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A Canadian Model of Corporate Governance: Director Duties, Stakeholder Interests, and Emerging Hybrid Legal Structures

CAROL LIAO, SJD/PhD Candidate
Faculty of Law, University of Toronto and University of British Columbia (Joint Program)

cfgr.ca

LIST OF PARTICIPATING PRACTITIONERS

My sincere thanks to the following senior legal practitioners who kindly and generously contributed their time and expertise to this project:

William M. Ainley, Davies Ward Phillips & Vineberg LLP
Rita C. Andreone, Q.C., Lawson Lundell LLP
Jeff Barnes, Borden Ladner Gervais LLP
Noralee Bradley, Osler, Hoskin & Harcourt LLP
William J. Braithwaite, Stikeman Elliot LLP
Terrence Burgoyne, Osler, Hoskin & Harcourt LLP
Rob Collins, Blakes, Cassels & Graydon LLP
Douglas G. Copland, Borden Ladner Gervais LLP
Dallas L. Droppo, Blakes, Cassels & Graydon LLP
Aaron S. Emes, Torys LLP
Jean Fraser, Osler, Hoskin & Harcourt LLP
Sharon C. Geraghty, Torys LLP
Mitchell H. Gropper, Q.C., Farris, Vaughn, Wills & Murphy LLP
Stephen Halperin, Goodmans LLP
Carol Hansell, Hansell LLP
Doug H. Hopkins, Boughton Law Corporation
Michael L. Lee, Lawson Lundell LLP
Robert Lehodey, Q.C., Osler, Hoskin & Harcourt LLP
Jon Levin, Fasken Martineau DuMoulin LLP
Andrew J. MacDougall, Osler, Hoskin & Harcourt LLP
R. Hector MacKay-Dunn, Q.C., Farris, Vaughn, Wills & Murphy LLP
Margaret C. McNee, McMillan LLP
D. Shawn McReynolds, Davies Ward Phillips & Vineberg LLP
William K. Orr, Fasken Martineau DuMoulin LLP
Barry J. Reiter, Bennett Jones LLP
Simon A. Romano, Stikeman Elliot LLP
Richard A. Shaw, Q.C., ICD.D., Richard A. Shaw Professional Corporation
John Smith, Lawson Lundell LLP
Rene R. Sorell, McCarthy Tétrault LLP
Edward J. Waitzer, Stikeman Elliot LLP
Tom Theodorakis, McMillan LLP
Marvin Yontef, Stikeman Elliot LLP

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All errors and omissions contained in this report are my own.

ABSTRACT

This report comes at a unique time in Canadian corporate governance history. It has been five years since the landmark decision of *BCE Inc. v 1976 Debentureholders*, a plan of arrangement case where the Supreme Court of Canada specifically addressed director duties in relation to stakeholder interests. In the decision, the court affirmed its earlier findings in *Peoples Department Store Inc. (Trustee of) v. Wise* and seemed to shift away from an Anglo-American definition of shareholder primacy. But of course, the current state of Canadian common law is only one part of a larger story. The Canadian securities commissions have become increasingly influential in the governance sphere, and by design are investor-focused. Canada is considered one of the most bidder-friendly jurisdictions in the world, as National Policy 62-202 leaves Canadian boards with a limited number of defensive tactics when faced with an unsolicited takeover bid. Shareholders' rights have increased well beyond what was ever contemplated by Canadian corporate laws, and the issue of greater shareholder vs. board control has now become the topic of live debate. Competing proposals from the Canadian Securities Administrators and the Autorité des Marchés Financiers regarding poison pills and defensive tactics in general have put these issues under increased scrutiny.

The conflicting theoretical positions from the courts and the securities commissions have enriched the dialogue on the current environment of Canadian corporate governance. This qualitative study brings together some of the top corporate legal minds in Canada to opine on the fundamental principles that are driving the development of Canadian corporate governance today. Interviews were conducted with 32 leading senior legal practitioners across Canada, who spoke candidly on matters involving shareholder primacy, director duties, stakeholder interests, common law and the courts, regulatory bodies, and the future trajectory of Canadian corporate governance, among other things. The observations from these senior practitioners provide a pulse check on the dynamic field of Canadian corporate governance. Taken within the context of today's legal and regulatory environment, their insights piece together an early-stage framework of a Canadian model to further director knowledge and help inform future research.

In addition to outlining a Canadian model of governance, this report hopes to address another issue arising in the corporate legal field – the emergence of hybrid corporate legal structures on the international stage. Hybrids are new corporate legal entities that are combining both for-profit and non-profit legal characteristics in their design to enable the dual pursuit of economic and social mandates. As Canadian social leaders actively pursue hybrids in the coming years, this report hopes to weave together a conversation that needs to be had between those leaders, legislators, and corporate practitioners before any further hybrid legislation becomes widespread in Canada. A Canadian model of corporate governance needs to be examined and properly understood so incoming hybrids can be tailored specifically to meet Canadian social and legal needs.

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A Canadian Model of Corporate Governance:
Director Duties, Stakeholder Interests, and Emerging Hybrid Legal Structures

Introduction

Corporate governance models are frequently addressed in Anglo-American corporate legal scholarship, with shareholder primacy touted as the dominant model that governs modern day corporations.[1] Common themes in academic debate include whether shareholder primacy is efficient, whether it should be the dominant model, and how it can be improved, among other things.[2] However, for many of Canada's legal practitioners, theoretical models of governance are foreign to the day-to-day functioning of providing legal services that support good governance practices within Canadian corporations. Academic discussions on shareholder primacy and other alternative models of governance, such as director primacy,[3] team production,[4] enlightened shareholder value,[5] labour-oriented and state-oriented models,[6] are rarely put to the test against the backdrop of Canadian corporate practice.

The act of recognizing a Canadian model of corporate governance has its own particular set of challenges. As one practitioner interviewed for this study noted: "Many Canadian executives and directors have been schooled on US-style governance and that is just a function of the US market being so much bigger – S.E.C. rules, media, scandals, etc.…When you are trying to study corporate governance as a director or a C.E.O. might, it is easy to assume that Canadian corporate governance is one and the same as US corporate governance." While growth of corporate governance as a field of study in the past few decades has been formidable, Canadian legal scholars often rely on American research due to the lack of Canadian-specific scholarship available, and much of the theoretical analysis has blurred country lines.

Since Canadian corporate legal scholarship has managed to subsist in this manner for some time, it is fair to query why at the present moment it is worthwhile to identify whether or not a recognizable Canadian model of governance indeed exists. While there are several intrinsic and academic reasons why it is important to clarify Canadian governance issues in legal scholarship, identifying a Canadian-specific model it is not limited to simply an academic exercise. The rapid emergence of hybrid corporate legal structures on the international stage has caused a Canadian

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[1] See e.g. Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89:2 Geo LJ 439; Charles Elson, 'Five Reasons to Support Shareholder Primacy', NACD Directorship Blog (15 April 2010), online: <www.directorship.com/charles-elson-shareholder-primacy/>. Shareholder primacy is also frequently assumed to be the dominate model in articles that critique it, see e.g. Lynn Stout, "Bad and Not-So-Bad Arguments for Shareholder Primacy" (2002) 75 S Cal L Rev 1189.

[2] See e.g. Ian Lee, "Efficiency and Ethics in the Debate about Shareholder Primacy" (2006) 31:2 Del J Corp L 533; Jill Fisch, "Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy" (2006) 31:3 J Corp L 637.

[3] Stephen M Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97:2 Nw UL Rev 547.

[4] Margaret Blair & Lynn Stout, "A Team Production Theory of Corporate Law" (1999) 85 Va. L. Rev. 248; Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44 Alta. L. Rev. 299.

[5] Cynthia Williams & John Conley, "An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct" (2005) 38 Cornell Int'l L J 493; Virginia Harper Ho "'Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide" (2010) 36 J Corp L 59.

[6] Hansmann & Kraakman, *supra* note 1 at 443-47. Hansmann and Kraakman describe the manager-oriented model as one that existed between the 1930s and the 1960s in the US and the labour-oriented model as one that peaked in Germany in the 1970s.

model of governance to become a highly relevant topic of debate.

Corporate hybridity is a legal innovation that has received little scrutiny in academic scholarship to date, as it is a very new institutional phenomenon.[7] The growth of the "social enterprise" – a term with no legal import that commonly refers to either a for-profit corporation trying to be socially good or an enterprising non-profit organization – is generating a legislative response in some countries. In the corporate context, a hybrid can be defined as a corporate legal structure that combines both for-profit and non-profit legal characteristics into its design to enable the dual pursuit of economic and social mandates.[8] The United Kingdom (UK) and the United States (US) have been leading the charge, implementing a number of new corporate hybrids. Some have been met with relative success, others have not. Restrictions on dividends, obligations on directors to consider stakeholder interests, and community-purpose asset locks are some examples of the unique governing features found within these corporate legal innovations.

Canadian legislators are beginning to contemplate the adoption of hybrid corporations into its laws, and the process has already begun in a few provinces. There is now much fanfare in Canada surrounding the possible implementation of a hybrid similar to the US benefit corporation to address traditional for-profit sector needs for social progress.[9] As Canadian legislators begin to move toward the implementation of hybrids, an important question arises: What *is* Canada's actual legal model to govern its corporations? The answer to that question should dictate how Canada proceeds in the adoption of hybrid corporate legal structures. If the benefit corporation is designed mainly to address American corporate governance needs for social progress, then before Canada elects to adopt similar laws, there must first be an accurate depiction and understanding of Canada's own governance position. This will ensure that Canada does not simply adopt an American solution to an American problem that is not reflective of Canada's current legal stance, if indeed there is a distinction to be had.

Thus, this report attempts to accomplish two main objectives, each of which typically address different audiences but here help to inform the other. The first objective, which comprises of the main bulk of this report, is to outline the parameters of a Canadian model of governance for directors and others to consider. Interviews were conducted with 32 leading senior legal practitioners across Canada, who spoke candidly on matters involving shareholder primacy, director duties, stakeholder interests, common law and the courts, regulatory bodies, corporate norms, and the future trajectory of Canadian corporate governance, among other things. The observations from these senior practitioners provide a pulse check on the Canadian governance landscape, providing frank and thoughtful insights on some of the fundamental principles that drive the decision-making of Canadian corporations. Taken within the context of today's legal

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[7] Of the few articles available, see e.g. Julie Battiliana, et al, "In Search of the Hybrid Ideal" (2012) 10 Stanford Social Innovation Review 51; Dana Brakman Reiser, "Governing and Financing Blended Enterprise" (2010) 85 Chicago-Kent L Rev 619; Dana Brakman Reiser, "Blended Enterprise and the Dual Mission Dilemma" (2010) 35 Vermont L Rev 105.

[8] Also known as a "blended enterprise" (Brakman Reiser, *supra* note 7).

[9] See e.g. See e.g. Stacey Corriveau, et al, "Benefit Corporations in Canada: A tool to support blended enterprise in Canada" (2011) MaRS Centre for Impact Investing [draft with author]; BC Social Innovation Council, "Action Plan Recommendations to Maximize Social Innovations in British Columbia" (March 2012), online: Government of British Columbia <www.innovationbc2011.crowdvine.com> at 11; Adam Spence, "In Search of the Benefit Corporation" (25 November 2010), online: MaRS Centre for Impact Investing <www.marsdd.com/2010/11/25/in-search-of-the-benefit-corporation/>.

and regulatory environment, these insights piece together an early-stage framework of a Canadian model to further director knowledge and help inform future research.

The second objective is to apply the insights of these leading practitioners to the question of whether US benefit corporation legislation should in fact be adopted by Canadian provinces. The movement to establish the benefit corporation in Canada originated from American social activists, who partnered with willing Canadian organizations to lobby provincial governments for new legislation.[10] As Canadian social leaders actively pursue hybrids in the coming years, it is critical that those leading the benefit corporation movement in Canada are informed on the status of Canadian corporate governance, so incoming hybrids can be tailored specifically to Canadian social and legal needs. This report hopes to weave together a conversation that needs to be had between these leaders, legislators, and corporate practitioners before any further hybrid legislation becomes widespread in Canada.

Part I of this report begins by examining the legal principles of corporate governance. Section A first outlines the methodology and Section B then examines a widely-held academic definition of the shareholder primacy model of corporate governance, made up of five core principles, and puts it to test against Canadian corporate legal practice. Section B.1 examines the question of who should have ultimate control of the corporation, and draws upon practitioners' observations regarding the current debates on defensive tactics in Canada. Section B.2 then delves into a discussion on the management of the corporation, and the question of whether "best interests of the corporation" and "best interests of the shareholders" is a significant or negligible difference in Canadian corporate law. In Section B.3, practitioners consider the role of stakeholder interests in corporate decision-making, and offer their thoughts on the landmark *BCE* decision and how its findings have impacted Canadian corporations, if at all. Section B.4 then addresses the protection of minority shareholder interests, and Section B.5 considers whether the market value of a company's shares should be regarded as the principal measure of shareholders' interests. Section C then provides a broader overview of Canada's legal and regulatory landscape governing Canadian corporations. How have the courts helped to form Canadian corporate governance? What has been the securities commissions' role, and others? Finally, Section D gives overall remarks on the outline of a Canadian model and surmises on the future development of Canadian corporate governance.

Part II leaves behind high-level Canadian corporate law and brings the discussions in Part I into sharp focus – the applicability of a Canadian model to new hybrid corporate legislation. In Section A, the international hybrid phenomenon is discussed, including a brief overview of hybrids how have succeed and failed in the last decade. In Section B, the US benefit corporation is considered and examined, and then in Section C, important questions are drawn from the framework of Canadian corporate governance to assess whether Canada should adopt the benefit corporation legal structure as it has been implemented in the US. Section D provides final thoughts on the future of hybrid legal structures in Canada, and then the report concludes with an overall assessment of the findings.

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[10] B Lab is a Philadelphia non-profit organization that is behind the state benefit corporation movement in the US. They have since partnered with several Canadian organizations, including MaRS Discovery District, Social Innovation Generation, Vancity Savings and Credit Union, and the Natural Step, to support the adoption of benefit corporation legislation in Canada.

PART I: A CANADIAN MODEL OF CORPORATE GOVERNANCE

A. Methodology

Potential participants for this study were selected based on several factors, including: (1) reviews of online profiles from prominent Canadian law firms where the senior practitioner is identified as a specialist in corporate governance, among other things; (2) appearances on "Best Lawyers in Canada" lists, "Lexpert" rankings, "Who's Who Legal," "Chambers Global," and other equivalent lists; (3) colloquial understandings as to who the leaders are in Canadian corporate governance; (4) recommendations from executive members of the Canadian Foundation for Governance Research; and/or (5) recommendations offered by participants on other senior practitioners appropriate for the study. Participation was limited to those practising in Toronto, Vancouver, and Calgary. This was mainly due to manageability of content, with a focus on the major financial epicenters of Canada that practice in common law jurisdictions.

Invitations to participate were sent to over 100 senior legal practitioners via email, where 32 indicated interest. Questions were emailed a day or more in advance to give practitioners the option of reviewing questions beforehand. Interviews were conducted over the phone with the exception of one practitioner who supplied written answers. Comments by the practitioners were on a not-for-attribution basis. Practitioners were informed that any identifying characteristics within their comments would be stripped from the report and were invited to speak freely. Gendered language (such as "his" or "her") was not used in the report in order to preserve confidentiality, thus plural pronouns were required to be used. Discussions were conversational and not beholden to the interview questions, with the interviewer taking significant liberties to ask for further elaboration and/or follow-up questions based on practitioners' answers. Many practitioners provided stories and personal accounts in addition to their responses, and several referenced or provided supplemental material prior to and/or following their interviews, including journal articles, either authored by themselves or others, firm news bulletins, web-links, or any additional thoughts they had. With permission from each participant, interviews were recorded and then later transcribed, with over 1,000 pages of transcriptions culminating into the following summary of findings.

This report is not meant to be treated as a quantitative study. It is a qualitative study akin to a fireside chat with a group of knowledgeable and experienced experts to gain a deeper understanding of Canada's governance framework. Throughout the interviews, one was easily struck by the level of thoughtfulness and candor behind practitioners' answers. As one practitioner noted during their interview, "there is a gulf between what people hope something is, think it should be, and what it is….that may, to some extent, account for some of the difference in views you are going to hear." In parsing carefully through the comments made by practitioners, every effort was made to preserve the essence of practitioners' words, and to capture the intent behind them in the context they were given. Directors may appreciate the candid nature in which issues were discussed by these leading senior practitioners.

As this report deals with high-level legal issues, several practitioners referred a number of legal terms, important cases and transactions in their comments. In order to improve the flow and readability of this report, while also accommodating for a range of readers with different legal backgrounds, certain legal definitions and details on particular cases and transactions are provided in the footnotes as opposed to the body of the report. It should be noted that participants

spoke for themselves and not necessarily for the organizations with which they are affiliated. Their participation should not be construed as an endorsement of this report or its findings.

B. Examining Legal Principles of Corporate Governance

In their well-known and often cited 2001 article "The End of History for Corporate Law," Henry Hansmann and Reinier Kraakman, senior Yale and Harvard law professors, argued that the basic law of corporate governance across nations had already achieved a high degree of uniformity to the shareholder primacy model and that "continuing convergence toward [this] single, standard model is likely."[11] According to Hansmann and Kraakman, some key normative principles in this consensus include:

(1) ultimate control over the corporation should rest with the shareholder class;
(2) the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders;
(3) other corporate constituencies, such as creditors, employees, suppliers, and customers, [which, together with shareholders, are included as "stakeholders"] should have their interests protected by contractual and regulatory means rather than through participation in corporate governance;
(4) noncontrolling shareholders should receive strong protection from exploitation at the hands of controlling shareholders; and
(5) the market value of the publicly traded corporation's shares is the principal measure of its shareholders' interests.[12]

Arguing from an Anglo-American perspective, Hansmann and Kraakman believed that alternative governance models had already been tried and had failed.[13] Pointing to shareholder primacy's assumed efficiencies and its historical economic domination, they contended that the ideological convergence of this model is unlikely to be undone, especially since "no important competitors to the standard model of corporate governance remain persuasive …."[14] To Hansmann and Kraakman, the ideological convergence toward the model meant that general convergence in practice would eventually follow – thus signifying, for all intents and purposes, an end of history for corporate law.[15] Economic efficiency was the main force behind Hansmann

[11] Hansmann & Kraakman, *supra* note 1 at 439.
[12] *Ibid* at 440-41. There seems to be little contention in legal scholarship regarding Hansmann and Kraakman's definition of shareholder primacy. See e.g. Bainbridge, *supra* note 3 at 573 (which describes two principles of shareholder primacy: the shareholder wealth maximization norm and the principle of ultimate shareholder control); Fisch, *supra* note 2 at 637 (which asserts that shareholder primacy "defines the objective of the corporation as maximization of shareholder wealth"); Lee, *supra* note 2 at 535 (which defines shareholder primacy as "the view that managers' fiduciary duties require them to maximize the shareholders' wealth and preclude them from giving independent consideration to the interests of other constituencies").
[13] Descriptions of the manager-oriented model and labour-oriented model are provided at Hansmann & Kraakman, *supra* note 6. They describe the state-oriented as one most extensively realized in France and Japan post-World War II. *Ibid.* at 443-447.
[14] *Ibid.* at 454.
[15] *Ibid* at 455. There is also considerable discourse available on the issue of the global convergence of corporate governance, both prior to and following Hansmann and Kraakman's work. See e.g. John C Coffee Jr, "The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications" (1999) 93:3 Nw UL Rev 641; Jeffrey N Gordon & Mark J Roe, *Convergence and Persistence in Corporate Governance* (Cambridge: Cambridge University Press, 2004).

and Kraakman's presumption of the long-term international acceptance of the shareholder primacy model. They identified profit maximization, historical success and international competitive advantage as factors that "made the virtues of [the shareholder primacy] model increasingly salient."[16]

Practitioners were provided with Hansmann and Kraakman's definition of shareholder primacy, and asked if they found the definition to be an accurate depiction of Canadian corporate governance. Practitioners were invited to weigh in on each of the five principles, and discussions led from there.

1. Control of the Corporation

Principle: *"Ultimate control over the corporation should rest with the shareholder class."*

Several practitioners agreed that, in Canada, control belonged with the shareholder class – but with caveats. The principle of ultimate shareholder control was described as "mostly right," "correct subject to general laws of the land," and "somewhat true but with very significant exceptions." Many focused on the shareholders' abilities to elect and remove directors as signifying ultimate control, but pointed out that this control was limited and far removed from the day-to-day control exercised by the board and management. Three practitioners likened the control of shareholders to that of voters in a democratic country, where "as citizens of the country, our voting franchise is how we elect our representatives." Directors are the elected officials who now "have obligations to everybody and, ultimately, they have to answer to electorate or the shareholders." Shareholders therefore are not in a position to decide the specific depths that a corporation will take in executing or adopting business plans. In that sense, there is ultimate control but "on a day-to-day basis, control really rest with the board for resolution."

A small minority of the practitioners supported greater shareholder control since shareholders are the ones that have taken on the financial risk. However, one practitioner put it in the context of the corporation's existence, pointing out that when the company's financial situation has deteriorated "the party that's economically at risk is the creditor rather than the shareholder…[In that circumstance,] there's more obligation to the creditor." A significant majority of the practitioners tended to prefer greater director control in general.

Interestingly, there were differing interpretations as to whether Canada was trending towards greater board or shareholder control. A few practitioners felt that Canada was moving towards greater director control in practice, noting how "the biggest change over the last 10-15 years has been the increased role and responsibilities of directors, ensuring governance at the board level is robust." Other practitioners identified how administrative rules were generally changing in favour of the shareholder, as shareholders have been getting a sympathetic ear from the regulators and the stock exchange, who have "expanded the universe of shareholders' rights on various matters well beyond what the law ever contemplated." In a mergers and acquisitions (M&A) context,

[16] Hansmann & Kraakman, *supra* note 11 at 449. It is perhaps worthwhile to note that Hansmann and Kraakman's article was published in early 2001, prior to a number of financial calamities that marked the first decade of the 21st century, including the fall of Enron Corporation and other corporate and accounting scandals in 2001-2002, and, more recently, the global financial crisis. This has not changed the tenor of the presumed dominance of shareholder primacy in Anglo-American legal scholarship, but certainly has increased in its critiques.

many practitioners pointed to the securities regulators' shareholder-centric position on defensive tactics as representing significantly greater shareholder control in Canada, particularly when compared to the US position on these measures.

a. *Poison Pill Debate*

Canada is considered a very bidder-friendly jurisdiction as National Policy 62-202 *Take-Over Bids – Defensive Tactics* leaves Canadian boards with a limited number of defenses when faced with an unsolicited takeover bid.[17] This position is now under review in Canada. The Canadian Securities Administrators (CSA), the organization responsible for the securities regulation of all provinces, has released proposed National Instrument 62-105 *Security Holders Rights Plans*, which allow target boards to implement shareholder rights plans (known as "poison pills")[18] for a longer period than currently permitted when facing a hostile bid, subject to shareholder approval.[19] An alternative proposal has been put forth by the Autorité des Marchés Financiers (AMF), the organization mandated by the Quebec government to regulate Quebec's financial markets.[20] The AMF proposal seeks a new regime to govern all defensive measures, allowing boards with a greater overall arsenal to defend target companies in the face of unwanted takeover bids. The extended comment period for these proposals closed in July 2013.[21] As one practitioner observed:

> The proposals can be seen as a subtext of who actually should have ultimate decision-making authority in the context of change of control transactions: whether it should be the shareholders, which is the current approach of the securities regulatory scheme and the approach the commissions have traditionally taken on poison pills, or whether the boards should be more empowered, which is the path the courts seem to have taken but the regulators have not.

An overwhelming majority preferred the AMF proposal and felt a regime change was necessary, with one practitioner calling it "more intellectually honest" than the CSA proposal.[22] Another

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[17] National Policy 62-202 *Take-Over Bids – Defensive Tactics*, online: Ontario Securities Commission <www.osc.gov.on.ca/en/13274.htm>.

[18] A shareholder rights plan is a defensive tactic employed by companies to discourage hostile takeovers. This is done by making the shares of a company less attractive to the potential acquirer, either by allowing existing shareholders to buy more shares at a discount, or allowing shareholders to buy the acquirer's shares at a discounted price after the merger.

[19] Canadian Securities Administrators, "Notice and Request for Comment: Proposed National Instrument 62-105 Security Holders Rights Plans, Proposed Companion Policy 62-105CP, and Proposed Consequential Amendments" (14 March 2013) online: <www.osc.gov.on.ca>.

[20] Autorité des Marchés Financiers, "Consultation Paper: An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics" (14 March 2013), online: Autorité des Marchés Financiers <www.lautorite.qc.ca>.

[21] For some helpful summaries providing greater detail on the current proposals, see e.g., Robert Black, et al, "The Competing Visions of the CSA and AMF on Shareholder Rights Plans and Take-over Bid Defensive Tactics" Davis LLP Securities & Corporate Finance Bulletin (22 April 2013), online: Davis LLP <www.davis.ca/en/publication/csa-and-amf-on-shareholder-rights-plans-and-takeover-bid-defensive-tactics/>; John Emanoilidis, et al, "Canadian Companies Will be Harder to Acquire Under New Poison Pill Proposals" Torys LLP M&A Bulletin (14 March 2013), online: <www.torys.com/Publications>.

[22] The exception was one practitioner, who thought it would be better to work within the CSA's proposals and get them right since that was where Canada was probably going to end up, noting how the acceptance of the AMF proposal was "just never going to happen." This practitioner did, however, prefer the AMF proposal.

practitioner believed the proposals were motivated out of the desire of the Ontario Securities Commission (OSC) to "get out of the pill hearing game" and that "all the OSC is doing is largely codifying what's developed out of their own jurisprudence." There was consensus among practitioners in the M&A field that Canadian boards did not have enough in their defensive toolkit to properly respond to takeover bids, citing how "as a board, you have no bargaining power in Canada." One practitioner pointed out how "shares trade over so quickly once the transaction is announced that those who are holding the shares have a stake in only one thing, which is with a transaction going ahead."[23] Once a bid is made for a Canadian company, it can almost be assumed that the company will be sold, as the board has no way of resisting the bid, and "ultimately no ability to negotiate the best price or find an alternate because the bidder just has to wait the board out and then go straight to the shareholders." Many also preferred the AMF proposal because it would align more with the US standard of practice in M&A transactions. The AMF position would put Canada on a more even playing field on the global capital markets, "essentially bringing us to a Delaware state of law, which means you can indefinitely keep a hostile bidder away."

While some acknowledged the motivation behind regulators' push for greater shareholders' rights was due to a concern that directors could become entrenched and refuse a takeover bid to perpetrate the board's own power, these practitioners felt the fear was unwarranted. The concern was something that "had an element of truth 30 years ago," but nowadays "directors are acutely aware of their fiduciary duties in a change of control, and that they are exposing themselves to hellacious lawsuits if they try to entrench themselves with any form of conflict of interest." Some practitioners seemed to share a common sentiment that the Ontario Securities Commission was "substituting its visceral reaction for the business judgment of the directors," leaving boards "emasculated." Several expressed how "better run companies would have more director primacy" as the directors have the knowledge and capability to make better long-term decisions. The majority of these practitioners expressed how negotiating with the board was the most effective way to obtain the best deal for shareholders. One practitioner in particular, who strongly argued in favour of the corporation being run solely for the economic benefit of the shareholders, felt that the regulators have "tried to write a plan to eliminate the power of the board," which philosophically "is exactly where the power ought to be" as a fiduciary of the shareholders.

Some practitioners were cautiously optimistic that the acceptance of either proposal could temper the commissions' shareholder-centric position slightly in the future, signifying a possible trend towards greater board control. One practitioner noted how "right now the securities administrators all think, to a greater or lesser degree, that we have gone too far and it's time to make takeover protection stronger." Another commented that the securities regulators are making decisions "based on what they believe is the right thing for investors, but not with much thinking as to what was is the right answer for a corporation." A handful of practitioners contended that, given how the current debate on poison pills has a particular focus – which is solely looking at protecting investors in the capital markets from the commissions' view – the debate should not be construed to represent the overall governance model in Canada.

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[23] The practitioner continued on to state: "A lot of people would say that the people who bought shares are the ones whose interest you should be protecting – but that starts a step too late. If the board had the proper ability to negotiate with bidders, people wouldn't sell as quickly and people would stick it out and reap the rewards of doing that."

The discussions from practitioners suggest the answer of who holds ultimate control depends very much on what aspect of the law a practitioner elects to focus on. Fiduciary duties aside, the securities commissions have clearly favoured shareholders having the ultimate say in takeover situations, as their interest is in investor protection. In this context, and specifically regarding the current debate on the proper allocation of power in the treatment of poison pills, many of the practitioners expressed frustration over the fact that greater director control, in their minds, is more beneficial to shareholders in increasing their share value in the face of a takeover bid.

Stepping back from the poison pill debate, the board and management clearly exert greater day-to-day control in practice. And of course, shareholders continue to have the power to elect and remove directors. Decisions that will follow the AMF and CSA proposals as to how securities commissions across Canada approach poison pills specifically, and perhaps defensive tactics as a whole under the AMF proposal, will dictate whether there will be a power swing toward greater board control in an M&A context in the future, something heavily favoured by a significant majority of the practitioners interviewed.

2. Manage in the Best Interests of Whom?

Principle: *"The managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders."*

A few practitioners conceded that people mostly think that the obligation of the board and management is to manage the corporation in the interests of its shareholders. Despite this, all practitioners agreed that the theoretical principle was inconsistent with Canadian corporate law, which under s. 122 of the *Canada Business Corporations Act* (CBCA) requires that directors and officers manage the corporation in the "best interests of the corporation" as opposed to the shareholders.[24] The topic of the debate, then, became whether or not the difference between "best interests of the corporation" and "best interests of the shareholders" was simply a technical one or if there was a noteworthy Canadian difference to be had.

A handful of practitioners strongly felt there was no difference, stating that "it's the same thing" with one practitioner noting how "it's fine for directors to believe that it is in the best interest of the corporation, which to me means the best interest of its shareholders, notwithstanding that the Supreme Court goes a little off the reservation in this allegation." Other practitioners felt there was a difference between the two, with a few holding comparably strong views on the fact that there was a difference, including this practitioner, who stated:

> It's entirely different, that is not our common law…It should be a matter of complete indifference to the directors what the interests of the shareholders are, except if it makes a difference to the corporation. There's nothing wrong with taking shareholders' interests into account, but that's incidental…I don't think the law could possibly be clearer if you look at the corporate statutes and look at what the courts have said.

[24] *Canada Business Corporations Act,* R.S.C., 1985, c. C-44 [CBCA] at s. 122 ("every director and officer of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation" and "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances").

A few practitioners noted the difference when compared to the US, Delaware in particular, where their laws indicate that directors' duties are to the corporation and the shareholders, which a few practitioners felt was treated as one and the same by the American courts. One practitioner distinguished how American jurisprudence "is more clearly articulate that the interest of the shareholder should be foremost in the thoughts of the board in terms of maximizing shareholder value than perhaps has been articulated historically in the Canadian jurisprudence." There is, therefore, "a slightly different focus in Canada." In terms of its application, one practitioner described it as a "kind of continuum, where the obligation to consider decreases as the strength of the relationship with other constituents decreases." Another put it in the context of proportionality:

> There is a difference….You do have to consider all the influences of the company when you're making decisions, because it is in the best interest of the corporation, but when you look at what that means – the corporation – predominately you're talking about the investors, the people who put in their money to own a stake in the company….As a director, you're out there for all the world to see as to how the shareholders have judged and measured you. You don't have that same scrutiny with these other stakeholders…so practically, directors are driven to that same relative view.

Nevertheless, a large majority of the practitioners felt that even if there was a theoretical difference between "best interests of the corporation" and "best interests of the shareholders," the difference was "largely indistinguishable" in practice because a business case could be made that best interests of the corporation equated to the best interests of the shareholders.[25] Many expressed how one can easily make an argument that if the corporation is acting in the best interests of all of its stakeholders, over time the wealth of shareholders will be maximized. Most agreed (with a few exceptions) that the shareholders should be the foremost priority for directors, with other stakeholders' interests being considered depending on the issue at hand.

A number of practitioners implied that the negligible difference could become relevant in narrow circumstances. For example, the difference could become acute in times of financial distress or when a significant stakeholder is involved. Two practitioners gave the example of a pipeline across First Nations territory, where in that scenario the corporation should have regard to the broader interest of stakeholders.

One of the practitioners that found a stark difference between the best interests of the corporation versus the shareholders admitted that "certainly the entire shareholder community in Canada would say it's all about the shareholders, absolutely." Nevertheless, the practitioner reiterated the point that doing what's in the best interests of the corporation is really something for the directors to determine, and is not beholden to any particular stakeholder group, including shareholders.

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[25] For example, comments included: "it makes really good business sense – law aside – for a corporation to take into account other [stakeholder] interests"; "you can make an argument; at least academically you can as a director, that if we run this corporation in the best interests of all of its stakeholders over time we will maximize wealth for shareholders"; "even when considering, for example, employee issues, all those decisions I see being made is for the sustainability for the corporation itself and how it will better grow the company, for the benefit of the investors"; "while I would hope it would be out of pure corporate governance, it may just be out of pure business sense with mitigation and that sort of thing"; "in order to be a good corporation and do what your shareholders want and make value for your shareholders, it may make an awful lot of sense to do good things for the community or good things for the environment or good things for your employees, because it's good for the owners."

When this practitioner was informed that several participants felt that "best interests of the corporation" and "best interests of the shareholders" were of negligible difference, the practitioner responded:

> If you are trying to advise a board in a manner that keeps them out of harm's way, that's different. Providing that kind of advice, practically speaking for a lawyer advising a client, is much different than talking about the legal theory. Because you can have all kinds of laws, but when you've got one group who is the most likely to sue you, you tend to worry about that group…People's sense of right and wrong will also change over time but I don't think the legal theory is going to change. So it is kind of a flexible concept that can accommodate a lot of different views of a lot of different kinds of directors.

A few practitioners echoed this sentiment, reflecting on how Canada is more flexible in that it can, in any particular set of circumstances, put the best interests of the corporation to a wider group of stakeholders.

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In the significant majority of times during a corporation's existence, directors may find there to be little practical differences between decisions made in the "best interests of the corporation" as opposed to the "best interests of the shareholders." Many practitioners felt that there should be a healthy balance and greater proportionality given to the interests of shareholders, who have taken on the financial risk. Given the strong business case to consider stakeholder interests, these interests almost always align with increasing share value in the long term. A few practitioners' did cite some limited circumstances where the difference may become more acute, and indeed, the relevance of that difference may become more pronounced outside the big business sectors of Canada. As is discussed in Part II of this report, the contemplation of new corporate structures in Canada designed to accommodate social value output alongside with economic pursuits may seek to capitalize on the difference. Social enterprises often operate on a much smaller scale, in a private company setting, although the growth of social enterprises into the public company domain may be on the rise.[26] So, in somewhat of a reverse analysis, can "best interests of the corporation" take into account interests other than the shareholders better than "best interests of the shareholders"? The theoretical answer is obviously a yes, and the answers from these practitioners also suggest the affirmative is possible in practice – many questioned whether actions made in favour of stakeholders interests is even distinguishable from actions benefiting shareholders and the corporation in the long term.

3. Consideration of Stakeholder Interests

Principle: *"Other corporate constituencies, such as creditors, employees, suppliers, and customers, should have their interests protected by contractual and regulatory means rather than through participation in corporate governance."*

While there were some differences among practitioners in the treatment of this principle and the

[26] See e.g. the SVX, an online impact investing platform that launched on the Toronto Stock Exchange on 19 September 2013, which may serve as a conduit for more social enterprises entering the public domain in the future. SVX and MaRS Centre for Social Investing, online: SVX <www.svx.ca>.

meaning behind "participation in corporate governance,"[27] the overwhelming majority of practitioners interpreted the principle to mean that the protection of non-shareholder stakeholder interests were outside the scope of corporate governance practices, particularly with respect to the board's corporate decision-making.

A handful of practitioners agreed with the principle, citing significant protections available to non-shareholder stakeholders through contractual and regulatory means. One practitioner felt the principle was correct because shareholders are the ones without contractual rights, thus directors had a primary duty to protect their interests above those that already have built-in protections through contract and/or regulation. Another practitioner in particular felt strongly that contractual and regulatory protections were sufficient for these interests, reflecting on how "we've forgotten what contracts do…Corporations have to operate within a contractual set of obligations they've undertaken and a regular set of obligations." When asked whether regulation was sufficient protection for environmental interests, the practitioner responded that "the people that should be sued are the government for being totally negligent about adequately regulating the destruction of our environment…the bulk of the deficiency is the intellectual paucity of environmental regulation."

Several practitioners questioned how Canadian common law fit within this principle, with a few practitioners recognizing that courts "have become more aggressive in identifying and protecting the non-contractual rights of other corporate stakeholders" and a handful pointing out how "it's a little bit different in Canada as a result of *BCE* – the court has decided that other stakeholders, irrespective of their contractual relationships with their company, have an interest that needs to be protected." Practitioners' were asked to opine on the 2008 decision in *BCE Inc. v. 1976 Debentureholders* (*BCE*) [28] and its impact, if any, on Canadian corporate governance practices.

a. *The BCE Decision*

In brief, the facts of the *BCE* decision are as follows. The debentureholders of Bell Canada, a subsidiary of BCE Inc., used the oppression remedy[29] to seek relief concerning the privatization of BCE by a consortium of private equity buyers under a plan of arrangement that had been determined by BCE's directors to be in the best interests of BCE and its shareholders. Upon the completion of the arrangement, the debentureholders stood to lose approximately 20 percent of the short-term trading value of their holdings. The court ultimately found in favour of BCE Inc., and against the debentureholders' claim. [30]

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[27] Some practitioners had a different interpretation on the meaning of "participation of corporate governance" in this principle. One practitioner, for example, pointed out that in continental Europe, unions were provided with representatives on boards. Any practitioners that construed the principle in this manner agreed with the statement. When the principle was interpreted to mean there was a strict choice "between people protecting their own rights, rather than having a voice in the corporate decision," then generally speaking, practitioners tended to agree that it is "an accurate statement, but it isn't a complete statement."

[28] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 66, 3 SCR 560 [*BCE*].

[29] The oppression remedy will be discussed in greater detail in Section B.5 of this Part I.

[30] Several summaries and analyses are available for further details on the case. See e.g. Mohammad Fadel, "*BCE* and the Long Shadow of American Corporate Law" (2009) 48 Can Bus LJ 190; Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48 Can Bus LJ 232; J Anthony VanDuzer, "*BCE v. 1976 Debentureholders:* The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision Since *Peoples*" (2009) 43 UBC L Rev 205; Sarah P Bradley, "*BCE Inc. v. 1976 Debentureholders*:

In its decision, the SCC reiterated its findings in the 2004 decision of *Peoples Department Store Inc. (Trustee of) v. Wise* (*Peoples*)[31] that directors were permitted to consider the interests of, among others, "shareholders, employees, creditors, consumers, governments and the environment."[32] The court held that directors were "not confined to short-term profit or share value," but that, where the corporation is an ongoing concern, directors were to look to the long-term interests of the company, and the context of this duty varied with the situation at hand.[33] The court also reinforced its support for the business judgment rule.[34] Moreover, the court held that directors were required to act in the best interests of the company "viewed as a good corporate citizen"[35] and "commensurate with the corporation's duties as a responsible corporate citizen."[36] The court did not elaborate further in their concept of good corporate citizenry.

No practitioner expressed dismay over the ultimate result of the *BCE* decision. Many specified that whatever they felt about the rest of the decision, the end result in favour of BCE Inc. was the correct one. A handful of practitioners found the SCC's findings in the *BCE* decision very positive overall, making comments that they "quite liked the decision" and its conclusion, calling it "a breath of fresh air," and declaring that the court in *BCE* "really started to get it right." These practitioners were pleased that the decision "gave a little more ammunition to the notion that the board can take a broader view when it makes its decisions."

Others expressed hesitancy over how important the case was to Canadian corporate law. One practitioner, for example, was "not a believer that one case is particularly important in the general scheme of things" or that a particular case "fell off one side or the other at the head of a pin on a very narrow point." Instead, the practitioner felt it was important to consider the "run of cases" and with respect to the *Peoples* and *BCE* decisions, they felt that "neither of them did anything particularly surprising" and that it "was not a watershed." A few practitioners considered the decision "a reflection of the times" that was also "a product of a lot of things that preceded it, and not just within the legal arena but within society, in the larger sense." Another practitioner, who previously expressed that "best interests of the corporation" had a significantly different intent and meaning than "best interests of the shareholders," believed the court had simply "repeated the

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The New Fiduciary Duties of Fair Treatment, Statutory Compliance, and Good Corporate Citizenship?" (2010) 41 Ottawa L Rev 325; J Alex Moore & William Ainley, "*BCE v.1976 Debentureholders*: An Unexamined Question Considered," online: Davies <http://www.dwpv.com>.

[31] *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at para 42, 3 SCR 461. In brief, following the bankruptcy of the Peoples Department Stores Inc., the trustee brought an action against the company's directors for breaching their fiduciary duties by, prior to the bankruptcy, implementing a credit scheme that favoured Peoples' parent company, Wise Stores Inc., over its creditors. The Supreme Court found that when considering what is in the best interests of the corporation, directors may consider stakeholder interests and that in this instance there was no breach. Several summaries and analyses are available for further details on the case. See e.g. Catherine Francis, "*Peoples Department Store Inc. v. Wise*: The Expanded Scope of Directors' and Officers' Fiduciary Duties and Duty of Care" (2005) 41 Can Bus LJ 175; Darcy L MacPherson, "Supreme Court Restates Directors' Fiduciary Duty – A Comment on *Peoples Department Stores v. Wise*" (2005) 43 Alta L Rev 383.

[32] *BCE*, *supra* note 28 at para 39.

[33] *Ibid* at para 38. Regarding the oppression remedy, the court found there was no violation by the directors in their fiduciary duties.

[34] The business judgment rule means that courts will defer to the directors' business judgment so long as those directors used an appropriate degree of prudence and diligence in reaching a reasonable business decision at the particular time the decision was made. See *Peoples, supra* note 31 at paras 64-65.

[35] *Ibid* at para 66.

[36] *Ibid* at para 82.

law the way it's always been" given that and the oppression remedy, and echoed the sentiment that the decision was one that happened gradually along a broader trend in Canadian corporate governance history. The practitioner felt that, aside from the good corporate citizen concept, the decision "wasn't ground-breaking."

Interestingly, the majority of practitioners found several problems with how the findings of the court were articulated, calling it "a thin piece of work," "incoherent," "terrible," "peculiar," "written by people who didn't understand corporate law," "basically written by their clerks," and the articulation of the fiduciary duties of the board "contrary to common sense" and "a bit impractical, frankly." Several felt that the decision would not assist the lower courts on what the right approach was to oppression, fairness, etc., depending on the context.

Nevertheless, many conceded that the decision could not be ignored, since "it's the Supreme Court of Canada and it's a very recent and big case." One practitioner expressed how *BCE* is "kind of a dog's breakfast; there's something in there for everybody" but there was no question that *BCE* has caused legal advisors "to tell any board that they can – and indeed should – take into account non-shareholder value issues." The practitioner pointed out that "these are all things that we used to take into account before *BCE*, but *BCE* is now giving you more of an overt license to do it."

Many practitioners felt the decision was a clear step away from a shareholder primacy model of governance, with one practitioner stating how it "clarified that the *Revlon* rule[37] does not apply in Canada, and boards are not required to act in the role of auctioneer in an M&A context, with their sole goal being to maximize shareholder value." Nevertheless, a few practitioners bemoaned the fact that SCC left questions open when they could have been settled. One practitioner wished that the SCC "had been far more hawkish and clear" and "would really like the court to specifically clarify Canada's take on corporate governance versus the US because we are such a small market compared to our neighbors – we're inundated with US information."

b. Good Corporate Citizen

As one of the objectives of this project is to engage the question as to how new corporate legal structures supporting dual goals of profit and social value would fit within Canada's corporate legal landscape, practitioners were specifically asked whether they thought boards were aware of the SCC's comments regarding how the best interests of the corporation is to be "viewed as a good corporate citizen" and "commensurate with a responsible corporate citizen" as per *BCE*.

[37] The *Revlon* rule refers to the fiduciary duty of American boards to maximize shareholder value in change of control transactions. *Revlon Inc v MacAndrews & Forbes Holdings,* 506 A (2d) 173 (Del Sup Ct 1986) [*Revlon*]. Prior to 2004, a series of cases in Canada, particularly from Ontario, spoke to the existence of a fiduciary duty for directors to take reasonable steps to maximize shareholder value. See e.g. *Casurina Limited Partnership v Rio Algom Ltd*, [2004] 40 BLR (3d) 112 at para 27, 181 OAC 19 (Ont CA); *Pacifica Papers Inc v Johnstone*, [2001] 15 BLR (3d) 249 at para 30 (BCSC) affirmed in *Pacifica Papers Inc v Johnstone*, [2001] 93 BCLR (3d) 20, 19 BLR (3d) 63 (BCCA); *Gazit* (*1997) Inc v Centrefund Realty Corp.*, [2000] 8 BLR (3d) 81 at para 69, [2000] OJ No 3070 (Ont SCJ); *CW Shareholdings Inc v WIC Western International Communications Ltd*, [1998] 160 DLR (4th) 131, 39 OR (3d) 755 (Gen Div); *Benson v Third Canadian General Investment Trust Ltd*, [1993] 13 BLR (2d) 265, 14 OR (3d) 493 at 500 (Gen Div); *347883 Alberta Ltd v Producers Pipelines Inc,* [1991] 3 BLR (2d) 237, 80 DLR (4th) 359 at 399-402 (Sask CA).

Answers were split down the middle, with almost half either somewhat disagreeing or disagreeing, and the other half either agreeing or strongly agreeing. There tended to be two camps among practitioners, with one camp considering the good corporate citizen concept "an interesting throwaway line….a bit gratuitous," and the other finding that it "really does set Canada on its own path." Some practitioners pointed out that the good corporate citizen concept was something "better understood amongst the lawyers" and "business people tend to not pay that much attention to it or not be as aware of it." A handful of practitioners also noted that many companies want to be viewed as good corporate citizens, and "this is not because of anything the Supreme Court says." One practitioner sensed that the good corporate citizen concept was "not getting any airtime" in small to mid-cap companies struggling for capital relative to larger companies that were "not going to live or die quarter by quarter" because "it's hard to think of these concepts when you're in survival mode."

There was much discussion on how the "good corporate citizen" concept was difficult to apply, as can be seen from these various responses:

> …Nobody really knows what it means. If I went to a client and said, 'Be sure when you do that that you're acting as a good corporate citizen because that's what *BCE* says,' the next line is going to be, 'And what does that mean?' and I'm going to shrug and say, 'I don't really know.' They'll say, 'Why did you tell me that? What do you want us to do with that?' Practically speaking people don't run around talking about it that way.
>
> ….Obviously a good corporate citizen is better than saying, 'You better up your profits this quarter.' But I really do think it's a bit of apple pie, motherhood type of statement. It's pretty hard to say. I mean, are you going to have liability if you're not viewed by the outside as a good corporate citizen?
>
> … the SCC makes this bizarre statement to stakeholders about good corporate citizenship and then specifically refers to some purported stakeholders. If you're going to go there, you either should have given guidance or not gone there. They sort of left it. They got it out there, but it's still sort of a blank page.

One practitioner felt that there was an "upwards trend" towards good corporate citizenry, and wasn't sure if that was a reflection of legal development so much as "a maturing of some of the thinking that goes on in the boardroom," while a handful of practitioners noted that an increase in independent directors and director education is "really having an impact" on director awareness of these legal concepts.[38]

A small group of practitioners felt the need to qualify their answers, citing how their personal preferences on the matter are divergent from their legal take on the state of the common law. These practitioners, most of which found the *BCE* decision a disappointment in its applicability to legal practice, expressly stated that they appreciated the direction of the court in supporting more of a "social conscience" in corporations. Despite this, a few questioned whether the law had the capacity to do so; others questioned whether it was even appropriate.

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[38] One practitioner had a notably different take, finding director education and certification programs a "huge disservice to the capital markets" because they cause inexperienced people to believe they have the tools to sit on a board "just because he or she has taken a course – that's a nonstarter."

c. Influential to Practice?

Practitioners were asked whether the *BCE* decision had influenced the decision-making of Canadian boards. The collective response was that boards have been influenced by the decision, with almost all agreeing or strongly agreeing, and only one practitioner somewhat disagreeing. Nevertheless, there was significant consensus that the influence was more regarding the *process* of decision-making, and there was serious question as to whether it had made a difference in terms of changing results. On how the *BCE* decision largely influenced the process, here are some select responses from various practitioners:

> ….That's why takeovers in Canada are so complex; the documentation is so complex, and they outline in great detail every meeting that's been held, every discussion that's been held, what the fairness opinion said, what other valuations have said, etc.…The result becomes a very process-driven process; processes can be used to defend judgments, but they don't necessarily facilitate making good judgments.
>
> …Let me repeat something I have said to counsel boards at various situations: the reason you hire lawyers and investment bankers and all of that is so that you can demonstrate how thorough a process you went through. You sat through the process, and you basically say we dotted our i's and we crossed our t's and this was the result we have.
>
> …Did we consider the various issues? Did we record that we considered them? Did we get the advice that we needed to consider them? *BCE* has built into corporate governance more procedural requirements. My instinct is … where you had situations where people were attempting to be conscientious I suspect they would have got to the same place, but now they won't get there without jumping through hoops.
>
> ….If you're faced with a takeover bid and you've some competing stakeholders, clearly *BCE* will be mentioned. If you're going into a plan of arrangement and you need to do the fairness criteria, it may be mentioned but more as something that's entirely decipherable rather than unclear…*Magna*[39] was one of the first cases where it was really argued in detail. It was not pretty.

[39] *Re Magna International* (2010), 101 OR (3d) 736 (Sup Ct) [Magna, Sup Ct], aff 'd (2010), 101 OR (3d) 721 (Div Ct) [Magna, Div Ct]; Ontario Securities Commission, "In the Matter of The Securities Act, RSO 1990, c S-5, as Amended and In the Matter of Magna International Inc and In the Matter of the Stronach Trust and 446 Holdings Inc" Decision and Order (24 June 2010), online: OSC <http://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20100624_magna.pdf>. Briefly, the *Magna* decision attempted to expand and/or clarify on some findings in *BCE*. The court confirmed that it would only consider whether there is a valid business purpose from the perspective of the corporation, there is no need to determine a valid business purpose from the shareholders' perspective. However, where the court is considering different interests within the same class of stakeholders, more weight can be placed on the shareholder vote in determining the fairness and reasonableness of the arrangement than in circumstances where the court is balancing competing interests between different classes of stakeholders. The details of the *Magna* case are particularly complex, thus readers are encouraged to review the several summaries and analyses available for further details on the case. See e.g., Edward Iacobucci, "Making Sense of *Magna*" (2011) 49 Osgoode Hall LJ 237; Anita Anand, "Was Magna in the Public Interest?" (2011) 49 Osgoode Hall LJ 311; Emmanuel Pressman, et al, "Key Lessons from the *Magna* Decision" Osler Corporate Review (September 2010), online: Osler <www.osler.com>; Kent E. Thomson, et al, "The Magna Proceedings: Devising a Litigation Strategy and Elaboration on the BCE Test" (2011) Lexpert/American Lawyer, online: Davies <www.dwpv.com>.

There were many that pointed to the risks of having an overloaded process, and how it can quickly become boilerplate, stating how “the more you make something process-driven, the less meaning it has for people.”

In answering whether Canadian directors in actuality consider non-shareholder stakeholders in their corporate decision-making, whether it be due to Canadian corporate law or otherwise, the answers varied much more significantly, with 6% strongly disagreeing, 13% disagreeing, 10% remaining neutral, 33% somewhat agreeing, 28% agreeing, and 10% strongly agreeing that directors take stakeholder interests into account. Several suspected that any consideration of stakeholder interests was due more from business motivations than anything required by corporate law.

One practitioner acknowledged that “it’s early days yet, it’s hard to tell” what the effects of the *BCE* decision are, but as a practical manner “a lot of practitioners would probably tell you that a high enough offer price in a takeover will still prevail.” A handful of practitioners noted that the decision “may have given a target board some more ammunition with which to fight off a bid that they don’t like.” Others were much more skeptical as to the impact of the decision. When advising clients, one practitioner put it bluntly: “I say, ‘the owners get the money and at the end of the day the Supreme Court said that’s right.’ Cut through all of the flowery language, the nice poetry, that’s what happened.”

As was the similar finding from practitioners’ comments in Section B.2 with regard to the “best interests of the corporation,” practitioners tended to feel that the exercise of considering stakeholder interests could result in a different result in narrow circumstances. A few practitioners provided theoretical examples, and a small number referenced the TMX/Maples transaction[40] as “a great test case where the board could have come to a non-maximizing shareholder value decision.” One practitioner pointed out that oftentimes, it was not just a process issue for boards, but some stakeholders are a force to be reckoned with in any case. Creditors, for example, can be very influential and it is difficult for boards to ignore them. The practitioner put it this way: “The board is not sitting around saying, ‘Gee, I wonder who this would harm? Maybe it would be the creditors.’ Usually the creditors are right in their face, it’s not like they have to put the creditors on their agenda.” Another reflected on how the desire to consider stakeholder interests tended to be linked into the lifespan of the corporation, as directors were more inclined to listen to stakeholder interests when the company is in insolvency or near insolvency.

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[40] The TMX/Maples transaction involved the takeover of the TMX Group Ltd., Canada’s main stock exchange company, by a consortium of banks and pension funds under the Maple Group Acquisition Corp. One practitioner described how in the transaction,

> The board clearly felt strongly that it had fiduciary obligations to stakeholders that went well beyond the shareholders, because they act as a market for the financial system and it was very important. Interestingly, OSC was wearing two hats in that transaction. The one hat [was concerned about] shareholder interests being protected…but they were also the regulator of the Toronto Stock Exchange and very much wanted the ultimate owner of the Toronto Stock Exchange to honor all those other obligations it has to other stakeholders.

The practitioner noted how the transaction was “a lot of pure corporate theory playing out in practice, where the securities regulators and corporate theory have collided…trying to come up with a transaction that would be good for the Canadian market and good for the shareholders of the TMX.”

d. Extent of Consideration: May, Should, or Obligated?

The *BCE* decision left open for many – academics, practitioners, and directors alike – the question as to the extent of obligation to consider stakeholder interests.[41] Thus, in an attempt to see if there was some consensus among this group of leading Canadian practitioners, all were asked the question, “Do you believe directors may, should, or are obligated to consider stakeholder interests?”

Several practitioners did not commit to one option, but chose two (such as “between may and should” or “they should and they are obligated to”). On the continuum of ‘may’ being the least restrictive for directors, and ‘obligated’ being the most, where the most restrictive answer was used as the recorded answer of the practitioner, 44% of practitioners said directors were obligated to consider stakeholder interests, 40% felt that directors should consider them, and 16% felt directors may consider them. Comments that help to colour in practitioners’ answers, as well as other noteworthy ones, are cited below.

One practitioner, who believed there was a legal obligation, summarized the sentiment echoed by most of the practitioners who answered in that manner, stating how “the trick is they can make a decision that may be counter to those interests, but they’re obligated to consider them in the event.” For practitioners that did not think there was an obligation, a few offered reasons why, explaining how “it doesn’t seem possible for the same group of people to owe conflicting duties to two different groups” and that it is almost impossible to impose this kind of an obligation to have regard for the interests of all stakeholders, because “how do you differentiate, how do you favor, how do you choose?” Many concluded that once they have taken stakeholder interests into account then the decision made, absent conflicts of interest and gross negligence, “should not be second guessed” as per the business judgment rule, thus the obligation really became one of process.

Even in circumstances where one believed the law requires less than obligatory consideration, several practitioners recommended caution on the matter, citing how “it’s an easy test to meet and it’s a foolish test to fail.” One practitioner in particular pointed out how “if you don’t pay attention to a stakeholder interest, then you are left defending yourself saying, ‘I didn’t have an obligation to do it.’” The practitioner went on to state:

[4141] See e.g. Edward Waitzer & Johnny Jaswal, “*Peoples*, *BCE,* and the Good Corporate “Citizen”” (2009) 47 Osgoode Hall LJ 439 at 442. Regarding the decision, Waitzer and Jaswal noted how:

> Even the questions of whether directors may consider, should consider, or are obliged to consider stakeholder interests, and, if so, at what point, were not addressed clearly by the Court. Early in its reasons, it noted that, in *Peoples*, ‘this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders.’ Later, the Court stated that ‘the duty of directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders… equitably and fairly.’ Is this duty mandatory?

See also Iacobucci, *supra* note 30 at 234, where he states “[t]he Supreme Court in *BCE* rejected the idea that directors have an *obligation* to promote stakeholder welfare, but confirmed that directors have the *discretion* to consider stakeholders” citing the court in *BCE*, *supra* note 28 at para. 39: “[i]n *Peoples Department Stores,* this court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory,* to consider the impact of corporate decisions on shareholders or particular groups of stakeholders” [emphasis in original].

> Why not just pay attention to it and then decide to dismiss it? This is where we get caught up in process so much as lawyers. It's just a safer thing to do. Turn your mind to it. Decide if it's important then move on. Our job is to protect our clients and so, it'd just be crazy for us to say, 'you don't have to consider that.' It's much safer to say, 'Consider it, balance it, then decide what you think is the right thing to do.'

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Most practitioners found that there was little change to corporate decision-making subsequent to the *BCE* decision, and a handful felt that this was because Canadian corporate law had already progressed to incorporating stakeholder interests through the oppression remedy and "best interests of the corporation," among other things. It may be that in the past "it just wasn't as open a discussion" as one practitioner put it, but the consideration of stakeholder interests seems to have become a live issue in Canadian corporate governance practices. Some practitioners were disappointed with how the *BCE* decision has forced a very process-driven exercise in Canada. It is unclear how one can counteract the negative aspects of this process without stripping away the broader goals and/or interests that presumably are aiming to be served.

In the aftermath of the *BCE* decision, it is somewhat unclear from a legal stance how the consideration of non-shareholder stakeholders fit in the decision-making equation for Canadian directors. Practitioners cited a range of reasons why directors should consider stakeholder interests: due to the *BCE* decision, concerns regarding the oppression remedy, the business case for doing so, and/or simply to play it safe given the ambiguity of Canada's legal position on the matter. Given that the combined total of 84% of the practitioners interviewed felt that directors were either obligated to or should consider stakeholder interests, as a practical legal matter directors may be well served by considering non-shareholder stakeholder interests in their corporate decision-making, and document such process whenever possible.

With regard to the good corporate citizen concept, one practitioner noted how the concept was "a bit of surprise coming out of our courts…they are not usually quite so bold." As a practical manner, practitioners were split on how the concept has resonated with Canadian boards, if at all – many found it highly irrelevant to board decision-making whereas others felt it had, but emphasized there were usually broader business reasons for companies electing to act with a social conscience. There is a high chance that without the push of external market forces, such as changing business trends and strategies,[42] process alone will do little in motivating corporations to act as good corporate citizens – the concept seems to have been somewhat lost in translation from the courts. Corporations are free to capitalize on the statement made by the SCC, but since there is no legal meaning behind the concept, they equally can ignore it. The likelihood that it will become more relevant as a corporate governance tool in the future seems highly doubtful at this point in Canadian corporate governance history.

4. Protection for Minority Shareholders

Principle: *"Noncontrolling shareholders should receive strong protection from exploitation at the*

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[42] See e.g. David A. Lubin and Daniel C. Esty, 'The Sustainability Imperative' (May 2010) Harvard Business Review 2, citing how sustainability is an 'emerging megatrend' that may soon 'force fundamental and persistent shifts in how companies compete' at 2.

hands of controlling shareholders."

Many practitioners reflected on how Canada is home to several controlled companies, thus strong minority protection is particularly important. In Canada, it is easy for both founding and institutional shareholders to be able to exert extreme pressure on boards. Due to those significant players and liquid stock, one practitioner noted how "movement in the stock can be quite dramatic." That being said, there was overwhelming agreement from the group of practitioners that the principle of minority shareholder protection was "baked into our corporate law." Given the several options available to minority shareholders and other stakeholders, there tended to be consensus among practitioners that in Canada, "we are well taken care of."[43] The oppression remedy[44] in corporate law and Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (MI 61-101)[45] from the securities regulators were often cited by practitioners as the most notable protections, although others raised the ability to bring derivative actions,[46] and another pointed to specific rules under the Toronto Stock Exchange requiring minority approvals.

In particular, a number of practitioners expressed how the minority protection principle was "more true in Canada than in the US," in that "we are fairly unique" by having the concept of an oppression remedy, which protects not only minority shareholders but other stakeholders as well. One practitioner commented on how the oppression remedy in the past was existing "but only theoretically available," whereas now it become an important tool in corporate law. Another expressed how the remedy "really does work" in that "it scares the majority shareholders more than anything. You can get into court in pretty short order. Courts do listen even though the cases may have gone a lot of times the other way."[47] On the other hand, one practitioner pointed to

[43] There were two notable exceptions in the group. One practitioner felt that there "is not enough of a corporate perspective to protect the minority – it needs to go further" and "would just prefer to see it dealt with in corporate legislation, rather than securities." Another practitioner, who did support the principle of minority protection, felt somewhat less sympathetic towards the plight of minority shareholders, reflecting on how "if I buy shares as a minority in a controlled corporation, I do so knowing that it is a controlled corporation and that there's going to be controlling shareholder at the end of the day."

[44] The oppression remedy is set forth in s. 241 of the CBCA and other provincial statutes to describe the broader right of action on behalf of certain stakeholders (such as creditors) to apply to a court to rectify matters complained of where: (i) any act or omission of the corporation effects a result; (ii) the business or affairs of the corporation have been carried on or conducted in a manner; or (iii) the powers of the directors of the corporation have been exercised in a manner that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer. This right goes beyond shareholders of a corporation.

[45] Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (c. V-1.1, r. 33), online: Ontario Securities Commission <www.osc.gov.on.ca/en/13230.htm>.

[46] A derivative action set forth under s. 239 of the CBCA and other provincial statutes creates a broader right of action on behalf of certain stakeholders (such as creditors), in addition to shareholders, to bring on behalf of a corporation to enforce the directors' duty to the corporation when the directors are themselves unwilling to do so. A complainant, who may be a registered or beneficial holder of a security (including shares and debt obligations), a director or officer or former director of officer of the corporation, or "any other person who, in the discretion of the court, is a proper person to make an application", may bring an action, upon obtaining the leave of the court, to enforce a right of the corporation, including rights correlative to the duties of the officers and directors of the corporation.

[47] See also Stephanie Ben-Ishai and Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995-2001 (2004) 30 Queen's LJ 79. In reviewing oppression cases in Canada, Ben-Ishai and Puri contend that Canadian courts have applied the remedy in a way that reflects the primacy of shareholder interests and nexus of contracts model in corporate law. However, the increasing success of creditors as non-shareholder applicants pointed to a

some limitations in the oppression remedy. It is only available against shareholders that own more than 50% of the company and a claimant also has to be an affiliate of the company to be a proper defendant. Since there are a lot of Canadian companies controlled with 40-45% shareholders, the practitioner felt that the remedy had more limited use than one would assume.

Regarding MI 61-101, most felt it had gone a long way in ensuring procedural and substantive fairness in related party transactions. There was an exception made by one practitioner, who felt that the rule did not prevent enough transactions that some would consider abusive because "it simply becomes a kind of formula to get through" and therefore in many instances "it just degenerates into a process."[48]

Other options were also considered by the practitioners. A few practitioners noted that while derivative actions were also possible in Canada, they were not common and "terribly expensive to launch," and very few practitioners referenced this option. Other practitioners highlighted how the Toronto Stock Exchange has provided greater protection for minority shareholders by providing majority and minority requirements for approval of certain types of transactions which listed companies are required to follow.[49]

Overall, most all practitioners felt there was a good balance between the oppression remedy and MI 61-101 in protecting minority interests. Reflecting on Canada's position in the principle, a few practitioners expressed how the strength of Canada's statutory remedies, some of which specifically take into account the interest of other stakeholders, meant that Canada "cannot have a model that is a hundred percent shareholder primacy."

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Clearly, there are built-in principles in Canadian common law designed to protect minority shareholders from exploitation at the hands of controlling shareholders. While there were some nuances as to how effective the principles were in practice, the general sentiment amongst practitioners was that this principle was well supported in Canadian statutory and common law rules, and that Canada also offers statutory protections to other stakeholders beyond what is outlined in the principle.

5. Principal Measure of Shareholder Interests

Principle: *"The market value of the publicly traded corporation's shares is the principal measure*

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possible change in attitude by the courts. Ben-Ishai and Puri suggest the cautious approach by the courts is likely to continue in the near future.

[48] One practitioner cited *Magna* as an example (see *Magna*, *supra* note 39 for further references), stating:

> There was vehement disagreement about whether that is a fair transaction or not and yet it passed muster through that whole process. So, there will be many who will say that in fact, MI 61-101 won't prevent transactions that some would consider abusive because there becomes a formula for how you approach them, what in many instances degenerates into just process. What the OSC will say is, 'at least we put it out in the open.' People see what's going on. Yes, it may only be process, but it can't be done behind closed doors and if someone's unhappy with it, then they can go to court and try to put a stop to it and so on. The argument that would come up is not that one shareholder has some protection, but is it strong protection? That's where you might find some difference of opinion.

[49] Further discussion on the role the Toronto Stock Exchange has played in Canadian corporate governance is discussed in Section C.3.a of this Part I.

of its shareholders' interests."

Under Hansmann and Kraakman's definition of shareholder primacy, the corporation is managed in the best interests of its shareholders, and in identifying those interests, the principal measure in a public company is the market value of the company's shares. For Canadian public companies, since the proxy voting system does not make the identity of a company's shareholders accessible to its board, and since directors are to manage a corporation in its best interests – which many practitioners identify as predominately meaning the interests of its shareholders – how can Canadian directors know what shareholders' interests equate to be? Presumably market value is the measure. Practitioners' responses, however, were mixed, with many finding the principle problematic or incomplete, and others qualifying it in several instances.

Several practitioners expressed how, while it was hard to escape measuring a company's worth by the market capital or by the share price, sometimes the market value doesn't have any resemblance to the intrinsic value, particularly for highly illiquid stocks. Market value, explained some practitioners, "has nothing to do with the shareholder" and "more to do with the shareholders' expectations." Many expressed how the applicability of the principle depended in large part on the type of company and the investment criteria, with a few practitioners citing how since there are many illiquid companies in Canada, the market value "is not really useful figure." It is just one of many measures and "doesn't really tell that much." Some practitioners recognized circumstances where in the short-term, the market value will dip, such as in cyclical businesses or in fluctuations expected in anticipation of an M&A transaction. As put by one practitioner, "sometimes the best interest of the corporation will point you in the other direction and…quite often a board will take a step that does drive down or diminish share price in the short term in the long-term best interest of the company." Many practitioners observed that, from the point of view of legal theory, those directors "are perfectly entitled to do that and indeed, they are doing the right thing."[50] Despite this, some practitioners noted that many external pressures force boards and management to do things in the short-term to prevent driving down the trading value at the expense of long-term benefit.

There were many practitioners that came down hard on the principle as a whole. One practitioner cited how "if recent market experience has demonstrated anything, it is how fallible market values are as a measure of corporate or shareholder value." Another found the principle "completely ridiculous" and "sufficiently obtuse," contending that the market value on any given date never represents the true value. Still one other practitioner who strongly disagreed with the principle made the argument that if market value were the sole test, "you would say that the current Canadian practice on poison pills, which is finally now under review, is the right practice...and essentially eliminate the efficacy of the poison pill." Overall, practitioners tended to agree with this practitioner's comment that "it makes all kinds of sense to do a whole bunch of things that don't generate short term value for shareholders if it advances the long term intent."

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The assertion that market value is an unreliable measure in relation to the intrinsic value of a company is certainly not novel. One of the common arguments against the shareholder primacy

[50] Practitioners noted how it is usually the case in an acquisition transaction that the acquirer shares drop and the target company's shares go up, especially if shares are going to be issued by the acquirer to complete the deal.

model is its overreliance on market value as representative of shareholders' interests. It has been well-documented in academia and elsewhere that market value is a fundamentally flawed measure of value in many instances, representing at times "irrational exuberance and anxiety" in the marketplace, with the events leading up to the global financial crisis as the most recent and obvious example. [51] How to combat the negatives associated with relying on this measure is unclear, and beyond the scope of this report.

C. Canadian Legal and Regulatory Landscape

While the securities commissions' stance on defensive tactics is largely touched upon in Section B.1.a regarding the poison pill debate, and the courts' proficiency in recent common law decisions is discussed in Section B.3.a, this Section C discusses these issues from a broader perspective, addressing the nation's corporate legal and regulatory landscape and practitioners' views on how the courts, regulators, and other bodies have shaped the development of corporate governance standards in Canada.

1. Inadequacy of Legislators and Courts as Governance Leaders

There seemed to be a common understanding among many of the practitioners that the legislators and the courts were less influential in the development of corporate governance in Canada for a variety of reasons. While legislative action may be an appropriate route in governance reform, only a few practitioners mentioned the role of the legislatures in the development of corporate governance in Canada. That itself may signal how a small role legislators have played in the governance sphere, and indeed, of those that brought up the role of legislators during discussions, it was almost always to point out their insignificance in Canadian governance. One practitioner pointed out how "legislators aren't well equipped" to deal with corporate issues and that corporate legislation "changes very infrequently in Canada." Any efforts to illicit legislative change become "an extremely slow progression." Another practitioner reasoned that corporate legislation is "not something that politicians get particularly excited about" as "it's not something their constituency gets excited about." Furthermore, since corporate legislation operates on a jurisdiction basis, it has not proven to be a robust method of helping governance practices evolve in Canada.

As for the courts, many practitioners did not to shy away from their strong feelings on the inadequacies of the courts in providing clarity in governance, with some of those thoughts reflected here:

> …I'll let my cynicism shine through here. As a broad overgeneralization, the courts are staffed by ex-litigators, many of which do not come from a corporate background…and that applies to the Supreme Court of Canada quite nicely. As a result, they've come to these decisions with immense brain power but not a lot of practical, corporate experience.
>
> …I don't think that the Canadian judges have a lot of self-confidence when they go to corporate law, and that's why decisions like *BCE* and *Peoples* are so weak…they have been criticized as not being done with a huge amount of conviction or expertise…When

[51] Peter Huang, "Regulating Irrational Exuberance and Anxiety" in Francesco Parisi and Vernon L. Smith, eds. *The Law and Economics of Irrational Behaviour* (Chicago: Stanford University Press: 2005).

> you go to court in Canada, you're going to get a very conservative kind of reaction…we don't have a lot of knock 'em dead corporate cases.
>
> …Off the top of my head, I couldn't name a corporate solicitor that's gone to the bench. You can have some challenges where you've got somebody dealing with a business case that really has no background on how these things really work, but anything really weighty in the business sense, no matter which way it goes, is likely to be appealed. Often these things shake out at the higher courts because, in general, these courts are quite sophisticated.
>
> …too few of our judges have any commercial experience….It's a bit of a crap game of who's going to hear the case. The real fear of going to court in a corporate matter is you'll get somebody who you've got to sort of start educating.

A few practitioners noted how the courts may be limited in developing governance standards in Canada because "all the courts can do is discourage bad behavior by sanctioning it. They simply have no instrumentalities to promote good behavior." A number of practitioners noted that generally, the courts give a lot of deference to the board due to the business judgment rule, with one practitioner observing how "it's a pretty low bar to jump over in order for the courts to say, 'I have to defer.'" If the boards have followed proper process, avoided conflicts, and obtained enough information to make an informed decision, Canadian courts have proven that they are very reluctant to change it.

Several practitioners lamented on the differences in Canada's courts compared to the US, noting how "there is a lot more self-confidence about the way things are done there," and commenting on how Canada does not have a set of developed common law principles in corporate law as they do in Delaware. Practitioners noted how the Delaware courts in particular have "a very active and knowledgeable court system," so that state has the opportunity to be the national corporate law-maker, whereas that is simply not the case in Canada. Practitioners generally found that Canadian courts have become "intellectually shallow on business issues" because of the securities commissions' deep involvement with public companies, although many practitioners found that the Ontario commercial list of judges was particularly adept. Several practitioners appreciated the strength of the Ontario commercial court, calling it "proficient" and "sophisticated" while others noted how provinces like Alberta make an effort to direct particular corporate cases to certain judges. One practitioner even envisioned a day when Canada would have a bench as advanced as the Delaware courts, commenting that "we can get there" and pointing to how judges on the Ontario commercial bench "are able to come up with some very nuanced and good decision-making in real time." Indeed, some practitioners noted how, while the courts haven't been as influential in the past on corporate governance, "litigation is increasing" and one practitioner pointed out that "courts are being used in the governance world more tactically, so people will fire in court procedures as a tactical matter, as shareholders against boards, boards against shareholders."

2. Guidance from Securities Commissions

Whether by choice or through the process of elimination, the securities commissions are now playing a major role in shaping Canadian corporate governance practices. One practitioner

described it this way: “Canada is split into two – what the courts say, and what the securities commissions say. And what the practitioners determine to be one way or the other tends to be reflective of which power source they believe has the most sway, and is the most relevant.” By virtue of the fact that the securities commissions are by design created for the purpose of protecting investors, with a ‘public interest’ jurisdiction to protect the capital markets,[52] many practitioners sensed that their influence has pushed Canada towards a more shareholder-centric model of governance.

Most practitioners identified with one practitioner’s statement that “it’s the securities commissions through the CSA, their national umbrella, which have driven the standards of corporate governance.” Many practitioners found it a curious Canadian phenomenon that the securities regulators were significantly impacting the corporate legal sphere. Practitioners recounted how when the securities regulators initially began encroaching on a space that was traditionally for the legislatures and the courts, it was “extraordinarily controversial.” When the commissions first proposed adding special approval thresholds on related party and other transactions over a decade ago, one practitioner described how:

> It was a hot issue at the time as to whether they were overstepping their jurisdiction. They were a specialized securities regulatory body, not a specialized corporate governance body or a corporate law body, so what business did they have in changing what the legislature had enacted in the *Business Corporations Act*? This has nothing to do with the raising of capital, the issuance of securities, or the fitness to sell securities of individuals that need license under the traditional views of what the *Securities Act* was there for.

The regulators’ involvement was understandable to some, in that the commissions have an interest in the governance of organizations accessing the capital market because “if they are better governed, presumably they will need less securities regulation.” Practitioners reflected on how eventually people got past the notion of the securities commissions overstepping their jurisdiction and have now generally accepted the securities commissions’ role in the Canadian corporate governance sphere.

A couple practitioners, upon reflection, considered the role of the commissions from a theoretical standpoint. One practitioner recalled how the OSC recently came out with a paper on board diversity and measures through disclosure to encourage having more women on boards, and reflected,

> My first reaction, although it’s a subject that interests me is, is this the right place for the securities commission? Traditionally they kept out of the issues like that, and it really caused me to think about whether they belong there and whether that’s the right thing for the securities commission to do. I suspect their conclusion is if they don’t, nobody else will, and somehow they work that into their ‘public interest’ mandate that it will be in the best interest of Ontario investors if they can add this diversity dimension to boards…but it’s a surprising step.

The other practitioner considered how, in terms of appropriate jurisdiction under the CSA and AMF proposals, “there’s an open question…their jurisdiction ends somewhere and some

[52] S. 127(1), para. 3 of the *Securities Act,* R.S.O. 1990, c. S-5, and the equivalent in other provincial acts.

defensive tactics in theory wouldn't involve any sort of securities issuance." Nevertheless, both expressed how practitioners have tended to follow what the securities commissions have said, whether or not it's securities-related or corporate law-related, without questioning their jurisdictional reach.

When asked explicitly if the securities commissions were overstepping their role, several practitioners felt this was absolutely the case, but nevertheless, "there's a void, someone's got to fill it." The growing role of the securities commissions in developing governance standards has been evident. Among the several ways that the commissions have influenced governance standards, one practitioner recounted specifically how the commissions have required disclosure about director independence, they have imposed independence standards for audit committees, and have made other disclosure requirements related to executive compensation, "which ultimately influences the board's behavior if it has to be disclosed." Other ways that they have influenced boards are pronouncements about selective disclosure. As one practitioner noted, "having the commission up there hovering on top of the corporation does influence the way directors see their job, the way boards are put together and the way they conduct themselves."

Overall, the viewpoints of practitioners' in terms of the appropriateness of the commissions' role in governance tended to vary. The majority of practitioners felt the regulators were "better than the alternative." For example, a few practitioners noted how the Alberta Securities Commission has been quite effective in reform, commenting on how their past involvement in the National Policy 58-201 *Corporate Governance Guidelines*[53] has helped increase the overall quality of corporate governance in Canada. Absent the securities commissions establishing rules and guidelines, and the courts enforcing them, Canada would not have the robust system that exists today. Another pointed out that the commissions have probably as far as they can in the governance sphere, and "having got to that point, nobody's going to come out today and say, oh get rid of all that, it doesn't do anything." Some pointed to how the commissions have "been a positive in creating more fairness in transactions" under MI 61-101. Whether or not the practitioners agreed or disagreed with what the securities commissions did generally, many conceded that the regulators are "knowledgeable and better equipped" than governmental or judicial bodies in the field, and the courts are helpful in providing outside constraints when the securities commissions "become a little bit too zealous."

Other practitioners tended to express general unhappiness over the regulators' dominance in the governance area. Several felt the commissions are not well-versed in evidentiary rules and "make it up as they go along." They also often fail to establish principles that can guide lower courts, with some agreeing that the commissions "are more effective on the rule-making side than the jurists credential side." A few remarked that the commissions have often disregarded findings from the courts. One practitioner cited how Canada's stance on defensive tactics "seems to give a short shift to what *BCE* is about...ultimately, the securities regulators are just saying, 'We don't care about *BCE* – that's just the Supreme Court of Canada, who cares." And for a few practitioners, it was highly regrettable that the securities commissions have dominated, with one practitioner in particular stating how there is "no place or need for securities regulators to interfere with the carefully engineered corporate structure." This practitioner found that the

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[53] National Policy 58-201 *Corporate Governance Guidelines,* online: Ontario Securities Commission <www.osc.gov.on.ca>.

commissions' interference inhibits the board's ability to fulfill their mandated duties, resulting in "the fate of the company being put in the hands of arbitrary shareholders." The practitioner found the commissions' myopic focus on shareholder democracy "farcical" and "Canadian business, our communities and society at large are the losers as a result." This practitioner much preferred that the securities regulators follow the lead of the courts in the *BCE* decision, and the AMF proposal with regard to defensive tactics.

Many practitioners felt that greater power by the securities commissions in the governance sphere would mean greater shareholder primacy in Canada. One practitioner reflected on how, "notwithstanding all of the academic and judicial writing on the duties of the directors, as long as the securities commission holds their current view, we are, in an M&A context, still very much of the shareholder primacy model and that was tested very much by the *Magna* case." Another reflected a general sentiment by some of the practitioners that "what's in the best interest of the shareholder doesn't align with better governance. That's where it falls down."

The underlying issue tended to rest on the fact that the securities regulators are able to act on a coordinated basis across the nation, they are better equipped than those dealing with the administration of the corporate laws. One practitioner pointed out that the CSA "becomes a very convenient place to deal with changes," citing how the shareholder advisory group, the Canadian Coalition for Good Governance, in terms of changes that they or their constituency would like to make, "deliberately seeks out changes through securities regulation" because they don't view it as practical to pursue changes in corporate legislation, even if, from a philosophical perspective, it is more appropriate for that venue.

3. Other Players

A number of other non-regulatory bodies were addressed by practitioners in terms of their influence to Canadian governance. The few that received particular airtime from some practitioners included the Toronto Stock Exchange (TSX), the Canadian Coalition for Good Governance (CCGG), and Institutional Shareholder Services Inc. (ISS).

a. Toronto Stock Exchange

As a practical matter, most if not all public entities are listed on the TSX, hence they are regulated by the TSX.[54] To be granted a listing, companies are required to sign a listing agreement where they agree to comply with TSX rules, including any subsequent rules issued by the TSX over time. The TSX played a historical role in sponsoring the 1994 Dey Report[55] and, similar to some of the discussions in the previous section, there were open questions as to the appropriateness of the stock exchange in requiring rules beyond what was provided in the statutes.

One practitioner noted how the shareholder community has "very effectively and perceptively focused on the stock exchange as an instrumentality through which the boundaries could shift in favor of shareholder votes on more and more things." A number noted how shareholder groups

[54] One practitioner noted how the universe of issuers with publicly traded securities that are not listed on the TSX or TSX Venture Exchange is very small.

[55] Toronto Stock Exchange Committee on Corporate Governance in Canada, "Where Were the Directors? Guidelines for Improved Corporate Governance in Canada" (Toronto, December 1994).

have had some success in persuading TSX management to increase shareholders' rights to approve actions that were traditionally in the hands of the board. Several practitioners shared the sentiment of this practitioner that "it is a very interesting phenomenon that the employees of a for-profit listed company are making decisions that affect the relationship between the rights of shareholders and the power of a board to manage the business and affairs of the company," and a number expressed some latent concern over this. The practitioner went on to commented on how "it seems like a curious group of individuals from a policy perspective to be making corporate law, effectively" and another stated how "at a certain point you begin to wonder whether it's appropriate for them to making governance rules." Another practitioner's view was pragmatic, in that "if [the TSX rules] work for the way these companies operate, I guess I'm okay with that" but they did emphasize that

> Sometimes you worry there's a bit of a conflict of interest because the exchanges want to attract the issuers to the exchange. The exchange goes all over the world in places where there are growing economies to encouraging people to get listed in Canada. So there is a certain tension that they would want to make it attractive to be listed here.

While the exchange is not making universal rules for particular jurisdictions, they are making rules for every listed company and "it's a bit naïve to suggest that if a company does not like their rules, can just delist and go somewhere else." Thus, some practitioners identified the TSX as "a battleground where governance issues are discussed and are dealt with because it's a place that is willing to entertain the discussion."

However, a number of practitioners noted that the TSX has "taken a backseat" on influencing governance practices of late, with one practitioner pointing out that once the securities commissions began getting involved in governance matters, "more or less the people didn't pay attention any more to what the stock exchange was saying." Another practitioner felt, however, that the TSX was "stepping back into the governance game" and "giving more powers to the shareholders." Still one other practitioner shared how "you never feel with the TSX that they serve a comprehensive philosophy about how governance should be."

b. Shareholder Advisory Groups

A handful of practitioners expressed their views on the influence of shareholder advisory groups in Canada, specifically the CCGG and ISS. Again, due to the lack of guidance from the courts and legislatures on governance, these practitioners found the rise of shareholder advisory groups a very positive one generally, as the organization has stepped in to advance good governance principles nationwide and have been influential in setting and regularizing several governance standards. Nevertheless, a number of these practitioners expressed their level of discomfort with the amount of power and influence held by these representatives of institutional shareholders.

Specifically, these practitioners shared concerns over how the CCGG has more sway outside of their constituent membership and "have made themselves players in the market." Canadian demographics allow for these groups to wield enormous amounts of power since significant amounts of concentrated investment capital in Canada are managed by funds and fund managers. Many of those funds' operational policies state that, on any matters that go to a shareholder vote, they will vote with the CCGG or ISS's recommendations without looking behind why they are recommending it, "giving these groups more influence than anybody bargained for." One

practitioner commented specifically on how the ISS, being the watchdog for institutional shareholders and public companies, "have a bee in their bonnet about how much power they have over the words they say about companies." This practitioner pointed out how "the comment of 'I like this practice' or 'I don't like that practice'" from the ISS "could turn majority voting from an 80% approval to a 50% approval" and they can influence all kinds of decisions. The practitioners noted how public companies are occasionally frustrated with the level of influence wielded by these groups, with one practitioner in particularly explaining how "there's no recourse if information put out by these groups is wrong, and it dramatically affects a decision that a company is taking." Another reflected on how "investors may not understand that they're not getting much in terms of independent analysis on some of these big corporate decisions when they invest in a fund." Most of these practitioners expressed a need for either disclosure rules, guidelines, or some other form of regulation to control these groups due to their enormous ability to influence the market.

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There is an interesting phenomenon in Canadian governance. While it seems clear that the courts have tended towards greater board control and broader consideration for stakeholder interests, by and large the judiciary have fallen by the wayside in terms of developing corporate governance practices, with the exception of the occasional important case that brings particular issues to the forefront. For public companies, the securities commissions have increasingly stepped up their role in corporate governance to fill this void, along with other non-regulatory bodies like the TSX and shareholder advisory groups. These groups are very influential in the regulation of public companies, and by design seek to protect shareholders' investments which most often translates to increasing shareholders' rights. It remains to be seen from the pending determinations regarding the CSA's proposed National Instrument 62-105 and the AMF proposal as to whether the commissions will be tempering their positions toward shareholder primacy in the future.

D. Overall Remarks

One practitioner shared that good governance simply boiled down to one concept: common sense. Another had a unique take on the importance of governance in Canada, or lack of importance, finding "there is scant evidence whether good governance makes a damn bit of difference" and liking it to a chicken soup theory, meaning "people say it helps does because they want it to... I have never seen a bad decision become a good decision because of corporate governance." This position was imparted on another practitioner, querying whether that practitioner agreed with the position. Reflecting for a moment, the practitioner responded:

> You know what would be even better…it's the stone soup theory. To me that has some real appeal, because then, it's artificial. It's a stone, but everybody is contributing something. It does make something; it makes something worthwhile for everybody's benefit. How we got there? Nobody individually knows.

The exercise of outlining a Canadian model of corporate governance is a tricky one: governance it is a dynamic, evolving field and comparative analysis can be drawn from not only theoretical definitions but real world national comparisons as well, based on a wide variety of select factors. In speaking with these highly trained and highly skilled legal professionals on Canadian

corporate governance matters, similar debates and discussions tended to take shape, and these debates and centres of tension mark the outside borders of how Canadian corporate governance is being challenged and developed – be it through the courts, legislators, securities regulators, or other bodies and external forces. One practitioner described the corporation as “more of an organism, with various components through it. That organism is a growing, evolving one, and it changes with the times, and beneath the society in which it operates.” This is also true of a holistic national governance framework that envelops and guides these corporations.

What one determines to be the Canadian model depends in large part on what issue is the most compelling at the given time. Isolated to a public M&A context, the lack of defensive protections and shareholder-centric position held by the securities regulators generally point to greater shareholder control in Canada. Interestingly, a significant majority of practitioners did not prefer this trend. While a few included broader communitarian reasons, the large majority focused on how boards were not being utilized effectively in unlocking greater value for their shareholders in M&A transactions. So in fact, priorities between the regulators and practitioners supporting greater board control are very much aligned – getting the highest share value for their shareholders is the priority. Regulators have tended towards increasing shareholder rights in order to accomplish that goal, whereas the overwhelming majority of practitioners in this study felt that action is misplaced. They contend that directors are in the best position to unlock share value, as it is their fiduciary duty in the best interests of the corporation, but directors are being denied the proper tools to do so. The practitioners’ concerns tended to be focused on *how* the regulators have elected to protect shareholders’ value – it should not be through shareholder approvals they say, but through greater powers bestowed on the board to exercise their duties to the corporation – which in almost all cases should translate to greater shareholder value. If indeed the AMF proposal is taken to be the position by securities commissions across Canada, that would be a significant step away from how Canadian governance is currently forming in the M&A context. Indeed, as one practitioner put it, “the shareholder primacy model has different ingredients to it” meaning “there are some elements that are stronger than in others” and most importantly, “the sands on this can shift.”

Leaving aside change of control transactions for the moment, the building blocks of Canadian corporate law have some notable differences when compared to the academic definition of Anglo-American shareholder primacy, and common law developments have emphasized those differences. The legislation requires management to act in “best interests of the corporation” and makes available the oppression remedy, while the 2004 *Peoples* decision and the 2008 *BCE* decision all suggest a more stakeholder-based model in Canada. One practitioner put it succinctly how:

> In fact, the shareholders do not have primacy in the corporate context in Canada, although directors generally think that they do. It’s a very difficult distinction that the Canadian courts made based upon our corporate statutes and it’s a very difficult distinction to explain to boards of directors.

And perhaps this difficult distinction may be why many practitioners tend to keep those nuances in a Canadian model limited to boilerplate provisions. Several practitioners found the differences in Canadian law compelling and important, but the majority found the practical impact of these differences largely boiled down to a change of the process in corporate decision-making only.

Indeed, as one practitioner commented, “the areas of distinction between Canada and US that’s recognized by high-end M&A corporate lawyers in Canada probably isn’t recognized anywhere else.” Another practitioner found this to be due to the fact that “the Canadian public, in my mind, is so influenced by the US experience, the US media, and US information that it doesn’t even know whether the law in Canada is the same or different.” And for many practitioners, deemphasizing the difference does little to no harm – keeping the focus on ensuring the process is complied with, but ending up with the same answer after going through the process is a less controversial route, from a legal viewpoint.

PART II: EMERGING HYBRID LEGAL STRUCTURES

A. The Hybrid Phenomenon

There is an international movement underfoot that has attempted to sidestep the negative effects associated with the shareholder primacy model of governance, allowing businesses to pursue both economic and social mandates in their corporate decision-making through alternative legal structures. A corporate “hybrid” can be defined as a corporate legal structure that combines both for-profit and non-profit legal characteristics into its design to enable the dual pursuit of economic and social interests. Through the use of hybrids, traditional charitable and non-profit organizations are able to generate equity capital and make a profit. In theory, it enables profit-conscious businesses to integrate stakeholder interests and sustainability into their business practices well beyond what is tolerable under the mainstream corporate model. Hybrids are attempting to provide legal opportunities for entrepreneurs to house their social enterprises, and affirm that “the independence of social value and commercial revenue creation is a myth.”[56] Within the last decade, several new corporate hybrids have appeared on the global stage, including the ‘low profit limited liability company’ and the ‘benefit corporation’ in the United States and the ‘community interest company’ in the United Kingdom.

In March 2012, the British Columbia government announced the creation of a new hybrid, the community contribution company (known as the “C3”), which was made available to the public in July 2013.[57] Nova Scotia has since followed suit, announcing the adoption of a similar hybrid in November 2012.[58] These provincial hybrids are each mirrored after the UK community interest company (known as a “CIC,” pronounced “kick”), which was implemented in 2005 and designed to allow traditional non-profits with the ability to make a profit and issue shares while keeping the social mission intact through stringent limitations on their distribution of capital. Specific features include the implementation of a community purpose asset lock and a dividend cap on investors.[59] There is also no taxable benefit associated with this hybrid. The adoption this model by provincial legislators indicates an eagerness to respond to growing demands from an

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[56] Battilana et al, *supra* note 7 at 52.

[57] British Columbia Ministry of Finance, “BC Introduces Act Allowing Social Enterprise Companies” (5 March 2012), online: Government of British Columbia <www2.news.gov.bc.ca>; British Columbia Ministry of Finance, “Legislative Changes Encourage Investment in Social Capital” (2 March 2013), online: British Columbia Newsroom <www.newsroom.gov.bc.ca/2013/03/legislative-changes-encourage-investment-in-social-capital.html>.

[58] Service Nova Scotia and Municipal Relations, “New Opportunities for Social Entrepreneurs” (28 November 2012), online: Province of Nova Scotia <novascotia.ca/news/release/?id=20121128010>.

[59] *Companies (Audit, Investigations and Community Enterprise) Act 2004* (UK), c 27 [*UK Companies Act*]; *The Community Interest Company Regulations 2005*, SI 2005/1788 [*CIC Regulations*].

expanding sector of social enterprises.

Regarding the potential of hybrids, there have been winners and losers. BC and Nova Scotia legislators may be relying on the relative success the CIC has had in the United Kingdom. Purely based on numbers, UK CICs have doubled in the last two years to 2013. There are now over 6,000 CICs, with around 2,000 created in 2012 alone.[60] It is reported that over 100 new CICs are registered every month,[61] and a considerable number of CICs have survived the three-year mark. In comparison to another alternative legal structure, the co-operative, the CIC has already surpassed its number. Sources indicate there are presently over 5,933 independent co-operatives in the UK, putting the UK co-operative economy at £35.6 billion and approximately 13.5 million members.[62] There are no equivalent statistics available on CICs' monetary contributions to the UK economy, the average size of CICs, or total members. But if it is simply a numbers game, do 6,000 CICs spell success after eight years in existence? Compared to the number of co-operatives, the answer seems to be yes.

On the other hand, there have been a number of losers in the hybrid game. The low-profit limited liability company, for example, implemented in some US states starting in 2008 is in many ways a failed model. It is a very specific hybrid that was designed to simplify Internal Revenue Service (IRS) rules regarding the issuance of program-related investments by charitable foundations, mainly by adopting IRS language in its governing documents. Early drafters had hoped for a blanket IRS private letter ruling acknowledging this hybrid, but the IRS' silence on the matter has been deafening, and two attempts at passing bills before Congress to recognize the hybrid have failed.[63] The model has been relatively unsuccessful as a result, its numbers have peaked at around 800, and it is highly unlikely there will be further growth.[64]

Another example, this time from Canada, is the community service co-operative, which has existed in British Columbia since 2007.[65] It has the same legal status as a non-profit and it can apply for charitable status, it also cannot issue investment shares and has an asset lock. This

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[60] Regulator of Community Interest Companies, "Annual Report 2011/2012," online: <www.bis.gov.uk> at 13. 590 CICs were also dissolved, with key reasons for dissolution being 'lack of funding, no trading activity, and poor corporate governance'. *Ibid.*

[61] CIC Association, "What is a CIC?," online: <www.cicassociation.org.uk/about/what-is-a-cic>.

[62] Co-operatives UK, "About Co-operatives," online: <www.uk.coop/co-operatives>.

[63]The proposed "Program-Related Investment Promotion Act of 2008" attempted to have low-profit limited liability companies (known as "L3Cs") entitled to a rebuttable presumption that below-market investments from foundations qualified as program-related investments. Mannweiler Foundation Inc., "The Program-Related Investment Promotion Act of 2008: A Proposal for Encouraging Charitable Investments," online: <www.cof.org/files/Documents/Conferences/LegislativeandRegulatory06.pdf>. The proposal did not end up being introduced to US Congress and thus was not successful in producing new federal legislation or IRS rulings. Similarly, a subsequent attempt with the proposed "Philanthropic Facilitation Act of 2011" was tabled before Congress. It attempted to provide a simple IRS registration and approval process to prevent foundations from spending considerable time and money obtaining PLRs each time a PRI was sought by an L3C. The proposed legislation also did not result in any federal action. Philanthropic Facilitation Act of 2011 (H.R.3420); Americans for Community Development, "Proposed Federal Legislation" (15 November 2011), online: <www.americansforcommunitydevelopment.org/proposedfed legislation>; GovTrack, "H.R. 3420 (112th) Philanthropic Facilitation Act," online: <www.govtrack.us/ congress/bills/112/hr3420>.

[64] InterSector Partners L3C, "Here's the latest L3C tally" (8 March 2013) online: <http://www.intersectorl3c.com/l3c_tally.html> (numbers based on active L3Cs reported by Secretaries of State).

[65] British Columbia Co-operative Association, "Co-op Legislation," online: BCCA <www.bcca.coop/content/legislation>

model is seven years old, and only around 12 exist. Whether this is due to a failure of promotion or education, or perhaps the combination of legal features make it unattractive from a business perspective for entrepreneurs, is unclear, but it is likely a combination of these factors, among others.

The success or failure of the BC C3 remains to be seen, and there are many reasons beyond legal ones that will dictate its success. The BC government has made it clear that they have no funding to regulate, promote, or educate the public on this model, something opposite to the grand rollout that was made for the UK CIC. With the lack of infrastructure and governmental oversight in the BC hybrid, there are inherent risks. It is unclear whether this model will gain any traction from entrepreneurs. The legal restrictions of the C3, particularly the asset lock, may come across as too limiting for many of those currently situated in the for-profit sector.

There is now a significant push by many social leaders in Canada to adopt a model similar to the US benefit corporation, which is a taxable corporation with certain governing features that support a social mandate alongside economic goals. Ontario and British Columbia are particular hotspot provinces where benefit corporation legislation is actively being explored.[66] Many believe a US-style benefit corporation in Canada will be a strong alternative to combat the negative externalities and pressures that come along with Canada's presumably mainstream shareholder primacy model of governance.

The following Section B examines the legal features of the US benefit corporation, and then Section C explores the question of whether Canada should adopt a similar model, using the findings from Part I to assist in answering this question.

B. US State Benefit Corporations

The states of Maryland and Vermont became the first to pass benefit corporation legislation in 2010, facilitating new corporate structures designed to create both social benefits and shareholder value.[67] Maryland's benefit corporation laws took effect in October 2010[68] and Vermont's in July 2011.[69] Twenty states have since followed suit, including Delaware in 2013, and others are said to be in the interim stages of implementing legislation.[70] The governing features in benefit corporations vary somewhat from state to state, but the main common features across several of the states echo those that were first enacted in Maryland and Vermont, thus these two states are used as the example.

The ostensible purpose of a benefit corporation is to create a general public benefit, which is defined as "a material positive impact on society and the environment, as measured by a third-

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[66] See Rachel Mendleson, "Canadian 'B Corps' Put Their Money Where Their Branding is" (2 March 2012) Huffington Post Canada, online: <www.huffingtonpost.ca/2012/02/02/canada-b-corps-benefit-corporations_n_1251383.html>; Spence, *supra* note 9; Corriveau, *supra* note 9.

[67] Corporate Social Responsibility Newswire, "Maryland first state in union to pass benefit corporation legislation" (14 April 2010) online: <www.csrwire.com>; Outdoor Industry Association, "Vermont becomes second state to pass B Corporation legislation" (2 June 2010) online: <www.outdoorindustry.org>.

[68] *Corporations and Associations*, Md. Code Ann. tit. 5 § 5-6C-01 (2010) [*Maryland Act*].

[69] *Vermont Benefit Corporations Act*, Vt. Stat. tit. 11A § 21 (2011) [*Vermont Act*].

[70] Benefit Corp Information Center, "State by state legislative status," online: <www.benefitcorp.net>.

party standard, through activities that promote [some] combination of specific public benefits."[71] A corporation seeking benefit corporation status must include or make a clear and prominent statement in its articles that it is a benefit corporation.[72] There are no specific criteria to qualify as a benefit corporation so long as proper company approvals have been met, and that also applies if a company wishes to withdraw from being a benefit corporation. Existing state corporate laws are to fill any holes left in the benefit corporation laws.

A significant aspect of the benefit corporation laws is the codification of stakeholder interests in directorial decision-making. In Maryland, a director is required to consider the effects of any action or decision not to act on stockholders,[73] employees, subsidiaries, suppliers, customers, community and societal considerations, and the local and global environment.[74] Vermont has an additional sixth factor, encompassing "the long-term and short-term interests of the benefit corporation, including the possibility that those interests may be best served by the continued independence of the benefit corporation."[75] In contrast to the standard articulated in *Revlon*, this addition relieves directors of the duties to maximize shareholder value in a takeover situation.

In Maryland, the director has no duty (fiduciary or otherwise) to a person who is a general public beneficiary of the benefit corporation. Vermont, however, has actually gone a step further in expanding the definition of fiduciary duties for their directors.[76] Vermont directors have fiduciary duties only to those persons entitled to bring about a proceeding against the benefit corporation. A "benefit enforcement proceeding" means a claim or action against a director or officer for failing to pursue the public benefit purpose set forth in its articles, or for violating any duty in the statute. These persons have been identified as shareholders, directors, persons or group of persons that own 10 percent or more of the equity interests in an entity where the benefit corporation is a subsidiary, or any other persons specified in the articles of the benefit corporation.[77] Shareholders, and shareholders of any parent company, can bring proceedings against the benefit corporation for violating their fiduciary duties, including failing to pursue or create a general public benefit.[78] Directors are not subject to a different or higher standard of care when decisions may affect the control of the benefit corporation. Directors also have the same immunity from liability as directors of regular for-profit corporations, including where the benefit corporation failed to create general or specific public benefit. So unless they did not act diligently, or their

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[71] *Maryland Act*, *supra* note 68 at § 5-6C-01(c); *Vermont Act*, *supra* note 69 at § 21.03(4).
[72] *Maryland Act* at § 5-6C-03, § 5-6C-05; *Vermont Act*, *supra* note 69 at § 21.05.
[73] In Maryland and certain other states, the term 'stockholder' is used instead of 'shareholder.'
[74] *Maryland Act*, *supra* note 68 at § 5-6C-07(a)(1). Vermont has some *de minimis* differences in wording. See *Vermont Act*, *supra* note 69 at § 21.09(a).
[75] *Ibid. at* § 21.09(a)(1)(F). The explicit inclusion offers symbolic vindication for Vermont, home of the socially-minded ice cream business, Ben & Jerry's Homemade, Inc., whose board in 2000 had multiple offers to purchase the company but had no choice but to sell to the highest offer or risk a shareholder lawsuit. Ben & Jerry's Homemade, Inc., News Release, "Ben & Jerry's and Unilever to join forces" (12 April 2000) online: <www.benjerry.com/company/media-center/press/join-forces.html>. But see Anthony Page and Robert A Katz, "Freezing out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon" (2010) 35 Vermont L Rev 211, which argues that Ben & Jerry's had strict anti-takeover defenses that their board declined to test, and that negative reactions to the sale of social enterprises may be misguided as such sales may create more opportunities for social enterprises to do good work.
[76] *Vermont Act*, *supra* note 69 at § 21.09(e).
[77] *Ibid.* at § 21.13(b).
[78] Vermont's expansion of duties thus has required setting out proper parameters of the directors' duties. See *Vermont Act*, *supra* note 69 at § 21.09(a)(3).

acts constitute fraud or negligence, the courts are unlikely to intrude upon a director's business judgment.

A benefit corporation is responsible for creating an annual benefit report, with Vermont requiring board approval prior to the report being sent out to shareholders.[79] The report is required to include: (1) a description of how the benefit corporation pursued a public benefit during the year and the extent to which the public benefit was created; (2) any circumstances that hindered the creation of the public benefit; and (3) an assessment of the societal and environmental performance of the benefit corporation, prepared in accordance with a third-party standard.[80] Vermont includes more explicit instructions on how the report must be constructed, such as outlining specific goals or outcomes, disclosing the amount of compensation paid to each director and the name of each shareholder owning five percent or more of the shares.[81] These additions add a heightened level of transparency and accountability that echoes some of the disclosure requirements of public companies.[82] Vermont also has created the requirement for one director of the board to be designated as a benefit director, who is required to be independent, and prepare an annual statement detailing whether, in the opinion of that director, the company acted in accordance with its benefit purpose, and if not, why.[83] This statement and the annual benefit report are to be delivered and approved by the shareholders and also posted on the company website.

In the US, the benefit corporation is regarded as a potential alternative to shareholder primacy to combat negative corporate behaviour that may be damaging to broader community, environmental, or other stakeholder interests. Several states do not track the names and number of benefit corporations, so it is difficult to determine how many are currently in operation although the Benefit Corporation Information Centre website lists around 400 benefit corporations in its directory.[84] The benefit corporation seems to be a positive development for US corporate governance reform, as it is designed to address American corporate governance needs for social progress. The development of benefit corporation laws promotes a more stakeholder-based model with supporting infrastructure to encourage an active level of social responsibility, and it will be interesting to see how it fares in its critical nascent years of development.

C. Proposed Benefit Corporation in Canada

The implementation of a benefit corporation in Canada, when compared to several of the findings in Part I, raises some immediate concerns regarding redundancy when compared to Canadian corporate laws. The most significant legal innovation in the US benefit corporation is the requirement that directors consider stakeholder interests in their decision-making. As seen in Sections B.2 and B.3 of Part I, this feature echoes what is already available under Canadian laws, specifically under the requirement that directors manage the corporation in the "best interests of

[79] *Maryland Act*, *supra* note 68 at § 5-6C-08(a).
[80] Vermont has also required a statement of the specific goals or outcomes, and actions that can be taken to attain them while improving its social and environmental performance. See *Vermont Act*, *supra* note 69 at § 21.14(a)(1)(D).
[81] *Ibid* at § 21.14(a)(4)-(7).
[82] *Vermont Act*, *supra* note 69 at § 21.14(b) and § 21.14(d); *Maryland Act*, *supra* note 68 at § 5-6C-08(b), (c).
[83] See e.g. *Vermont Act*, *supra* note 69 at § 21.10.
[84] Benefit Corp Information Center, "Find a Benefit Corporation," online: <www.benefitcorp.net/find-a-benefit-corp>.

the corporation," and findings from the *BCE* decision regarding the consideration of stakeholder interests. Indeed, as indicated by the practitioners, the effect of the *BCE* decision has made this particular requirement to consider stakeholder interests much more potent, as directors feel the pressure to document and record evidence of the process they took to consider stakeholders' interests in their decisions. On this requirement alone, the Canadian model of governance is already more stringent than this legal offering by the benefit corporation.

Numerous practitioners cited how in practice, the "best interests of the corporation" and consideration of stakeholders leads, more often than not, to the same conclusion that would be reached if directors' fiduciary duties were solely for the shareholders' best interests. This would certainly be the case under the auspices of a benefit corporation as well, given the business case for considering stakeholders in order improve long-term corporate performance. For those who would argue that the benefit corporation is better equipped to pursue a social value mandate when this pursuit runs against economic interests of the company – perhaps, but not for reasons that have anything to do with the construction of the corporate laws. Flexibility in corporate decision-making in Canada was not lost on the senior practitioners in this study. The board is not confined to short-profit or share value, nor required to consider only shareholders' interests. The board is not simply act as an auctioneer in the face of a takeover bid, but is required to determine what is in the best interests of the corporation. As for what equates to the best interests of the corporation, one practitioner in this study, when focused on the theoretical underpinnings of Canadian corporate law, pointed out that, "that's up to the directors to determine." And of course, the court in both *Peoples* and *BCE* specifically validated the business judgment rule. This is also in addition to the SCC's comment that directors are to look to the best interests of the corporation viewed as a good corporate citizen. If there is any legal import to be taken behind those words, then in that sense, all Canadian corporations should be acting as benefit corporations.

There may be a need here to also point out the differences from a private vs. public company standpoint. A private corporation in Canada that falls outside the purview of the securities regulators has little to fear in pursuing a dual mandate. In its simplest form, as one practitioner put it, "that person can be the shareholder, director, president, and chief bottle washer…their interests are aligned with the company's interest so the better the company does, the better they do." Closely-held companies can pursue whatever mandate they want without conflict if there is agreement, and indeed, several practitioners in this study practising in the private company sphere were clear that these companies had great flexibility the pursue profit-maximizing goals, corporate social responsibility, philanthropic and social goals, etc. If a company elects to expand its shareholder base and cultivates it, knowing its investors, there is little concern in pursuing a dual mission of economic and social value in its corporate pursuits. [85] Provided that the board's decision is within a range of reasonable alternatives, the court will always defer to that judgment. Directors pursuing dual mandates are well protected under Canadian corporate laws.

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[85] For added comfort, directors may be constrained using several legal tools to ensure the continuance of a social objective. As one practitioner noted:

> In a private corporation, you can put all kinds of constraints on the directors. You can use a unanimous shareholders' agreement or constrain them in the articles and bylaws and say, 'Look, we're the six shareholders and we don't want you to leverage this company over this ratio, and we're going to stick that in the bylaws….We're going to put a passage in the shareholder's agreement that you can't do that,' and they can't. The shareholders are able to step in the place of directors in a private company all they want.

The practitioner went on to note this is not the case in a public company as the shareholders will keep changing.

Granted, for public companies, it is much harder to move away from focusing on shareholders' interests, which most oftentimes translates to meaning an increase in share value. This is due to a variety of reasons, some expressed in Part I as well as general competitive business pressures – directors are under much higher scrutiny and institutional shareholders hold considerable influence, among other things. These pressures tend to force companies' to be drawn to the short-term bottom line which at times is to a company's own detriment,[86] and there have been movements to combat this type of short-term behaviour led by organizations that hold considerable weight in Canada.[87] Since the question being examined is in regard to the added value of implementing benefit corporation legislation in Canada, there do not seem to be any added legal features in the benefit corporation that would combat any of the pressures that exist for the regular Canadian public corporation. The model benefit corporation legislation requires a benefit director to be on the publicly traded benefit corporation's board – which one would assume is only meant to identify the specific tasks beholden to the benefit director and not the inherent reflection of a unique intent behind the benefit director's decision-making, as all directors are beholden to their fiduciary duties.[88] Other than this feature, there are no other protections offered to support the social benefit side of the benefit corporation in a public company context. The legislation is not equipped to counter the pressures that public companies face on the global capital markets. Section D of Part I touched upon how Canada's legal and regulatory landscape is in a theoretical conflict, with the securities commissions, TSX, and shareholder advisory groups having the most significant voice at the moment in governance practices. These organizations by nature are meant to protect shareholders, and as seen in Part I, shareholders' approvals on governance matters have grown considerably in the last few decades. Public benefit corporations would still be subject to NP 62-202 regarding takeover bids and defensive tactics, including any sort of amendments. Benefit corporations would have the exact same issues as all other public companies in that regard.[89]

As noted in Section B of this Part II, the Vermont legislation does specifically state that directors, in considering the long-term and short-term interests of the benefit corporation, a board may determine that those interests "may be best served by the continued independence of the benefit corporation."[90] The added statement may offer some solace if directors are particularly struggling in their decision and fear certain ramifications in the face of a takeover bid. From a corporate theorists' perspective, the added statement is not necessary. The directors already have that right

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[86] See e.g. John R. Graham, Campbell R. Harvey, and Shivaram Rajgopal, "Value Destruction and Financial Reporting Decisions" (2006) 26 Financial Analysts Journal 27.

[87] A few practitioners mentioned the joint initiative between Mark Wiseman, the President and CEO of the Canadian Pension Plan Investment Board, and Dominic Barton, the Global Managing Director of McKinsey & Company, entitled "Focusing on Capital on the Long Term," online: CCPIB <www.cppib.com>.

[88] This is reflected in the model benefit corporation legislation, but not necessarily in every state benefit corporation's laws. See

[89] It should also be noted that, to date, there are no benefit corporations that are public companies.

[90] *Ibid. at* § 21.09(a)(1)(F). The explicit inclusion offers symbolic vindication for Vermont, home of the socially-minded ice cream business, Ben & Jerry's Homemade, Inc., whose board in 2000 had multiple offers to purchase the company but had no choice but to sell to the highest offer or risk a shareholder lawsuit. Ben & Jerry's Homemade, Inc., News Release, 'Ben & Jerry's and Unilever to join forces' (12 April 2000) online: <www.benjerry.com/company/media-center/press/join-forces.html>. But see Anthony Page and Robert A Katz, 'Freezing out Ben & Jerry: corporate law and the sale of a social enterprise icon' (2010) 35 Vermont L. Rev. 211, which argues that Ben & Jerry's had strict anti-takeover defenses that their board declined to test, and that negative reactions to the sale of social enterprises may be misguided as such sales may create more opportunities for social enterprises to do good work.

under Canadian laws. Practitioners elaborated on how in select circumstances, even in a public company context, an alternative decision other than the highest bid offer, though rare, is feasible in Canada. As legal advisors, they simply would not recommend testing the parameters unless the conditions were right, but that is beside the point. There may be business reasons for inserting this language beyond what necessary in the law, and that is understandable. It is just unclear if corporate legislation is the appropriate place for it as opposed to contractual means, as the board discretion already exists in Canada, and regardless, takeovers in a public company context would still be subject to NP 62-202.

When the stakeholder requirements are stripped away from the benefit corporation structure, the remaining legal elements seem somewhat bare. The requirement that a benefit corporation create "a general public benefit measured by a third party standard" seems impressive at first glance, but a cursory glance at the benefit corporations listed on the Benefit Corporation Information Center's directory indicates that there are would be very few businesses that would be excluded from this standard. How does the sale of pastries, for example, provide a general public benefit? How does a regular cleaning business (with no mention of anything publicly beneficial on its website, not even eco-cleaning supplies) create a public benefit?[91] One practitioner mentioned Coca-Cola's somewhat counterintuitive campaign to fight obesity.[92] Could Coca-Cola be a benefit corporation? The "third party standard" measure seems to be a low one. Any corporation that has embraced the corporate social responsibility (CSR) movement and adopted some form of CSR practices in their business can become a benefit corporation. Benefit corporations also have no legal features to combat the limitations in CSR. Empirical studies have shown that CSR trends have been consistent with theories of strategic CSR and rational, profit-seeking management decision-making.[93] "Greenwashing" – where companies spend significantly more time and money on green advertising rather than on environmentally sound practices – is a real concern. There are no built-in legal mechanisms to prevent this type of corporate behaviour in a benefit corporation beyond what is already available for regular Canadian corporation.

The trouble is that the benefit corporation's definition of a "general public benefit" fits perfectly into the dogma has been at the core of modern economics since Adam Smith's *Wealth of Nations*, where he famously opined: "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[94] Smith's concept of the 'invisible hand' has resonated within the theoretical economic underpinnings of the corporation for some time now. It postulates that shareholders have powerful incentives to maximize the value of the firm and monitor corporate directors' and officers' conduct. Managers, as shareholders' agents, seek to maximize shareholder wealth through the increase of share value

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[91] This is not meant to single this company out, as it was one of several benefit corporations that had little evidence of any general or specific public benefit on its website.

[92] Coca-Cola Company, "Coming Together: Help Us Fight Obesity," online: Coca-Cola Company <www.coca-colacompany.com/coming-together/>.

[93] See e.g. Donald Siegel and Donald Vitaliano, "An Empirical Analysis of the Strategic Use of Corporate Social Responsibility' (2007) 16 Journal of Economic and Management Strategy 773; Ronald Fisman, Geoffrey Heal and Vinay Nair, "A Model of Corporate Philanthropy" (2007) Columbia Business School Working Paper, online: <http://knowledge.wharton.upenn.edu/papers/1331.pdf>.

[94] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) 1 Eighteenth Century Collections Online at 1.1.2.

and dividend payments, which presumably includes ensuring that stakeholders are appeased[95] and ultimately translates into benefits to consumers and society as a whole. Charles Elson, an advocate of shareholder primacy in the US, stated: "It's politically correct to suggest that a company benefit the public rather than its investors. But investors are the public."[96] If indeed the proponents behind the benefit corporation believe the hybrid is offering something clearly different from the mainstream corporation, and presumably they do, their legal features need to be more explicit and set them apart from the classic economic definition of how business translates to public benefit. Of course, benefit corporations also have the option to include the requirement to produce a "specific public benefit" in their governing documents – but so can a regular Canadian corporation.

The last two elements of the benefit corporation to be discussed briefly are its benefit enforcement proceedings, and its annual reporting requirements. As discussed in Section B of this Part II, directors in a benefit corporation have fiduciary duties only to those persons entitled to bring about a benefit enforcement proceeding against the benefit corporation. As seen in Section 4 of Part I, the benefit enforcement proceeding is less stringent than the oppression remedy, which is available to stakeholders against majority shareholders, and derivative actions claims which can be made against directors for violating their duties to the corporation. This is in addition to protections under MI 61-101 in a public company context. The legislation does indicate that proceedings can be brought against directors for failing to pursue a public benefit, but as earlier stated, there are inherent problems with the definition of public benefit, thus it would seem unlikely anyone would be able to bring a valid claim under that provision.

The annual benefit reporting requirement is certainly something that is not required by Canadian private companies. Public companies have their own disclosure requirements that presumably would capture much of the content within the benefit corporation's reporting requirements, but private companies do not 'benefit' reporting requirements. Therefore, this legal feature does offer something that private Canadian companies seeking to pursue both economic and social value do not have.

Overall, there is a concern that the benefit corporation may resort to a branding exercise if it is implemented in Canada. There are no meaningful teeth behind the benefit corporate legislation, and its offerings to Canadian corporate law are minimal. In fact, some of its standards are weaker. Even worse, the adoption of the benefit corporation may only confuse or misrepresent the current state of Canadian corporate laws. If the hybrid is regarded as a clear alternative to the mainstream corporate model, there is a risk that entrepreneurs may erroneously think that they are not able to pursue both social and economic value in their businesses without running some sort of legal risk. That would hinder the very social goals that presumably leaders behind the benefit corporation are trying to achieve. This point is critical.

The benefit corporation has not had exponential success in the United States to date, so there are0 good reasons for Canada to wait and see how it fares. Indeed, discussions are bubbling up in the US as well, as more practitioners are beginning to pay attention and question the relevance of the

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[95] See e.g. Reinier Kraakman, et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd ed. (Oxford: Oxford University Press, 2009) at 61-66.

[96] Angus Loten, "Can Firms Aim to Do Good if It Hurts Profit?" *The Wall Street Journal,* (11 April 2013) at B6, (quoting Elson).

benefit corporation in states with "other constituency" statutes, among other nuances in its corporate laws.[97] Canadian legislators should wait and see how this live experiment and subsequent conversations play out. There needs to be more thought put into benefit corporation legislation. MaRS Discovery District, a Canadian hub in social innovation, has drafted a White Paper pushing legislators to create an equivalent to the benefit corporation, calling it "an opportunity for Canada."[98] This author suggests patience, further research, and a willingness from Canadian social leaders backing the benefit corporation to better understand the state of Canadian corporate governance.

D. Looking Ahead

The next few years will be very telling as to the success or failure of hybrid legal structures, and whether they gain any traction in corporate practice. Hybrids are beginning to play an important role in challenging the mainstream model and forcing legislators to contemplate the legal limitations within that model. But it should also cause many to reflect upon the legal possibilities of existing laws. A look into the features of the US benefit corporation, and its possible implementation into Canadian corporate laws, only helps to emphasize a critical point: a Canadian way of governance is important and should be regarded as distinct.

The MaRS White Paper recognizes that a failure to educate the Canadian public on existing common law may have created the need for a benefit corporation in Canada. This failure is not sufficiently persuasive to merit creating a new kind of corporate entity with similar governing features to those detailed in Canada's corporate laws. More importantly, such a cross-border adoption would only further the problematic assumption that Canadian corporate law is identical to those in the US.

As seen in Part I of this report, given the somewhat split personalities of Canadian governance in terms of its treatment by the courts and the securities commissions, there is some confusion as to where Canada stands on whole in terms of corporate models, in the academic sense. Since the benefit corporation only offers solutions in the corporate law sphere, Canada's legal position in that realm is clear. The Canadian corporate governance model is more stakeholder-based, and more flexible to stakeholder interests and broader corporate purposes, and not one that requires the maximization of share value. Social entrepreneurs seeking to house their social businesses should be aware of these features in Canadian corporate law. Canada should not have to look southwards for direction in the area of innovative corporate standards. Doing so will result in losing sight of Canada's own corporate culture and norms, as developed or underdeveloped as they may be. Tensions within the common law and securities regulators, as well as within the theory and practice of Canadian governance indicate that mirroring American hybrid innovations is still premature. Further research on corporate hybridity will be crucial for optimal results in implementation, as well as input from practitioners, and ongoing support from leaders in both for-profit and non-profit sectors working in the realm of social enterprises.

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[97] Noam Noked, "Benefit Corporations vs. Regular Corporations : A Harmful Dichotomy" The Harvard Law School Forum on Corporate Governance and Financial Regulation (13 May 2012), online: <http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/>

[98] MaRS Discovery District, "Benefit Corporations in Canada" [draft with author] [*MaRS White Paper*].

Conclusion

Corporate governance is in a constant state of evolution, deriving from various laws, customs, and processes, with legal, regulatory, and institutional pressures as well as issues tied specifically to particular product and service markets. It is undeniable that there significant normative underpinnings. One practitioner in the study reflected on how corporate governance "is one of those things that people struggle to define," and another noted how corporate governance "is a never-ending process…standards today are different than they were 10 years ago, 20 years ago, and so on…" Outlining a national model may be a daunting task, and part and parcel of staking a position is that it is particularly vulnerable to alternative viewpoints, exceptions, and criticisms. Nevertheless, a healthy and robust discussion on the big picture view of Canada corporate governance is needed. While American academic articles are churned out en masse addressing corporate governance issues, the discussion only occurs in fits and starts within Canadian legal scholarship. This qualitative study brings together some of the top corporate legal minds in Canada to opine on the fundamental principles that are driving the development of Canadian corporate governance today.

This report comes at a unique time in Canadian corporate and securities law. It has been five years since the landmark decision of *BCE Inc. v 1976 Debentureholders*, a plan of arrangement case where the Supreme Court of Canada indicated that corporate directors are not confined to decision-making focused solely on shareholders' interests, short-term profit, or share value. The SCC recognized that non-shareholder stakeholder interests are to be taken into account in a board's corporate decision-making. The court noted that in exercising their fiduciary duties, directors are to act in the best interests of the corporation viewed as a good corporate citizen. Taken with other corporate legal features and remedies available in Canada, these findings by the SCC indicate that Canadian courts are shifting away from a shareholder primacy model of governance. Looking solely at Canada's corporate statutes and the common law, practitioners tended to agree that Canada has "overtones of a broader stakeholder model."

But of course, the current state of Canadian corporate law is only one part of a larger story. For public companies, the Canadian securities commissions have traditionally taken a much more shareholder-centric approach on matters, and have become increasingly influential in the governance sphere. National Policy 62-202 leaves Canada as one of the most bidder-friendly jurisdictions in the world. Many practitioners in this study cited the securities regulators' stance on defensive tactics as the main reason why shareholder primacy is alive and well in Canada. It will be interesting to see where Canadian regulators settle on the issue in the coming months.

The conflicting theoretical positions from the courts and the securities commissions have enriched the dialogue on the current environment of Canadian corporate governance. One practitioner expressed how "we're still digesting the *BCE* decision – we've got a ways to go" and another wondered if Canada is experiencing "an overture in decisions." While most felt that Canadian governance norms and culture are becoming quite well-developed, the frequent pull in different directions from the regulators and influential power sources in Canada have left Canadian governance in a "period of uncertainty….we're still trying to figure out what the model should be." Corporate statutes have not changed, but power dynamics can shift. The rise of board education and influence has created more robust mechanisms to govern corporations, while the mobilization of collective action by shareholder advisory groups like the CCGG and the ISS has

meant that that the institutional investors in Canada are a significant force to be reckoned with.

When examining the emergence of hybrid legal structures on the international stage, the outline of a Canadian model of governance suddenly becomes much clearer and more focused. In comparison to the US benefit corporation, a corporate legal structure designed to house businesses that maintain a public benefit purpose in addition to economic pursuits, one finds that the legal features are strikingly similar. The common law has made the process of considering stakeholders in the best interests of the corporation more overt, well beyond what is assumed in Anglo-American corporate legal scholarship.

Layered onto this corporate legal base, the securities commissions have provided other measures to bolster the field of corporate governance in Canada, while seeking to protect the integrity of the capital markets and the interests of investors within those markets. These efforts, along with those from other organizations, have raised and normalized governance standards, created more robust checks and balances, and helped to develop a stronger voice in the corporate governance movement within the last several decades of Canadian history. Tensions may be part and parcel of vigorous development, and the current debate on the treatment of poison pills should be seen as another healthy milestone in the evolution of Canadian corporate governance.