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June 29, 2015

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territory
Superintendent of Securities, Nunavut

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario M5H 2SB

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

Re: Canadian Securities Administrators (CSA) Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids and changes to National Policy 62-203 Take-Over Bids and Issuer Bids

Thank you for the opportunity to comment on the proposed amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids (**MI 62-104**) and changes to National Policy 62-203 Take-Over Bids and Issuer Bids (**NP 62-203**), (collectively, the **Proposed Bid Amendments**), both of which were published for comment on March 31, 2015. We appreciate the opportunity to be a part of the CSA's regulatory reform process and to contribute to these important developments.

Hurt Capital Inc. is a research-driven investment and venture advisory firm. Since 2008, our investment selections in the capital markets have outpaced the S&P 500. This was achieved with minimal trading, and predominantly a buy-and-hold approach to investing. We attribute this success to an investment methodology rooted in academic research, alongside the traditional value investing principles taught by Ben Graham at Columbia University in the 1930's and espoused by Warren Buffett with much success in recent years. Our research in this field has a reasonable prospect of enhancing the competitiveness of Canada's capital markets and advancing the future of the Canadian economy.

Overall, we are supportive of the intent of the Proposed Amendments to allow issuers subject to an unsolicited bid time to adequately evaluate and consider competing proposals. In extending the period, however, a careful balance must be maintained to minimize the cost burdens and risk exposure for offerors. The 120 day period may act as a deterrent to offerors, providing disincentive for potential transactions that would otherwise enhance value.

We appreciate the CSA's significant efforts to strike a balance between the rights of security holders, offeree issuers and offerors. Our comments that follow are general in nature with a view to informing the overall trajectory of securities reform, including the policy objectives of the Proposed Bid Amendments and the take-over bid regime.

"An Indeterminate Theory of Canadian Corporate Law",¹ published in the University of British Columbia Law Review and made publicly available on SSRN, lays the foundation of a distinct theory for the enhanced efficiency of public corporations. In revisiting the *BCE* decision, this article uncovers fresh insights and reveals new theoretical implications on this otherwise challenging development in corporate governance. Within a detailed analysis of Canadian corporate law, elements of Warren Buffett's approach to corporate governance are compared to Canada's distinctive fiduciary duty, both essentially rejecting central tenets of shareholder primacy and stakeholder theory. In considering Buffett's control position in Berkshire Hathaway, which in turn holds a controlling interest in numerous other companies, this research posits that the existence of ethical dominant shareholders may enhance the economic efficiency of publicly traded firms. In militating against agency costs, companies with powerful shareholders may benefit from greater efficiencies, provided that an inversely correlated "discriminatory problem" is mitigated. Anecdotal evidence is drawn from Warren Buffett's preference for concentrated ownership structures combined with an approach to corporate governance that reduces "discriminatory costs", a variant of the agency costs pervasive in widely dispersed U.S. corporations.

In Canada, legal mechanisms have developed over a forty-year period in response to a prevalence of controlling shareholders and dual class share structures in public markets. The theoretical underpinning of Canadian corporate law has evolved within this context, which is almost precisely obverse to the principal-agent ownership structure observed by Berle and Means² in 1932 – specifically, the separation of ownership and control in U.S. firms. In contrast, the Canadian regime has advanced along a trajectory that contemplates a divergence of interests between dominant and dispersed shareholders, alongside conventional agency issues.

In a study on U.S. firms, funded by the Investor Responsibility Research Center Institute and conducted by Institutional Shareholder Services Inc., researchers found that controlled companies are on the rise. In 2002, the S&P 1500 Composite had 87 controlled firms; by 2012 this number was up 31% to 114. Within these firms, 79 contained multi-class capital structures with unequal voting rights, while 35 were controlled through a single class of voting stock.³ Examples of this trend are found in Google's (U.S. \$367 billion, market capitalization) multi-class share split to concentrate voting control in the hands of two shareholders, as is the control position of a single shareholder over Facebook (\$246 billion).

¹ Claudio R Rojas, "An Indeterminate Theory of Canadian Corporate Law" (2014) 47:1 UBC L Rev 59, online: SSRN <<http://ssrn.com/abstract=2391775>>.

² Adolf Berle & Gardiner Means, *The Modern Corporation and Private Property* (1932), (New York: Harcourt, Brace and World, 1967).

³ Investor Responsibility Research Center Institute, "Controlled Companies in the Standard & Poor's 1500: A Ten Year Performance and Risk Review" (October 2012), online: <<http://irrcinstitute.org>>.

Concentrated shareholdings are also found in Berkshire Hathaway (\$345 billion), Wal-Mart (\$232 billion), Amazon (\$201 billion) and Oracle (\$178 billion). The aggregate market capitalization of these six firms is \$1.57 trillion. Restated, a small group of individuals dictates corporate policy over firms holding a combined market capitalization of approximately one-twelfth the value of all S&P 500 companies (\$19.76 trillion).⁴ This is reminiscent of Canada's experience with concentrated shareholders holding significant influence or control over the country's largest public corporations.

Research out of Stanford University and Columbia Law School goes further. In a paper by Ronald J. Gilson and Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation*,⁵ the authors contend that "the U.S. Supreme Court will come to realize what the Chancery Court has recognized for some time – that the doctrine of substantive coercion as a basis for takeover defense must give way as Delaware corporate law adapts to the very different shareholder distribution the capital market has now given us". The implication is that share ownership patterns in the U.S. equity markets reveal a gradual consolidation between ownership and control – restated, the landscape of U.S. capital markets is shifting.

Academic attention from prominent U.S. and UK scholars is intensifying on these issues. In "[The Long-Term Effects of Hedge Fund Activism](#)"⁶, Bebchuk (Harvard), Brav (Duke) and Jiang (Columbia) uncover empirical evidence that shareholder interventions are followed by improvements in five-year operating performance. Edmans (Wharton), in "[Blockholders and Corporate Governance](#)"⁷, reviews theoretical and empirical literature on the impact of large shareholders on governance and firm value. In "[Corporate Governance According to Charles T. Munger](#)"⁸, Larcker and Tayan (Stanford) explore the connection between economic efficiency and business ethics. A noteworthy body of research from scholars at Harvard, Yale, Oxford, and Cambridge delves further (see e.g. [Armour & Cheffins](#)⁹; [Armour, Hansmann & Kraakman](#)¹⁰; [Enriques, Hansmann & Kraakman](#),¹¹; [Cheffins](#),¹²; [Bebchuk](#),¹³). Together, these studies suggest that shareholder power leveraged within a suitable ethical framework enhances economic efficiency, thereby benefiting the various constituents that depend on a corporation's sustainable operating performance.

⁴ As of June 29, 2015. All figures in U.S. dollars.

⁵ Ronald J Gilson & Jeffrey N Gordon, "Agency Capitalism: Further Implications of Equity Intermediation" (2014). Stanford Law and Economics Olin Working Paper No. 456; Columbia Law and Economics Working Paper No. 461, online: SSRN <<http://ssrn.com/abstract=2359690>>.

⁶ Lucian A Bebchuk, Alon Brav & Wei Jiang, "The Long-Term Effects of Hedge Fund Activism" (2015). Harvard Law School John M. Olin Center Discussion Paper No. 802; Columbia Law Review, Vol. 115, No. 5, pp. 1085-1156, June 2015, online: SSRN <<http://ssrn.com/abstract=2291577>>.

⁷ Alex Edmans, "Blockholders and Corporate Governance" (2014). ECGI - Finance Working Paper No. 385, online: SSRN <<http://ssrn.com/abstract=2285781>>.

⁸ David F Larcker & Brian Tayan, "Corporate Governance According to Charles T. Munger" (2014). Stanford University, *Closer Look Series: Topics, Issues and Controversies in Corporate Governance and Leadership* No. CGRP-38, online: SSRN <<http://ssrn.com/abstract=2404077>>.

⁹ John Armour, & Brian R Cheffins, "The Rise and Fall (?) of Shareholder Activism by Hedge Funds" (2009). ECGI - Law Working Paper No. 136/2009, online: SSRN <<http://ssrn.com/abstract=1489336>>.

¹⁰ John Armour, Henry Hansmann & Reinier Kraakman, "Agency Problems, Legal Strategies, and Enforcement" (2009). Oxford Legal Studies Research Paper No. 21/2009; Yale Law, Economics & Public Policy Research Paper No. 388; Harvard Law and Economics Research Paper Series No. 644; ECGI - Law Working Paper No. 135/2009, online: SSRN <<http://ssrn.com/abstract=1436555>>.

¹¹ Luca Enriques, Henry Hansmann & Reinier Kraakman, "The Basic Governance Structure: The Interests of Shareholders as a Class" in R Kraakman et al, eds, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2d ed (New York: Oxford University Press, 2009); Luca Enriques, Henry Hansmann, & Reinier Kraakman, "The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies" in Kraakman et al, *ibid*.

¹² Brian R Cheffins, "Corporate Ownership and Control: British Business Transformed" (2008). Oxford University Press, online: SSRN <<http://ssrn.com/abstract=1304194>>.

¹³ Lucian A Bebchuk, "The Case for Increasing Shareholder Power" (2005). Harvard Law Review, Vol. 118, No. 3, pp. 833-914, online: SSRN <<http://ssrn.com/abstract=387940>>.

In the U.S., the era of the Berle-Means corporation is in decline. The magnitude of this shift is underappreciated, yet seismic in its implications on corporate governance theory and securities regulation. Increasingly, shareholders wield the power to determine or significantly influence corporate policy in U.S. firms. In focusing upon this evolution in ownership structure – specifically, narrowing within the separation between ownership and control – a distinct economic theory for the enhanced efficiency of public corporations is emerging.

We encourage the CSA to consider the unique characteristics of Canada’s capital markets, particularly with regard to concentrated share ownership patterns¹⁴ and the inherent efficiencies that are implicitly shifting the U.S. landscape towards greater levels of shareholder influence over corporate policy.

Thank you for considering these comments.

Yours very truly,

Claudio R. Rojas

¹⁴ Brian R Cheffins, “Hedge Fund Activism Canadian Style” (2014) 47:1 UBC L Rev 1. University of Cambridge Faculty of Law Research Paper No. 3/2013, online: SSRN <<http://ssrn.com/abstract=2204294>> (“the fact that the presence of dominant shareholders is a deterrent to offensive shareholder activism is highly relevant in the Canadian context... This ownership pattern discourages hedge fund activism in Canada”).