speakers as part of its continuing series this spring. Again, for those who were not able to attend some or all of these talks, we provide a brief summary.

ETHICS AND ACCOUNTABILITY IN THE FEDERAL GOVERNMENT: ROOM FOR IMPROVEMENT

Sheila Fraser, Auditor General of Canada

March 8, 2004



Sheila Fraser spoke shortly after the publication of her report on the federal government sponsorship program. While she allocated only a small portion of her speech to this particular issue, its impact clearly permeated much of what she said. Her primary point of reference was what she called (quoting a pollster) the new Canadian "search for certainty". Here the reference was to an increasingly educated public with a strong desire for credibility in both

the people and institutions of government. Ms. Fraser identified a key role for her department with its staff of almost 600 in this regard.

Ms. Fraser spent most of her talk focusing on the work of her department and others in encouraging accountability and good ethics, beginning with the initiatives of her predecessor Denis Desautels and leading to the report by the late John Tait signalling an emerging consensus on values and ethics in government. She reported that many government departments today implement sound policies but noted that these must also be applied with a strong dose of realism. "They recognize that values and ethics guidelines alone aren't enough to ensure honesty. We can't base governance on the hope that people will always be honest. As a result, these ethics programs I mentioned must balance a values- and ethics-based approach with robust financial and management controls."

Ms. Fraser discussed a number of the guidelines currently in place and talked of the importance of distinguishing between "answerability" and "accountability." She noted that the application of the latter is not always clear at either the ministerial or deputy ministerial levels. She also discussed the 2003 Values and Ethics Code and identified its strengths and weaknesses. While noting its value in requiring common adherence,

she observed that "While it calls for conflict among values and ethics to be resolved in the public interest, the Code doesn't offer much guidance on how to determine that public interest. Nor does it help reconcile or assign priority to conflicting values." Finally, she expressed faith in the vast majority of public servants and reiterated the need for her Office both to act as critic and to play a "a constructive part in maintaining the confidence of Canadians in government."

THE BUSINESS CASE FOR SUSTAINABILITY AND THE ROLE OF SOCIAL RESPONSIBILITY

Dan Gagnier, Vice President, Corporate and External Affairs, Alcan Inc.

April 26, 2004



Dan Gagnier addressed the complex and difficult concept of sustainability and corporate social responsibility, beginning with the definition of sustainability used by the CEO of Alcan, Travis Engen: "Sustainability, broadly speaking, means that you are striving for excellent performance in three dimensions: financial dimensions, social dimensions and environmental dimensions....".

Mr. Gagnier also identified, however, the poor public reputation of corporate social responsibility, describing the many scandals of the past few years and noting the general cynicism surrounding the concept. Here he quoted a January 22, 2004 article from *The Economist*: "CSR was conjured because government action was deemed inadequate. Ten years on, instead of declaring victory, disenchanted NGOs are coming to regard CSR as the greater sham. Might this be a sign that CSR has finally peaked?"

Despite these difficulties, there have also been many positive initiatives. Mr. Gagnier cited the most important ones and then proceeded to make the business case for integrating sustainability into the governing corporate

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2004 NEW CORPORATE MEMBERS

EthicsCentre CA welcomes the following new corporate members:

Small Business – Community Rehab, Hamilton

Supporting Member – Gardiner Roberts LLP

Chair's Circle – TD Bank Financial Group

objective of maximising value. He described the Alcan Sustainability prize and then detailed how Alcan integrates the concept throughout its operations. His final focus was on the ISO Advisory Group on Social Responsibility. He outlined its preliminary findings, including that "ISO needs to avoid addressing issues that can only be resolved through political processes." He sees an ISO standard as a very useful means for achieving real progress in this field because of its international status and the objectivity of its standards. The Advisory Committee Report will be discussed in June 2004 at a conference in Stockholm and the Technical Management Board will resolve how to proceed thereafter.

NEW PROFESSIONAL RULES FOR REPORTING UP THE LINE

Scott Jolliffe, National Managing Partner, Gowlings
Wednesday June 16, 2004

Scott Jolliffe outlined the new professional rules (March 2004) obliging lawyers to report transgressions by members of the organization internally.

Ontario lawyers, hearing of actual or proposed misconduct by the client or within the client organization, must discourage such misconduct and, if the conduct is or is likely to persist, report the concerns upwards in the organization to its most senior levels until the matter is dealt with "appropriately". Should the lawyer's advice be ignored and satisfactory (in the eyes of the lawyer) action not be taken, the lawyer is required to resign.

Rules of client confidentiality remain unaltered and, provided the lawyer is not governed by the US Sarbanes-Oxley legislation, the lawyer will not report the concerns outside the client corporation. The only exceptions remain the long-standing ones; namely, where lawyers become aware that severe physical or psychological harm might result from a client's proposed actions, they may report it externally, assuming the client will not change the proposed course of action.



INTRODUCTION TO OUR EXECUTIVE: ROMAN W. KOSMYNA, C.A.

Roman joined the EthicsCentre CA Board in November of 2001 and is its Treasurer and a member of the Executive. In his professional capacity, Roman is Chief Audit Executive at the Workplace Safety & Insurance Board of Ontario (WSIB) and is also a member of the WSIB's Senior Management Committee. He also leads the WSIB's Risk Committee.

Roman started his professional career in 1980 and articulated at the Montreal office of Price Waterhouse. He moved to Toronto in 1984 and joined the Internal Audit department of Torstar Corporation. He then moved to the Hudson's Bay Company and over his 14 years there rose to being its Audit Director.

Roman has been involved in professional conferences and seminars over many years as a presenter and seminar leader to a variety of groups on Audit and Risk topics. He has presented at Audit conferences and seminars in Toronto for Federated Press, IQPC and to the Internal Audit Division of Management Board Secretariat of the Government of Ontario, as well at professional audit conferences in Boston and Chicago by MIS Institute of Boston.

Roman is a chartered accountant and a member of the Institute of Chartered Accountants of Ontario. In addition to the Ethics Centre CA Board, he also sits on other NGO Boards and is a member of the Membership Review Committee for Catholic Charities of the Archdiocese of Toronto.

In outlining the importance of ethics and the role of the Centre, Roman had these thoughts to share:

"Ethics serves as a cornerstone of a socially responsible organization, both in the private and public sectors. In today's increasingly scrutinized business environment, an ethical approach to business and service delivery is a must regardless of the industry or sector you are in. The absence of ethics as a core value in business or public service will no longer be tolerated by stakeholders, nor should it be. Organizations need to address the four core elements or fundamentals of what I call the **CARE** Index to be effective, and they are: **C**redibility, **A**ccountability, **R**esponsibility and **E**thics.

The EthicsCentre is an organization that serves this public interest and trust by being a leader in Canada in this regard, and by being focused on and working towards a better business foundation built on the core value of Ethics. The Board of the Centre is an exceptional group of volunteers working with the Executive Director to improve what the Centre has to offer and to create an improved environment in support of the public trust. My thanks to the many organizations and individuals who support the EthicsCentre, for their organizational and financial support, to fulfill its mandate; and to my colleagues on the Board for their contributions to the Centre in terms of time, their efforts and a job well done."

UPCOMING EVENTS

LUNCHEON SPEAKER SERIES

Fall Luncheon Series sponsored by
Fraser Milner Casgrain LLP



FRASER MILNER CASGRAIN LLP

SEPTEMBER 22

12 Noon
The Ontario Club
5th Floor, 30 Wellington St. W.
Toronto

Michael Adams, President, Environics Group of Research & Consulting Companies and author of *Fire & Ice: The US and Canada and the Myth of Converging Values*, winner of the 2004 Giller Prize, the Donner Prize, the award in the Canadian public-policy field

OCTOBER 21

12 Noon
The Ontario Club
5th Floor, 30 Wellington St. W.
Toronto

Purdy Crawford
Counsel to Osler Hoskin & Harcourt LLP
Boards of Directors – Monitoring for Ethical Standards

NOVEMBER 24

12 Noon
The Ontario Club
5th Floor, 30 Wellington St. W.
Toronto

Maureen Sabia, Chair, Audit Committee of Canadian Tire Board of Directors and co-author of *Integrity in the Spotlight – Opportunities for Audit Committees*

FALL CONFERENCE

OCTOBER 18-19

Le Royal Meridien
King Edward Hotel
37 King Street East
Toronto

Corporate Ethics Summit 2004: Creating Competitive Advantage Through Business Ethics
Sponsored by EthicsCentre CA but put on by Federated Press

ETHICS CENTRE CA RELOCATES TO NEW OFFICE SPACE

Realizes significant savings and improved service

EthicsCentre CA is proud to announce that, by relocating to new offices, we have reduced our base operating costs while simultaneously improving our ability to fulfill our mission of championing the application of ethical values in the decision-making process.

Effective July 1, 2004, the new address of EthicsCentre CA's new home is 1 Yonge Street, Suite 1801, Toronto, Ontario, M5E 1W7. Our telephone number is (416) 368-7525 and our fax number is (416) 369-0515.

managementethics is published quarterly by EthicsCentre CA. We welcome appropriate announcements, letters to the editor, short articles of 300 to 1000 words (which will be subject to usual editorial processes) and suggestions from readers.

managementethics is edited by Sally Gunz.

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12161 1932 RR 0001

Back issues of **managementethics** are on-line at the Centre's web site.

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Printing: Courtesy of The Canadian Institute of Chartered Accountants

Layout and design: Avril Orloff

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