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A Rational Allocation of Responsibility Between Corporate & Securities Laws in Canada

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Executive Summary

Corporate and securities laws have different policy goals, jurisdictional reach and enforcement mechanisms. On the basis of these differences, several guiding principles can be used to support a rational allocation of responsibility between corporate and securities laws in Canada. These include:

- Shareholder versus Investor: Does the subject matter and relevant regulation focus on shareholders evaluating management or investors buying or selling securities? Subject areas that focus on the former are more appropriately within the jurisdiction of corporate law while subject areas that focus on the latter are more appropriately within the jurisdiction of securities laws.

- Substance versus Disclosure: Does the regulation of the subject matter impose substantive rules or does it mandate disclosure of information? If the regulation imposes substantive requirements requiring parties to take particular actions or achieve certain results, it is more appropriately within the domain of corporate law. However, if the regulation mandates disclosure of information, it is within the historic scope of securities law.

- Distributing versus Non-Distributing Corporation: Does the regulation focus exclusively on distributing corporations or both distributing and non-distributing corporations? While securities laws regulate only distributing corporations, corporate law regulates both distributing and non-distributing corporations. In respect of certain areas, it may be appropriate for corporate law to regulate only non-distributing corporations while leaving the regulation of distributing corporations to securities laws.

- Public versus Private Enforcement: Is the activity better enforced through private litigation and the courts or a public, specialized enforcement body? The *CBCA* is more appropriate if the activity is better enforced through private means, whereas provincial securities laws are more appropriate if the activity is better enforced through public means.

- Constitutional Limits: Do the application of the provincial securities laws focus on the internal governance of *CBCA* corporations, effectively sterilizing federally incorporated companies? If so, there may be constitutional restrictions on the ability of provincial securities laws to regulate in those areas in respect of *CBCA* corporations.

The existing model of overlapping regulatory jurisdiction between the *CBCA* and provincial securities laws provides some benefits but also imposes significant costs on stakeholders. The stakeholders that are considered in the analysis are: corporations (domestic, emerging companies, and those inter-listed in the U.S.); investors (institutional, retail and foreign); and regulators (federal corporate, provincial corporate and provincial securities regulators). The benefits of the current system include mutual

reinforcement and consistency. However, the benefits of the current system are outweighed by its many costs, which include:

- the costs of duplication incurred by regulators;
- costs of compliance imposed on corporations;
- time delays and opportunity costs incurred by corporations;
- the regulatory burden on emerging companies; and
- unequal opportunities, uncertainty and unfairness for investors.

Alternatives to the current regulatory model would preserve the mandate and policy goals of corporate and securities laws while significantly reducing the costs to stakeholders. These alternatives include: (a) a joint single national regulator of corporate and securities laws; (b) the current system of corporate law and a single national securities regulator; (c) a single national corporate law regulator and the current system of securities laws; and (d) better co-operation, co-ordination and harmonization within the current regulatory model of corporate and securities laws.

While each of these alternatives would better serve the public interest than the existing model, the report focuses on the last alternative presented, given the challenges inherent in implementing more fundamental reform. Greater co-operation, co-ordination and harmonization between corporate and securities laws regulators could be achieved through various mechanisms including the following:

- A joint committee of corporate and securities law administrators, which could use the guiding principles highlighted above to determine whether either regulator should exclusively regulate a particular subject matter; alternatively, where concurrent jurisdiction is desirable or necessary, the committee would decide how best to harmonize rules so that the cost to stakeholders is minimized.

- Incorporation by reference to the other regulatory framework, which would reduce costs to stakeholders. Exemptions or recognition based on compliance with the other regulatory framework would also achieve the same purpose.

- The form of legal instrument used (the act versus regulations versus policy statements) will affect the ease of amendments and the continued harmonization of corporate and securities law rules.

Subject areas where corporate and securities laws currently exercise concurrent jurisdiction and have conflicting or overlapping rules include: insider trading, corporate governance, takeovers, proxy solicitations and exemptions, and proportionate liability. On the basis of the guiding principles highlighted above, this report concludes that:

- Insider trading is more appropriately regulated within the jurisdiction of securities laws as opposed to corporate law; alternatively, corporate law could continue to regulate insider trading in respect of non-distributing corporations while leaving

the regulation of insider trading in respect of distributing corporations to securities laws.
- Corporate governance, defensive measures in response to takeovers, proxy solicitations and exemptions, and communication with beneficial shareholders are more appropriately regulated within the jurisdiction of corporate law as opposed to securities laws; and
- There is little justification for differing proportionate liability schemes in the *CBCA* and provincial securities laws.

To the extent that exclusive jurisdiction cannot be achieved, this report recommends that the provisions for each subject matter highlighted above be harmonized by ensuring that the relevant rules in each regulatory framework are identical or similar. The least cost would be imposed on stakeholders if one regulatory framework incorporated the relevant rule by reference to the other regulatory framework, or created recognized compliance with the rules of the other regulatory framework as compliance with its own regulatory framework. Consideration should also be given to the form of legal instrument to allow for ease of amendments and continued harmonization.

1. Introduction

The objectives of this research study are four fold.

First, it sets out and analyzes theoretical and policy differences in corporate and securities laws in Canada. Second, it develops a set of principles that rationalize whether certain corporate activity should be regulated exclusively within a federal corporate law code or provincial securities laws. Third, it develops a set of mechanisms that would allow for harmonization of corporate and securities laws in areas where concurrent jurisdiction is desirable or necessary. Fourth, it applies those principles to particular areas of corporate activity, including: insider trading, corporate governance, takeover bids, proxy solicitations and exemptions, and proportionate liability.

Part 2 sets out the existing corporate and securities law framework within which businesses in Canada must operate. This part reviews the creation and development of Canadian corporate law through the *CBCA* and provincial corporate law statutes, and compares it against the creation and development of provincial securities laws in Canada. They are compared on the basis of their differing policy goals and objectives, jurisdictional reach (including conflicts of laws and constitutional restraints) and enforcement mechanisms. On the basis of these differences, Part 2 concludes by offering several guiding principles that should be used to determine whether a particular aspect of business conduct should be exclusively regulated within in a federal corporate law code or by provincial securities laws.

Part 3 analyzes the rationales, benefits and costs of the current overlapping regulatory structure of corporate and securities laws in Canada today. The relevant stakeholders for this analysis are: corporations (domestic, emerging companies, and those inter-listed in the U.S.), investors (institutional, retail and foreign), and regulators (federal corporate, provincial corporate and provincial securities regulators). Part 3 then assesses the benefits of the current overlapping regulatory structure to the stakeholders including: mutual reinforcement and consistency. It then assesses the direct and indirect costs of the current system that are imposed on stakeholders including: costs of duplication incurred by regulators, costs of compliance imposed on corporations, time delays and opportunity costs, the regulatory burden on emerging companies, and unequal opportunities, uncertainty and unfairness for investors. Part 3 concludes with an assessment of whether a regulatory model other than the existing system would better serve the public interest. Part 3 analyzes how the current regulatory model could be improved, particularly by enhancing the existing levels of regulatory co-operation, co-ordination and harmonization between federal corporate and provincial law regulators in areas where concurrent jurisdiction is desirable or necessary.

Finally, Part 4 critically analyses the extent of overlap and/or conflict between provisions in the *CBCA* and provincial securities laws. These substantive areas that are analyzed are: corporate governance, insider trading, takeover bids, proxy solicitation rules and exemptions, communication with beneficial shareholders, and proportionate liability. Part 4 applies the guiding principles developed in Parts 2 to surface whether the *CBCA* or provincial securities laws should be the exclusive or primary regulatory authority in respect of these areas. Part 4 then applies the mechanisms discussed in Part 3 to enhance the existing levels of co-operation, co-ordination and harmonization in areas where exclusive jurisdiction is not possible.

Part 5 concludes.

2. Theoretical and Policy Differences between Corporate and Securities Laws

In 1971, the Dickerson Committee reported:[1]

> There has been far too much attention paid in the past to the supposed differences between corporate legislation and securities legislation. We do not believe that there is a valid distinction, and that a good deal of what is found in provincial securities legislation could just as validly be enacted as corporate legislation.

In a similar vein, the Final Report of the Ontario Task Force on Securities Regulation stated in 1994:[2]

> We observe that the boundaries between securities and corporate law are often blurred, and, at both a normative and pragmatic level, are difficult to draw with confidence. We note that, at one time, the rules governing insider trading and shareholder communications were matters relegated exclusively to corporate law. Few would now question the suitability of measured intervention in these areas by securities regulators.

The Dickerson Committee Report and the Final Report of the Task Force on Securities Regulation make extremely important comments about the appropriate divide between corporate and securities law. The author of this report is of the view that there are several guiding principles that can be used to support different responsibilities for corporate and securities laws. In determining whether there is a rational basis for allocating responsibility between corporate and securities laws, we must compare the differing

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[1] Information Canada, Proposal for a New Business Corporations Law for Canada, Robert W.V. Dickerson et al (Ottawa: Information Canada, 1971) at 5. [“Dickerson Report”].

[2] Responsibility and Responsiveness – Final Report of the Ontario Task Force on Securities Regulation (1994), 17 OSCB 3208, page 22 of 95. The Task Force Report also noted that some commentators expressed criticism of OSC Policy 9.1, particularly in respect of the rules governing related party transactions, an encroaching on the domain of corporate law. In this regard, the Report stated:

> These commentators expressed general concern about the utility of invoking securities regulation techniques to address matters within the sphere of corporate governance, which, it was claimed, should be remitted exclusively to the province of courts and corporate law….In this area, we recommend the statutory adoption of rule-making power which would provide clear support for all aspects of OSC Policy 9.1 but for the provisions governing related party transactions. We characterize the provision providing authorization for related party transactions as controversial, and anticipate resolution through further legislative change.

policy goals, jurisdictional reach and enforcement mechanisms of corporate and securities laws.

A. Policy Goals

The policy goals of corporate law are to: (a) enhance economic efficiency; (b) ensure accountability of corporate managers and directors; (c) protect shareholders and other vulnerable parties; (d) respond to the needs of large, widely-held corporations as well as small, closely-held businesses; and (e) attract business to the relevant jurisdiction by inspiring confidence and supporting competitiveness, innovation and growth.[3]

Corporate law is generally concerned with the internal governance of the corporation and is primarily focused on the responsibilities, duties and liabilities of directors and mangers and the rights of shareholders.[4]

The primary purpose of a corporate law code is enabling.[5] It provides a set of default rules that govern the relationship between the shareholders, directors and managers. While these stakeholders are free to create their own rules, a corporate law code creates a set of standard form rules that most parties would themselves have agreed to, had they put their mind to the matter. In this way, a corporate law code facilitates the efficient operation of business, reduces transaction costs and enhances economic efficiency.

While most rules in a corporate law code are default provisions, a corporate law code also contains certain mandatory rules that govern that relationship between the relevant stakeholders. A limited number of mandatory rules in a corporate law code are necessary because: (a) failures in the market and lack of voluntary compliance may necessitate mandatory legal regulation to achieve economic efficiency; and (b) mandatory legal regulation may be necessary to protect shareholders and other vulnerable parties.[6]

Because corporate law codes have to be sufficiently flexible to meet the needs of closely held corporations as well as publicly-held corporations, they have to provide various opt-out features for closely held corporations where the cost of the mandatory regulation outweighs the benefit to stakeholders.[7]

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[3] For a more detailed discussion and analysis of the policy objectives of corporate law, see Poonam Puri, The Hallmarks of Good Corporate Law: A Performance Evaluation of the Canada Business Corporations Act, prepared for Corporations Canada, Industry Canada, 2004. ["Puri, Hallmarks"]

[4] While the main focus of a corporate law code is the relationship between shareholders, directors and managers, corporate law statutes do contain a limited number of provisions that protect the rights of creditors and other stakeholders. For example, section 42 of the *CBCA* protects shareholders in the context of directors declaring dividends. Similarly, section 119 of the *CBCA* imposes personal liability on directors for employees' unpaid wages.

[5] For a more detailed discussion of a corporate law code's enabling features, see Puri, Hallmarks, *supra* note 3.

[6] *Ibid*.

[7] *Ibid*.

Securities laws are concerned with protecting investors and fostering fair and efficient capital markets. Prior to 1994, the stated mandate of the Ontario Securities Commission[8] was investor protection. In 1994, the *Securities Act*, Ontario was amended and it now states that its purposes are:[9]

(a) to provide protection to investors from unfair, improper or fraudulent practices; and
(b) to foster fair and efficient capital markets and confidence in capital markets.

Securities laws achieve these objectives by regulating corporations that issue their securities to the public. They mandate disclosure of material information to the market. Securities laws do not generally impose substantive requirements or dictate outcomes, such as the price at which an issuer should sell its securities. Securities laws also license and regulate market participants such as brokers, dealers and underwriters that assist issuers in accessing the public capital market.

Securities law regulators are increasingly cognizant of the fact that the cost of compliance with securities laws should not exceed the expected benefit to shareholders, and we are increasingly witnessing securities commissions around the world engaging in formal cost-benefit analyses prior to implementation of new laws or rules.[10]

An expansive interpretation of the securities law mandates of "investor protection" and "fostering fair and efficient markets" could allow for much of what is regulated under corporate law to be regulated under securities laws. However, several tests can be used to support a reasonable and rational allocation of responsibilities.

One test that can be articulated about the difference between corporate and securities law is that corporate law is focused on shareholders while securities laws are focused on investors. The concept of investor that is central to securities law is certainly broader than the concept of shareholder that is central to corporate law. Investor encompasses more than an existing shareholder in a particular corporation: it includes future shareholders, debt investors and the market or the investing public generally.

On this basis, it may be useful to draw another broad generalization: a shareholder for corporate law purposes encompasses an existing shareholder in a particular corporation who is interested in evaluating the current management, hence the role of corporate law to focus on the governance of the corporation. In contrast, an investor for securities law purposes is interested in buying and selling securities, hence the role of securities laws in ensuring a fair and efficient market for buying and selling.

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[8] "OSC"
[9] *Securities* Act, Ontario, section 1.1. ["*OSA*"]
[10] See for example, P.Puri & A.Sen, A Cost Benefit Analysis of the Multi-Jurisdictional Disclosure System, prepared for the OSC (2003). Available at http://www.osc.gov.on.ca/en/HotTopics/currentinfo/prom_inv_conf/pic_20030627_cba-disclosure-system.pdf.

At some point, the distinction between shareholder and investor breaks down. However, the Supreme Court of Canada employed a similar distinction in *Hercules Managements Ltd. v. Ernst & Young*[11] where it held that the shareholders of a corporation could use the audited financial statements required by the corporate law statute only for the purpose of evaluating the performance of management, not for the purpose of making additional investments in the corporation.

In addition, it may be useful to distinguish between corporate and securities laws on the basis that corporate law provides for mandatory or default rules that impose substantive requirements on parties while securities laws mandate disclosure of material information. Once again, it is acknowledged that, at some level, the distinction between substance and disclosure gets blurred in that mandating disclosure of information can often lead to preferred substantive results.

Finally, it goes without saying that securities laws regulate companies that distribute their securities to the public while corporate law generally provides rules for both distributing and non-distributing corporations.

B. Jurisdictional Reach

The jurisdictional reach of corporate and securities laws also differ, in respect of conflict of laws rules and constitutional limitations.

i. Conflict of Laws

A corporation is subject to the corporate law statute under which it chooses to incorporate. In contrast, a corporation must comply with the securities laws of all the jurisdictions in which a significant number of its investors reside. As such, a corporation can only be subject to one corporate law statute but it can be subject to multiple securities law statutes.

The on-going debate in Canada on a national securities commission reflects concerns about the inefficiencies and costs associated with the existing securities regulatory structure with multiple securities regulators.[12] This issue does not arise in the context of the multiple corporate law codes in Canada, because lack of uniformity does not significantly increase the direct costs imposed to corporations to comply with the corporate law of their incorporation.

In fact, the conflict of laws rules for corporate law create a framework where jurisdictions can potentially compete for corporate charters. In the U.S., Delaware has taken the lead on the incorporation business by providing a responsive corporate law code that is interpreted by a highly specialized corporate law judiciary. Canada has not experienced

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[11] [1997] 2 S.C.R. 165.

[12] See It's Time, Wise Persons Committee to Review the Structure of Securities Regulation in Canada, (Ottawa: Department of Finance, 2003). ["WPC Report"]

the same phenomena;[13] the provincial corporate law codes largely mirror the federal corporate law code. In addition, judges use case law and precedents from one corporate code to another, and as a result, judicial decisions also assist in harmonizing corporate law in Canada.

In contrast to the possibility of competition in corporate law, the conflict of laws rules for securities laws create conditions favourable to convergence of standards.[14] We are currently witnessing a convergence of securities law standards around the world, with the U.S. Securities and Exchange Commission taking the lead with the passage of the *Sarbanes-Oxley Act* of 2002. As a result, we have had an intense debate in Canada about the appropriate response by Canadian securities regulators as to whether to mirror the U.S. reforms or create different rules in light of the distinct character of the Canadian capital markets. The concern from a policy perspective is that we do not want Canadian corporate and securities law rules and policies to lag too far behind the U.S. and international standards, given the increasingly global nature of capital, investors and issuers and the real possibility that certain issuers and investors may bypass Canadian markets altogether.

ii. Constitutional Law

Both the federal and provincial governments have authority to make corporate and securities laws.[15] The provinces have authority to make laws in respect of "the incorporation of companies with provincial objects" under section 92(11) of the *Constitution Act*, 1867. The federal government does not have an express power to incorporate companies; it relies on the peace, order and good government power in s.91 of the Constitution Act, 1867 to do so.[16]

The provinces regulate securities markets on the basis of their power to regulate property and civil rights within the province. While the federal government has not promulgated securities laws, the WPC Report refers to several legal opinions which it obtained to the effect that it has the authority to do so.[17]

[13] See Daniels, R.J. (1991). "Should the Provinces Compete? The Case for a Competitive Corporate Law Market," McGill Law Journal 36 at 130; See also Cumming, D.J. and J.G. MacIntosh, (2000) The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law. International Review of Law and Economics 20 at 141.
[14] See P.Puri & J. Larsen, Corporate Governance and Securities Regulation in the 21st Century (Lexis-Nexis Butterworths, Toronto: 2004). ["Puri & Larsen, 21st Century"]
[15] For a much more detailed analysis of constitutional law issues on this topic, see Peter Hogg, Constitutional Law in Canada, chapter 23 (Toronto: Carswell, 2003). ["Hogg"]
[16] See *Citizens' Insurance Co. v. Parsons* (1881) 7 App. Cas 96*; John Deere Plow Co. v. Wharton* [1915] A.C. 330 at 340 suggests that the trade and commerce power may also be a source for the federal incorporation power, but Peter Hogg argues that this interpretation is incorrect. See Hogg, *ibid*, at 23-1, footnote 3.
[17] *Supra* note 12. The WPC obtained legal opinions of Ogilvy Renault, Torys LLP, and Fasken Martineau DuMoulin LLP, which are contained in Wise Persons Committee to Review the Structure of Securities Regulation in Canada, Research Studies, (Ottawa: Department of Finance, 2003) at 1-76.

Constitutional law does, however, impose certain restrictions on provincial securities laws (and provincial laws in general) in regulating the conduct of *CBCA* companies.[18] Professor Peter Hogg states the relevant principle as follows:[19]

> A province may not impair the "status and essential powers" of a federally-incorporated company…What this means is that if a province enacts a law which is within its legislative competence, but which would have the effect of impairing the status or essential powers of a federal company, then the law will be held to be inapplicable to any federal company.

The status and essential powers test was applied in A.-G. Man. V. A.-G. Can.(Manitoba Securities).[20] In this case, Manitoba securities legislation prohibited a company from issuing securities without first obtaining a licence from the provincial regulator, which could examine the company's incorporating documents and financial condition among other matters. The Privy Council held that the statute was constitutionally invalid in respect of federally incorporated companies on the basis that the capacity of a company to raise capital is so essential to its existence and the provincial legislation impairs the status and essential capacities of the company to a substantial degree. However, in *Lymburn v. Mayland*, Alberta's securities act provisions focused not on the licensing of companies, but on the licensing of brokers and salespeople who would sell companies' securities to the public. Formulated as such, the Privy Council held that the provincial provisions were valid in respect of federally incorporated companies.[21]

In *Multiple Access v. McCutcheon*[22], a more recent case in which the Supreme Court of Canada held that Ontario securities law regulating insider trading was applicable to a federally incorporated company, the relevant test was also articulated as whether the application of the provincial securities laws to the federal company would "impair the status and essential capacities of the company in a substantial degree."[23]

Justice Estey provided another formulation of the test where he stated that provincial securities legislation is constitutionally valid where the "central thrust of the legislation is not the constitution of the corporation."[24] This suggests that provincial securities legislation would be invalid where the central thrust is the constitution of the corporation.[25] As will be discussed in Part 4, this ratio and line of reasoning is

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[18] Hogg, *supra* note 14 at 23-12.
[19] *Ibid*., at 23-10.
[20] [1929] A.C. 260, discussed in Hogg, supra note 18 at 23-11.
[21] *[1932] A.C. 318.* See Hogg, supra note 18, at 23-12.
[22] *Multiple Access Ltd. v McCutcheon*, [1982] 2 S.C.R. 161. See also William J. Braithwaite, "Who is best suited to introduce corporate governance reform and mutual fund reform?" in Securities Regulation: Issues and Perspectives, Queens Business Law Symposium (Toronto: Carswell, 1995) where he discusses this issue in detail.
[23] Braithwaite, *supra* note 22.
[24] *Ibid*.
[25] *Ibid*.

particularly significant in the areas of corporate governance, proxy solicitations and exemptions, and shareholder communications.

C. Enforcement

Enforcement mechanisms for corporate and securities laws also differ. While a corporate law code relies largely on private parties pursuing their legal rights in the court system, securities laws are largely enforced by an active, specialized regulatory body.

A corporate law statute is generally self-enforcing. It relies in large part on litigation by aggrieved shareholders using remedies such as the derivative action and the oppression action. The *CBCA* provides that the Director may, for example, commence a derivative suit or oppression action, but in practice, there has been minimal regulatory intervention in respect of enforcement of the *CBCA* by the Director.

In contrast, securities laws are actively enforced by an activist, specialized regulatory body, although there is some scope for private enforcement by aggrieved investors.[26] Canadian securities regulators have broad discretionary power to act in the public interest in regulating the conduct of issuers and market participants. This public interest power has been the subject of much criticism.[27]

This public interest power allows for overreaching by securities regulators into the corporate law domain for a number of reasons. First, the public interest power in, for example, section 127 of the *OSA* has been interpreted such that it does not require a breach of any particular provision of the Act.[28] As well, the public interest power is considered to be preventive, not remedial. It can be used by securities regulators to prevent future misconduct. In this regard, the OSC stated *In Re Mithras Management Ltd.*: [29]

> We are not here to punish past conduct; that is the role of the courts…We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.

[26] Statutory civil liability provisions in provincial securities laws create some scope for private enforcement by aggrieved investors. For example, the *OSA* creates statutory civil liability for misrepresentations in a prospectus, (s.130); offering memorandum (s.130.1); takeover bid circular, issuer bid circular or director's circular (s.131); liability for non-delivery of prospectus or bid document (s.133); liability for insider trading (s.134). The *OSA* also contains a statutory scheme for liability for misrepresentations or omissions in respect of continuous disclosure obligations.

[27] See, for example, J. Macintosh, "Standard Trust co case Signals Expansion of the 'Public Interest' Powers of Securities Regulators" (1993), 1 Corporate Financing 38, where Macintosh criticizes the OSC for overreaching in to the domain of corporate law by focusing its decision on the duty of care of directors.

[28] *In Re Cable Casting* [1978] OSCB 37, the OSC issued a cease trade order even though there was no violation of securities laws. This was affirmed in *Re Canadian Tire Corp.* (1987), 35 B.L.R. 56, (1987), 59 O.R. (2d) 79 (Div. Ct.).

[29] (1990), 13 OSCB 1600.

In light of the different enforcement mechanisms available to corporate and securities laws, a rational allocation of responsibility between corporate and securities laws may be premised on the basis of whether the particular subject matter is best enforced by private parties and the court system or by a specialized regulatory body through public enforcement.

In comparing the relative merits of private versus public enforcement, it should be noted that private enforcement works best when the private parties have the economic incentives and resources to pursue their legal claims. In an article analysing the policy choices for controlling corporate misconduct, I noted that rational apathy and lack of economic incentives may deter private parties from pursuing meritorious legal claims against corporations and their directors and managers:[30]

> Private enforcement may be insufficient to control corporate misconduct when those harmed are unable to detect the harm, when the harm to each individual is relatively small, or when the individuals do not have the financial means to bring a private suit.

In addition, damages that are awarded in a private suit represent different policy goals and objectives than fines that are imposed in the context of public enforcement. Damages awarded to a private party attempt to compensate for the harm suffered by the plaintiff(s) whereas a fine set by a public body represents other policy goals such as deterrence.[31]

The relative institutional competence of the courts compared to a regulatory body must also be considered. Generally speaking, courts are passive and get involved after harm has been done whereas securities regulators are able to intervene ex-poste and prevent future misconduct. Securities regulators are staffed with highly specialized securities lawyers who have often practiced in the area of corporate-securities transactions. In contrast, courts are staffed with generalist judges, usually from litigation backgrounds as opposed to transactional corporate backgrounds. The Commercial List in Toronto is, however, allowing for the development of an expert, specialized class of judges who are able to engage in efficient dispute resolution of complex corporate law matters.

D. Guiding Principles to Allocate Responsibility

Based on the preceding analysis, a set of non-exhaustive principles or factors should be considered in determining whether federal corporate law or provincial securities laws ought to be the exclusive regulator for any particular subject matter.

- Shareholder versus Investor: Does the subject matter and relevant regulation focus on shareholders evaluating management or investors buying or selling securities? Subject areas that focus on the former are more appropriately within

[30] Poonam Puri, "Sentencing the Criminal Corporation" 39:2-3 Osgoode Hall L.J. 611 at 613.
[31] *Ibid*.

the jurisdiction of corporate law while subject areas that focus on the latter are more appropriately within the jurisdiction of securities laws.

- Substance versus Disclosure: Does the regulation of the subject matter impose substantive rules or does it mandate disclosure of information? If the regulation imposes substantive requirements requiring parties to take particular actions or achieve certain results, it is more appropriately within the domain of corporate law. However, if the regulation mandates disclosure of information, it is within the historic scope of securities law.

- Distributing versus Non-Distributing Corporation: Is the relevant rule focused exclusively on distributing companies or both distributing and non-distributing companies? Securities laws regulate distributing companies while corporate law regulates both distributing and non-distributing companies. In respect of some matters, it may be appropriate for securities laws to regulate distributing corporations and corporate law to regulate non-distributing corporations, as in the context of insider trading, discussed below.

- Public versus Private Enforcement: Is the activity better enforced through private litigation and the courts or a public, specialized enforcement body? The *CBCA* is more appropriate if the activity is better enforced through private means, whereas provincial securities laws are more appropriate if the activity is better enforced through public means.

- Constitutional Limits: Do the application of the provincial securities laws focus on the internal governance of *CBCA* corporations, effectively sterilizing federally incorporated companies? If so, there may be constitutional restrictions on the ability of provincial securities laws to regulate in those areas in respect of *CBCA* corporations.

These principles will be applied to particular subject areas in Part 4 of the Report.

3. Regulatory Models of Corporate and Securities Laws

A. Existing Model

Part 3 analyzes the rationales, benefits and costs of the current overlapping and conflicting regulatory structure of corporate and securities laws in Canada today. The relevant stakeholders for this analysis are: corporations (domestic, emerging companies, and those inter-listed in the U.S.), investors (institutional, retail and foreign), and regulators (federal corporate, provincial corporate and provincial securities regulators).

The current system of overlapping regulatory structure provides some benefits. In particular, it allows for mutual reinforcement and consistency. A rule that is contained in both the *CBCA* and provincial securities laws sends a consistent message to the global corporate and investment community that these issues are important to Canadian regulators and that both the federal corporate law statute and the provincial securities laws reinforce each other. Given that Canada has a fragmented securities regulatory structure, it may also be symbolically important for the *CBCA*, being the federal incorporation statute, to contain standards that reflect global regulatory best practices. The fact that many of the largest Canadian corporations are incorporated under the *CBCA* adds weight to this argument.

However, the benefits of the current system are outweighed by its many costs. Significant costs are imposed on stakeholders by the current overlapping regulatory structure. These include: the costs of duplication incurred by regulators; costs of compliance imposed on corporations; time delays and opportunity costs incurred by corporations; the regulatory burden on emerging companies; and unequal opportunities, uncertainty and unfairness for investors. Each cost is discussed below in detail.

i. Costs of Duplication Incurred by Regulators

CBCA administrators, provincial corporate law administrators and provincial securities commissions each devote significant resources to the substantive areas that they concurrently regulate. If corporate and securities law regulators could rationally allocate subject matters, significant cost savings would result.

ii. Costs of Compliance Imposed on Corporations

From the perspective of any particular corporation, it only needs to comply with one set of corporate law rules, and so different rules or the lack of complete harmonization of corporate law codes across Canada does not impose additional transaction costs.

Distributing corporations, however, must comply with not only the corporate law code under which they are incorporated but the provisions of all securities laws in which they have investors, which significantly increases their costs of compliance. Currently, corporate and securities law rules often conflict or differ in areas where they concurrently regulate. If the relevant corporate and securities laws rules were identical in areas where concurrent jurisdiction is exercised, and this was clearly indicated to corporations and their profession advisors (i.e. by way of incorporation by reference), then the costs of compliance would be significantly reduced.

iii. Time Delays and Opportunity Costs Incurred by Corporations

Overlapping and/or conflicting provisions in the *CBCA* and provincial securities laws add to the time delays and increase the opportunity costs of public companies.

iv. Burden on Emerging Companies

In the context of analyzing the costs of compliance for corporate issuers, special attention should be paid to the regulatory burden imposed on emerging companies. Small and emerging companies comprise a large portion of the Canadian economy and face a disproportionately large regulatory burden compared to larger companies, which are more easily able to absorb the burden of high costs of compliance.

v. Unequal Opportunities, Uncertainty and Unfairness for Investors

Conflicting rules in the *CBCA* and provincial securities laws create unfairness and a climate of uncertainty for investors who do not precisely know what their legal rights and duties are. Differing rules in the *CBCA* and provincial corporate law statutes also create different rights and opportunities for investors, which can result in an unequal playing field.

Until the repeal of the *CBCA's* takeover bid provisions in 2001, the conflicting provisions in the *CBCA* and provincial securities laws added unnecessary costs and created uncertainty for investors, as illustrated by *Nordair Inc. v. Quebecair-Air Quebec Inc.,*[32] where there was a conflict between the *Securities Act* (Quebec) and the *CBCA* on the timing of the obligation to take-up and pay on withdrawal rights. In this case, Quebecair made an unsolicited bid for all the commons shares of Nordair, subject to a condition that the bid would not be taken up and paid for by Quebecair until the Air Transport Committee established under the National Transportation Act approved the change in control. A deadline for receipt of approval was set at January 23, 1986, and while this deadline complied with the *Securities Act* (Quebec) it contravened sections 188(a) and 190(b) of the *CBCA*. The conflicting rules resulted in Nordair and its controlling shareholder applying to have the unsolicited bid declared void, while Quebecair counter-applied pursuant to section 197 to obtain retroactive exemptions from ss.188(a) and 190(b) of the *CBCA*. The court dismissed the Nordair application but granted retroactive exemptions to Quebecair under s.197 of the CBCA. The time delay and opportunity costs to the target and bidder were significant, not to mention the direct monetary costs ultimately incurred by the target and bidder's shareholders. (10 lawyers were on record in the hearing of the case.) Because of the uncertainty surrounding the litigation, the target's shareholders, the bidder and competing bidders were "paralysed" from acting or

[32] 1985 CarswellQue 27; 32 B.L.R. 253, [1986] R.J.Q. 756 Quebec Sup. Ct.

pursuing other options. As a general matter, the granting of retroactive exemptions also adds to a climate of uncertainty. From a policy perspective, conflicting rules in corporate and securities laws in the context of takeovers create a disincentive for initial and competing bidders to pursue unsolicited take-overs, resulting in sub-optimal levels of take-over bid activity, which is considered to be an important corporate governance mechanism to ensure accountability of management.

Similarly, an unequal playing field is created for investors across the country by the differing requirements in corporate and securities laws in respect of proxy solicitations and exemptions. An investor who wishes to communicate with other shareholders may be in compliance with the *CBCA* may be in violation of provincial securities laws. In addition, an investor may have broader and more substantial rights of communication with other shareholders if the company in which he or she is invested is incorporated under the *CBCA* as compared to a provincial corporate law statute.

B. Alternative Models

As noted above, the benefits of the current system are outweighed by the costs it imposes on stakeholders. There are a number of ways in which the current regulatory structure could be redesigned. Alternatives to the current regulatory system would preserve and could, in fact, enhance the mandate and policy goals of both corporate and securities laws while significantly reducing the costs to stakeholders.

These alternatives include: (i) a joint single national regulator of corporate and securities laws; (ii) the current system of corporate law and a single national regulator; (iii) a single national corporate law regulator and the current system of securities laws; and (iv) better co-operation, co-ordination and harmonization within the current regulatory model of corporate and securities laws. While each of these alternatives would better serve the public interest than the existing model, the report focuses on the last alternative presented, given the challenges inherent in implementing more fundamental reform.

i. A single national regulator of corporate and securities laws

If Canada's regulatory system of corporate and securities laws was housed under a single regulatory body, there would be significant cost savings to stakeholders. The costs of duplication that regulators currently incur could be significantly reduced as the expertise that is housed throughout corporate law regulators and provincial securities regulators across the country could be consolidated. The costs of compliance, time delays and opportunity costs and the burden on emerging companies would also be reduced because issues about jurisdiction and authority could be resolved internally and one clear set of consistent rules would emerge from this joint body. As a result, investors would also be more certain of their legal rights. The concept of a national single regulator of securities laws has been hotly debate in Canada and one could expect additional challenges facing the creation of a joint national corporate-securities law regulator.

ii. A single national regulator of securities laws and the current system of corporate law

A regulatory model where securities laws are regulated by a single national regulator, as recently recommended by the WPC Report, combined with the current system of corporate law could reduce the costs to stakeholders. Costs of duplication incurred by regulators could be reduced, as it would allow for easier co-ordination and harmonization of the *CBCA* with securities laws. To the extent that this model will allow for easier allocation of responsibility between corporate and securities laws or easier harmonization, the costs to corporations in respect of compliance and investors could also be reduced significantly.

iii. A single national corporate law regulator and current securities system

Another regulatory alternative would be to retain the current securities law system and create a single corporate law regulator. This alternative would not reduce the costs as significantly as the earlier two alternatives because harmonization or uniformity among corporate law regulators, while desirable, does not currently impose significant costs on corporations or investors. It may make it marginally easier for one corporate law body to co-ordinate and harmonize corporate and securities laws with the Canadian Securities Administrators.[33]

iv. Improvements to the existing model

The current model of concurrent jurisdiction of corporate and securities laws could be improved at the margin, resulting in some cost savings to stakeholders. Greater co-operation, co-ordination and harmonization between corporate and securities laws regulators would be beneficial. It could be could be achieved through various mechanisms including: (a) A joint committee of corporate and securities law administrators; (b) Incorporation by reference to the other regulatory framework; (c) Exemptions or recognition of the other regulatory framework; and (d) Forms of legal instruments used to allow for ease of amendments and continued harmonization.

(a) Joint Committee of Corporate and Securities Law Administrators.

While the CSA co-ordinates and harmonizes policies and practices of provincial securities regulators, there does not appear to be a parallel co-ordinating body for corporate and securities law regulators, or even federal and provincial corporate law regulators.

A joint committee of corporate and securities law regulators should be established which would have a mandate of achieving some level of rational and reasonable allocation of responsibility between corporate and securities laws in Canada. The committee would

[33] "CSA".

meet regularly to discuss which regulatory body should have exclusive authority to regulate a relevant subject matter, and the guiding principles set out in Part 2 of this report could be used as a starting point for the discussion and debate.

Where the committee cannot achieve consensus in respect of exclusive jurisdiction, the committee should consider adopting mechanisms, including those discussed below, so that concurrent regulatory jurisdiction minimizes the costs to imposed on stakeholders.

The committee could potentially counter-act the tendency in the recent past where provincial securities laws have expanded and encroached into areas that have traditionally been the focus of corporate law. While provincial securities commissions can act more quickly given their rule-making power and other features, a joint committee such as the one proposed would require a reasoned and balanced approach to expanding in areas which would better be regulated through corporate law. The existence of the committee would also reduce the likelihood of regulatory first-mover advantage where the regulator who first enters the field can significantly constrain the regulatory options of the second regulator.

(b) Incorporation by Reference

Another method of achieving harmonization is for one regulatory framework to incorporate the rules of the other regulatory framework in respect of the relevant subject matter.

Incorporation by reference would reduce the costs of compliance to corporations and investors because they would be able to clearly tell that there is one clear, consistent rule in both corporate and securities laws. It is unclear whether it would reduce the costs of duplication incurred by multiple regulators, because presumably the regulator that is incorporating by reference would engage in a full analysis and review of the appropriate form and content of the required regulation before deciding that incorporation by reference to the other regulator's rules is the preferred course of action.

In a recently released discussion paper, Industry Canada has requested comments on incorporating by reference a number of the CSA's rules on corporate governance into the *CBCA* and *CBCA* regulations.[34] Incorporation by reference forces one to ask the question of why a rule is necessary in both the *CBCA* and provincial securities laws in the first place. The answer depends on the weight given to the benefits of mutual reinforcement and consistency, and the symbolic aspect of the *CBCA* concurrently regulating in the area, even if by incorporation by reference.

The form that incorporation by reference takes may affect level of regulatory autonomy of the relevant regulator and the costs imposed on stakeholders. There are several options including: (a) copying the contents of the rule into the *CBCA* or the *CBCA* regulations; and (b) referring to the provincial securities law rule in the *CBCA* or *CBCA*

[34] Industry Canada, Towards An Improved Standard of Corporate Governance for Federally Incorporated Companies: Proposals for Amendments to The *Canada Business Corporations Act* (May, 2004).

regulations. If the actual rule is copied into the *CBCA* or regulations, then an amendment to the *CBCA* will also be required if the provincial securities regulators change their rule. There will likely be a lag in the amendments and this may impose unnecessary costs on stakeholders. If the securities law rule is simply referred to in the *CBCA* or regulations, then a change in the securities law rule would not require a change to the corporate code. When a securities law rule is changed, corporate law regulators would, of course, have the authority to re-evaluate whether they should continue to incorporate by reference, but the process would be smoother and would impose fewer additional costs on corporations and investors.

(c) Recognition or Exemptions

Another mechanism for harmonization between corporate and securities laws is to allow for recognition of the rules of the other regulator, such that a corporation that complies with the laws of one regulatory framework would be deemed to have complied with the other regulatory framework. The recognition could be one way or mutual, and it could be discretionary or generally available.

The MJDS agreement between Canadian and U.S. securities law regulators operates on the basis of mutual recognition.[35] Recent corporate governance reform by Canadian securities regulators exempts public companies that are inter-listed in the U.S. from the new Canadian requirements, on the basis that they are currently complying with the *Sarbanes-Oxley Act of 2002* and related provisions.[36] In addition, provincial securities laws contain exemptions for issuers if they are in compliance with their statute of incorporation.[37]

General exemptions or general recognition as opposed to discretionary exemptions or recognition impose fewer costs on stakeholder, but from a policy perspective consideration should also be given to the regulators' level of confidence that private parties will be able to police themselves.

(d) Forms of Legal Instruments Used

Related to the discussion in the preceding section, corporate and securities law regulators should make an effort to ensure that the forms of legal instruments used to bring a rule into effect allow for ease of continued harmonization in the future. For example, a corporate or securities law act, which is the most difficult to change, should contain rules that represent broad principles, while particular aspects of a rule, such as the number of days, number of directors, and any other detailed information should be contained in a regulation, rule or policy statement that can be more easily changed. That way, regulators can respond quickly to changed market conditions and more easily "keep up" with the other regulator if it changes its rules.

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[35] See Puri & Sen, Cost-Benefit Analysis of the MJDS, *supra* note 10.
[36] See generally, Leslie McCallum & Poonam Puri, Canadian Companies Guide to the Sarbanes-Oxley Act (Toronto: Lexis-Nexis/Butterworths, 2004).
[37] See for example, Section 81 of the OSA, discussed *infra*, Part 4: Proxy Solicitations and Exemptions.

Industry Canada's recently released discussion paper proposes to put many of the details of its corporate governance initiatives into the *CBCA* regulations.[38] This is an important feature of the proposed reforms, the significance of which should not be overlooked. Putting details in the regulations will allow *CBCA* administrators to respond more easily and harmonize more quickly if securities regulators change their rules in the area in the future.

[38] Industry Canada Discussion Paper, *supra* note 34.

4. Application to Areas of Concurrent Jurisdiction

Part 4 critically analyses the extent of overlap and/or conflict between provisions in the *CBCA* with provincial securities laws. The substantive topics that are discussed are: corporate governance, insider trading, takeover bids, proxy solicitation rules and exemptions, communication with beneficial shareholders, and proportionate liability.

Part 4 then applies the principles developed in Part 2 to explore whether the *CBCA* or provincial securities laws should be the exclusive or primary regulatory authority for each of these areas. Where exclusive regulatory oversight is not possible or where concurrent regulatory oversight is desirable, Part 4 then explores the issue of how best to minimize the costs to stakeholders in complying with multiple regulatory requirements, based on the discussion in Part 3.

A. Insider Trading

i. Current Situation

Both the *CBCA* and provincial securities laws currently regulate insider trading. Provincial securities laws regulate insider trading of securities of reporting issuers, while the *CBCA* regulates insider trading for distributing and non-distributing corporations. In addition, federal Bill C-13: *An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence-Gathering)* also proposes to create a new *Criminal Code* offence of improper insider trading.

Until the 2001 amendments to the *CBCA*, the *CBCA* required insiders to file periodic trading reports with the Director[39] who had an obligation to publish such reports.[40] These provisions were repealed on the basis that the *CBCA* requirements were duplicative with provincial securities laws, which contained similar requirements.

The *CBCA* and provincial securities laws both continue to prohibit trading of securities by insiders with knowledge of material non-public information. However, each regulatory framework words the relevant provisions slightly differently. For example, the *CBCA* regulates "insiders" as defined in the *CBCA* while the *OSA* focuses on persons or companies in a "special relationship" with a reporting issuer as defined in the Act.[41]

In addition, the enforcement provisions of the *CBCA* and provincial securities laws differ. Both regulatory frameworks contemplate public enforcement by way of fines and/or imprisonment and private enforcement by way of statutory civil liability. A person who violates the insider trading provisions of the *CBCA* is currently liable to imprisonment of up to 6 months and/or a fine which is not to exceed the greater of $1 million or three times the profit made (this was increased from $5000 in Bill S-11). However, under the

[39] Section 127 of the *CBCA*, since repealed.
[40] Section 129 of the *CBCA*, since repealed.
[41] Section 76(5) of the *OSA*.

OSA, a person who engages in insider trading is potentially subject to a much longer imprisonment term and significantly greater fine.

ii. Analysis

The first step in the analysis is to analyze whether either corporate or securities law should exclusively regulate insider trading.

Applying the shareholder versus investor test, insider trading appears to be primarily focused on maintaining a fair public market for securities such that insiders trade on the basis of the same information as other buyers and sellers in the market. Insider trading is more concerned with investors and the market as a whole rather than any particular shareholder in any particular corporation. This analysis suggests that insider trading is more appropriately within the domain of securities law as opposed to corporate law. However, the federal criminal law power can and should be used to address the most egregious cases of capital markets fraud, including insider trading.[42]

Applying the substance versus disclosure test, insider trading regulation takes the form of periodic reporting requirements and a prohibition on trading in certain circumstances. The periodic reporting requirement is disclosure based; it is appropriately within the jurisdiction of provincial securities laws and the *CBCA* appropriately withdrew from the requirement in 2001. The prohibition on trading, on its surface, is a substantive requirement; however, a better interpretation of it is to view it as a requirement that all material information must be disclosed to the market before insiders can trade. On this basis, insider trading prohibitions fit within the traditional form of securities law as opposed to corporate law.

Applying the status and essential powers test, insider trading prohibitions contained in provincial securities laws do not sterilize the operation of federally incorporated companies; nor do not they affect the central constitution or governance of the company. One cannot reasonably make the case that provincial insider trading laws should not apply to *CBCA* incorporated companies on the basis of constitutional law.

Are insider trading laws best enforced by public means or private means? Optimal enforcement of insider trading through private means is highly unlikely for a number of reasons. Most investors that are on the opposite end of a transaction involving prohibited insider trading are unaware that they have been harmed. As well, the process of matching buyers with sellers in a public secondary market is more or less random and so the justification for damages to any particular buyer or seller is diminished. These factors suggest that statutory civil liability is likely not very effective in the context of insider trading and that public enforcement is necessary to control misconduct in this area.

In respect of public enforcement, who is the most appropriate regulator? Public enforcement by way of the *CBCA* Director is least appropriate and least likely to be

[42] For a discussion on when corporate misconduct should be labeled criminal as opposed to regulatory or quasi-criminal offences, see Puri, Sentencing the Criminal Corporation, *supra* note 30.

effective, given the self-enforcing nature of corporate law and the generally passive role of the Director. Both the provincial securities commissions and the federal government, through its criminal law jurisdiction, can effectively regulate this area.

Securities regulators have placed increased emphasis on insider trading recently.[43] The federal government is also committed to expanding the resources devoted to investigating and prosecuting serious cases of capital markets fraud including insider trading. It has recently established Integrated Market Enforcement Teams (IMETs) across Canada comprised of RCMP investigators, forensic accountants and lawyers in key financial centres across the country. In addition, Bill C-13 creates, *inter alia*, a new *Criminal Code* offence of improper insider trading, as noted above. Under Bill C-13, the Attorney General of Canada would exercise concurrent jurisdiction, with the provinces to prosecute certain fraud-related offences in the *Criminal Code*.

This leads us to the second stage of analysis which focuses on the mechanisms that are appropriate to minimize costs on stakeholders if concurrent jurisdiction is appropriate or maintained. As discussed in Part 3 of this report, the relevant regulators need to co-operate, co-ordinate and harmonize their rules, policies and practices on insider trading.

In respect of penalties, the maximum mandatory sentences in the *CBCA* and provincial securities laws should be harmonized. While the reality is that judges and regulators do not impose sentence anywhere close to the maximum mandatory sentences set out in legislation, the significant disparity in mandatory maximum sentences between the *CBCA* and the provincial securities laws creates a situation of unfairness and uncertainty for investors and insiders which should be addressed.[44] In this regard, Industry Canada's recently released discussion paper on amendments to the *CBCA* proposes to increase the penalty for insider trading offence to mirror the penalties under the Ontario, Quebec and Alberta securities laws.[45]

In respect of the offence of insider trading that is contained in both the *CBCA* and provincial securities laws, further effort should be made to harmonize the two sets of provisions. For example, the *CBCA* refers to "confidential" information while the *OSA* refers to material non-public information. However, a better approach may be to allow the *CBCA* to exclusively regulate insider trading in respect of non-distributing corporations, while the provincial securities legislation could continue to focus on a statutory civil liability scheme for public companies.

In respect of concurrent jurisdiction of federal criminal law with provincial securities laws over insider trading, it is not necessary to harmonize the offence provisions because a criminal offence can and should have higher thresholds than regulatory or

[43] The Illegal Insider Trading Task Force released an independent report in November 2003, which was tabled to the CSA, with recommendations on how best to prevent, detect and deter illegal insider trading in Canada. Available at http://www.osc.gov.on.ca/en/HotTopics/currentinfo/intr_20031112_taskforce-report.htm.

[44] See Puri, Sentencing the Criminal Corporation, *supra* note 30.

[45] *Supra* note 34, at page 18.

administrative offences (including an intent requirement). However, the relevant regulators do need to work together to have a co-ordinated approach to determine which cases get sent where. In this regard, the Department of Justice has stated:[46]

> Federal involvement would be limited to a narrow range of cases that threaten the national interest in the integrity of capital markets… In order to ensure proper coordination, the Government of Canada will work with the provinces to establish prosecution protocols that would ensure a coordinated and effective implementation of concurrent jurisdiction.

In the context of concurrent federal and provincial jurisdiction, the most egregious insider trading cases could be prosecuted under the *Criminal Code* with greater stigma and harsher penalties, while less serious cases could be dealt with under the regulatory or administrative process of provincial securities commissions.

B. Corporate Governance

Until recently, stock exchanges played a central role in corporate governance. For example, following the Dey Report entitled "Where were the Directors?" the TSX adopted a list of 14 corporate governance guidelines in 1995 and required listed companies to disclose how their practices compared against the industry best practises.[47]

As a response to recent corporate governance and financial disclosure improprieties, provincial securities regulators have proposed to take over the regulation of corporate governance matters of public companies. Provincial securities regulators (with British Columbia and Quebec abstaining) have released a proposed policy statement containing 18 corporate governance guidelines (that in large part mirror the TSX's guidelines) and a proposed rule that would mandate disclosure of a company's practices compared to the recommendations.[48]

i. Composition of the Board, Nominating Committee, and Compensation Committee

The *CBCA* currently contains certain minimum standards in respect of corporate governance. For example, the *CBCA* currently requires that directors be over the age of

[46] Department of Justice, Backgrounder, Federal Strategy to Deter Serious Capital Markets Fraud, available at http://www.canada.justice.gc.ca/en/news/nr/2003/doc_30928.html.

[47] "Where Were The Directors?" Guidelines for Improved Corporate Governance in Canada, Report of the Toronto Stock Exchange Committee on Corporate Governance in Canada, December 1994.

[48] See proposed Multilateral Instrument 58-101, Disclosure of Corporate Governance Practices and proposed Multilateral Policy 58-201, Effective Corporate Governance. However, the securities regulators of Alberta, B.C. and Quebec have more recently proposed another rule that would mandate companies to disclose their corporate governance practices but without providing a recommended best practice. See proposed Multilateral Instrument 51-104, Disclosure of Corporate Governance Practices

18, of sound mind, individuals, and not have the status of bankrupt.[49] In respect of the size and composition of the board, the *CBCA* requires that distributing corporations have a minimum of three directors, two of whom must not be employees or officers of the corporation or its affiliates.[50]

Industry Canada has proposed to amend the *CBCA* to *require* the board of distributing corporations to: (i) be comprised of a majority of independent directors; and (ii) have a chair of the board who is separate from the CEO of the corporation or alternatively to have a lead independent director.[51] The main proposed provincial securities law rule *recommends* that companies do so but *requires* them to disclose their practice.

Industry Canada has also proposed to amend the *CBCA* to require the striking of compensation and nominating committees which must be comprised of independent directors. The proposed provincial securities law rule *recommends* that they do so and *requires* that they disclose their practice.

ii. Audit Committee Composition and Responsibilities

In respect of the size and composition of the audit committee, the *CBCA* currently requires that audit committee consist of 3 directors, a majority of whom are not officers or employees of the corporation or its affiliates.[52] The Industry Canada discussion paper on corporate governance has recommended that the entire audit committee be comprised of independent directors. The CSA's Audit Committee Rule contains the same requirement subject to a number of exceptions.

Currently, under *CBCA*, the theory is that shareholders appoint auditors and auditors report to shareholders.[53] The *CBCA* currently precludes the audit committee from making a recommendation directly to shareholders in respect of the appointment of the auditor, but Industry Canada proposes to amend the *CBCA* so that the audit committee recommends the auditor to the board who then submits the auditor for approval to the shareholders.[54] It is also proposed that the *CBCA* would be amended so that it would required that the audit committee have a written mandate, that it would be allowed to engage independent counsel and fund advisors. In addition, it is proposed that the *CBCA* regulations would require disclosure in the management proxy circular of other pertinent information. The CSA Audit Committee Rule also addresses this substantive area.

iii. Auditor Oversight and Independence

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[49] Section 105(1).
[50] Section 102(2).
[51] *Supra* note 34.
[52] Section 171(1).
[53] For a discussion of the theory and reality of auditors as gatekeepers, see P.Puri, Converging Numbers: Harmonization of Accounting Standards in the Context of the Role of the Auditor in Corporate Governance, Globalization and International Perspectives: 2001 Queens Business Law Symposium (Carswell).
[54] *Supra* note 34.

The recently created Canadian Public Accountability Board (CPAB) is a joint initiative of the CSA, the Office of Superintendent of Financial Institutions and the Canadian Institute of Chartered Accountants. It is responsible for ensuring that firms that audit public companies meet high standards of independence, accountability and transparency. The Industry Canada discussion paper proposes to amend the definition of auditor in the *CBCA* to require that auditors of distributing corporations be a participating firm in CPAB.[55] It also proposes to amend the *CBCA* regulations to require disclosure in the management proxy circular of any non-audit services engaged in by the auditor and amounts paid for auditing and non-auditing services. These proposed amendments to the *CBCA* are similar to the CSA's National Instrument 52-108 – Auditor Oversight.

iv. Certification of Financial Statements

The CSA has recently adopted a rule requiring CEO/CFO certification of financial statements. The Industry Canada paper proposes to amend the *CBCA* to require CEO/CFO certification of financial statements.[56] It is proposed that the requirement to certify would be in the statute, but that the actual form and content of the certification would be contained in the regulations, which could be adopted through various means.

v. Analysis

The first step in the analysis is to analyze whether either corporate or securities law should exclusively regulate corporate governance.

Applying the shareholder versus investor test, corporate governance is focused on the role and responsibilities of the board of directors and management and their relationship to shareholders. It is primarily focused on shareholders as opposed to investors. At some point, one can make the case that bad corporate governance practices across many corporations will have a detrimental impact on investor confidence in the market, but at its core, corporate governance is a corporate law issue in that is focused on existing shareholders of corporations who are attempting to meaningfully ensure accountability of management and evaluate their performance.

Applying the substance versus disclosure test, it is important to note the multiple ways in which securities regulators have expanded into the realm of corporate governance. The proposed corporate governance guidelines that provincial securities regulators are seeking comment on would take the form of mandatory disclosure, which is consistent with the traditional form of securities law, (although one could make the argument that mandating disclosure of how a company compares against recommended best practices effectively imposes substantive requirements). The CSA's audit committee rule, however, is a mandatory rule that reaches beyond the traditional form of provincial securities laws. The proposed amendments to the *CBCA* and regulations are for the most part substantive requirements and are thus consistent with the traditional form of corporate law.

[55] *Supra* note 34.
[56] *Ibid*.

Applying a constitutional law analysis to the regulation of corporate governance, the corporate governance provisions in provincial securities laws appear to go to the heart of the central constitution or governance of federally incorporated companies. On the basis of *Multiple Access*, one can make a reasonable argument that provincial corporate governance rules should not apply to *CBCA* incorporated companies. The argument is strongest for those provincial rules on corporate governance that mandate substantive requirements (such as composition and responsibilities of audit committees) as opposed to disclosure. While the constitutional jurisdiction of provincial securities laws to regulate in the area of corporate governance is questionable, it is unlikely that market participants will challenge the authority of securities commission to regulate in this area. Market participants have been loath in the past to challenge the jurisdiction or authority of provincial securities commissions with whom they must interact with a regular basis.

This leads us to the second stage of analysis that focuses on the mechanisms that are appropriate to minimize costs on stakeholders if concurrent jurisdiction in respect of corporate governance is appropriate or maintained. As a starting point, corporate and securities law regulators should co-operate and co-ordinate and harmonize their rules, policies and practices for the benefit of all stakeholders.

In this regard, it is particularly difficult for one regulator to respond after the other regulator has already acted and significantly narrowed the realistic options available to first regulator. In this regard, *CBCA* administrators are put in a difficult position because provincial securities regulators have already acted to expand their scope in the area of corporate governance, and so the options for the *CBCA* administrators are somewhat constrained.

In this context, it may be a reasonable compromise to allow the provincial securities regulators to focus on the corporate governance of distributing corporations while the CBCA and provincial corporate law codes focus on the corporate governance requirements for non-distributing corporations. Industry Canada's proposed corporate governance changes for distributing corporations that mirror, for the most part, the reforms undertaken by securities regulators reflect a version of this compromise.

The *CBCA*'s proposed mandatory requirements for corporate governance (a majority of independent directors on the board, an independent nominating committee and an independent compensation committee) mirror the provincial securities regulators proposed corporate governance recommended best practices, and thus do not impose conflicting requirements on *CBCA* companies.

Incorporation by reference in the *CBCA* and/or regulations to CSA rules has been raised in the Industry Canada paper in respect of areas including the composition and mandate of the audit committee as well as CEO/CFO certification of financial statements.

Incorporation by reference has been discussed in detail in Part 3 of this report. Incorporation by reference is desirable in this context because it would significantly reduce the costs imposed on stakeholders. Incorporation by reference to the CSA rule would be preferable to copying the CSA rule or form into the *CBCA* regulations because an amendment to the *CBCA* regulations would not be required if the CSA rule were amended in the future.

C. Takeover Bids & Defensive Tactics

i. Current Situation

Until the passage of Bill S-11 which repealed the *CBCA*'s takeover bid provisions, both the *CBCA* and provincial securities laws contained conflicting rules in respect of the regulation of takeovers. Prior to their repeal, the takeover bid provisions in the *CBCA* were triggered when an offeror made an offer, other than an exempt offer that would increase it's shareholding to more than 10% of the target's shares.[57] Once the definition of takeover was triggered, the offeror was required to distribute an offeror's circular and the directors were required to distribute a directors' circular. The *CBCA* provisions applied to all publicly traded companies or companies with more than 15 shareholders. In contrast, provincial securities laws contain provisions applicable to publicly traded companies that are triggered at a 20% threshold.[58]

However, both the *CBCA* and provincial securities laws continue to regulate defensive tactics that can be engaged in by the target company's management. In this regard, the 1994 Task Force on Securities Regulation noted that regulation by securities commissions of defensive tactics in response to take-over bids is a controversial area in respect of regulatory jurisdiction.[59]

The *CBCA* regulates this area by way of the fiduciary duty of directors to act in the best interests of the company. Caselaw in this area has indicated that directors can engage in defensive tactics that enhance shareholder value and that directors can also have reasonable regard for the interests of non-shareholders.[60]

Dissident shareholders have on occasion approached the securities commissions to intervene on excessive break fees, but the Ontario Securities Commission has suggested that the courts might be the more appropriate forum in respect of allegations on break fees. The Final Report of the Five Year Review Committee also recommended that the OSC should not adopt a new regulatory standard in respect of break fees but only exercise its public interest jurisdiction on a case by case factual basis.[61]

The OSC, however, has been more interventionist in respect of shareholder rights plans. The OSC recently held that a shareholder rights plans adopted as a response to a

[57] See sections 195-205 of the *CBCA*, since repealed by S.C. 2001, C-14, s.97.
[58] See, for example, Part XX of the *OSA.*
[59] *Supra* note 2 at 56 of 95.
[60] See, for example, *Teck v. Millar* [1973] 2 W.W.R. 385, 33 D.L.R. (3d) 288; See also, *Maple Leaf Foods v. Schneider Corp. et al* (1998), O.R. (3d) 177 (C.A.).
[61] See The Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario). Available at http://www.osc.gov.on.ca/en/Summary/srac_20030529_5yr-final-report.htm.

threatened or existing hostile bid may not be valid.[62] However, the OSC's ruling may be in contravention of the general duty imposed on directors to act in the best interests of the corporation, which may include instituting a poison pill to contain the hostile bid and seek alternate bids.

ii. Analysis

The first step in the analysis is to determine whether corporate or securities law should exclusively regulate takeover bids and defensive tactics.

Applying the shareholder versus investor test, takeover regulation is focused on providing equal time, information and treatment to all shareholders so that they can make fully informed decisions about whether to tender their shares. While the regulation is focused on existing shareholders, they are deciding whether to sell their shares, which would suggest that securities law is the more appropriate regulator and that the *CBCA* appropriately withdrew from regulating the area in 2001.

Applying the substance versus disclosure test, takeover bid regulation that focuses on adequate time and information to and equal treatment of all shareholders is appropriately within the domain of securities law. Takeover bid regulation via securities law is focused on disclosure and processes; it does not and should not be substantive by regulating, for example, the price at which a takeover must take place. However, the form that securities law rules, policies and practices on defensive tactics take result in an encroachment on corporate law. In some instances, provincial securities law rules are effectively substantive requirements or prohibitions (i.e. tactical shareholder rights plans are invalid), which may conflict with corporate law duties imposed on directors to act in the best interests of the corporation.

Applying the status and essential powers test, the takeover bid provisions in respect of equal information, time and treatment of investors do not sterilize the operation of federally incorporated companies; nor do they affect the central constitution or governance of the company. One cannot reasonably make the case that provincial takeover bid regulation should not apply to *CBCA* incorporated companies on the basis of constitutional law. However, provincial securities laws in respect of defensive tactics are more troublesome because they could fetter the discretion of directors to act in the best interests of the corporation. As a result, there may be a reasonable argument that provincial securities laws in respect of defensive tactics should not be applicable to *CBCA* companies.

Is takeover bid regulation best enforced by public means or private means? Private parties have certainly been strategic in deciding whether to pursue their grievances in the courts or have the securities commissions intervene. If the equal time, information and treatment provisions have not been adhered to while a bid is open, the provincial securities commissions are in the best position to intervene and enforce. However, the

[62] *Re Cara Operations Limited and The Second Cup Limited* (2000), 25 O.S.C.B. 7997 #48/02.

issue of defensive tactics is more appropriately regulated through corporate law. Securities regulators should be very cautious about intervening in any particular bid where certain shareholders feel that the directors are acting inappropriately. The matter is best left to the courts through an interpretation of the directors' fiduciary duties.

This leads us to the second stage of analysis which focuses on the mechanisms that are appropriate to minimize costs on stakeholders if concurrent jurisdiction is appropriate or maintained. Given that the *CBCA* has already withdrawn from regulating the equal time, information and treatment aspect of takeover bid regulation, the focus of co-operation and co-ordination should be with respect to defensive tactics. Because the *CBCA* sets out a broad standard of directors fiduciary duties, the onus is on the provincial securities commissions to ensure that they do not overstep their boundaries to create rules or regulatory standards that fetter the discretion of the directors to act in the best interests of the corporation.

D. Proxy Solicitations and Exemptions

i. Current Situation

The *CBCA* contains a number of specific exemptions to the definition of proxy solicitation that are not contained in provincial securities laws. For example, the *CBCA* was amended by Bill S-11 to exempt certain communications between shareholders from the definition of proxy solicitation, including targeted solicitations to 15 or fewer shareholders[63] and solicitations by public broadcast.[64]

These amendments have had a laudable effect on institutional investor activism. For example, the Canadian Coalition for Good Governance, a joint effort of the largest institutional investors in Canada to promote shareholder communications and activism, was created shortly after the *CBCA* amendments.[65] In addition, the Ontario Teachers' Pension Plan recently began publicly disclosing on its website how it intends to vote its shares at upcoming annual general meetings.[66]

Provincial securities laws, however, have not kept pace in respect of shareholder communications. Provincial securities laws still contain have a broad definition of proxy solicitation and require mandatory solicitation of proxies[67] except when an investor is soliciting proxies from 15 or fewer shareholders.[68] Securities regulators are not currently enforcing these stricter definitions.

This lack of harmony in corporate and securities laws in respect of proxy solicitation and exemptions forces uncertainty, unfairness and unpredictability onto investors. Does the existence of the Canadian Coalition for Good Governance violate provincial securities

[63] Section 146(4).
[64] Section 150(1.2).
[65] See http://www.ccgg.ca
[66] See http://www.otpp.com/web/proxyvot.nsf/proxyvotes?openform.
[67] See section 86(1) *OSA*.
[68] See section 86(2) *OSA*.

laws? Possibly. Does the Ontario Teachers' Pension Plan policy of disclosing how it intends to vote violate provincial securities laws? Possibly. Should investors comply with the stricter securities laws, even though they are not currently being enforced? Should they risk enforcement activity if the provincial securities regulators decide to engage in enforcement in this area?

ii. Analysis

The first step in the analysis is to analyze whether either corporate or securities law should exclusively regulate proxy solicitations and exemptions.

Applying the shareholder versus investor test, proxy solicitations and exemptions relate to shareholder communications with a goal of ensuring accountability of management. The ability of shareholders to communicate with one another is fundamental to the governance of the corporation, which suggests that regulation of proxy solicitations and shareholder communications is more appropriately within the domain of the corporate law as opposed to securities law.

Applying the substance versus disclosure test, proxy solicitation rules are both substantive and disclosure based. The exemptions are substantive and the requirements in respect of what is required in a proxy circular are disclosure based. On this basis, it would appear that the substantive requirements are more appropriately regulated through corporate law and the requirements for the disclosure through securities law.

Applying the test in *Multiple Access*, one could make a reasonable argument that the proxy solicitation requirements and exemptions in provincial securities laws effectively sterilize the operation of federally incorporated companies. Shareholder communications are critical to governance of a company and preventing reasonable communications negates a fundamental right of shareholders to ensure accountability of management in a meaningful way. On the basis of constitutional law, one can make a reasonable argument that provincial proxy solicitation rules should not apply to *CBCA* incorporated companies.

This leads us to the second stage of analysis which focuses on the mechanisms that are appropriate to minimize costs on stakeholders if concurrent jurisdiction is appropriate or maintained. The regulators need to co-operate and co-ordinate and harmonize their rules, policies and practices on proxy solicitations and exemptions.

Currently, Section 88(1) of the *OSA* recognizes that if a reporting issuer is complying with the requirements of the laws of the jurisdiction in which it is incorporated, and the requirements are "substantially similar," then the requirements of Part XIX of the *OSA* do not apply.[69] This absolute exemption is available to issuers but not investors.

Section 88(2) of the *OSA* allows for the OSC to make a discretionary exemption upon application of any interested person or company (which would include investors) if the

[69] See Section 88(1) of the *OSA*.

OSA provisions conflict with the provisions of the issuer's incorporating statute or "if it is otherwise satisfied in the circumstances that there is adequate justification for doing so." A discretionary exemption involves a case-by-case analysis and imposes significant costs on investors and regulators. It is not practical, reasonable or necessary for investors to obtain discretionary exemptions every time that they wish to use a *CBCA* exemption to the proxy solicitation rules.

To achieve greater harmonization in this area and reduce costs to stakeholders, provincial securities commissions should narrow the definition of proxy solicitation and broaden the exemptions to the requirement to distribute proxies so that provincial securities law rules conform to the *CBCA*. Alternative options are to incorporate the *CBCA* rules by reference, or generally recognize the *CBCA* rules in this area, for example, by amending section 88(2) of the *OSA* so that it is automatic as opposed to discretionary.

E. Communication with Beneficial Shareholders

i. Current Situation

The *CBCA* allows a corporation to treat the registered owner of a security as the person entitled to vote, receive dividends and exercise all other rights and powers of ownership.[70] However, it prohibits a registered owner from voting shares which it holds as a nominee without seeking voting instructions from the beneficial owner.[71] The CBCA does not currently require or facilitate communication between corporations and beneficial shareholders. In contrast, National Instrument 54-101 creates a structure to allow reporting issuers to communicate directly with beneficial owners who have not objected to the release of their names, addresses and securities holdings.

In analyzing the case of *Fama Holdings v. Powertech Industries Inc*.,[72] one commentator notes the confusion that can arise from the subtle but important differences between registered and beneficial ownership. He writes:[73]

> The distinction between registered and beneficial ownership has subtle implications. The case of Fama Holdings Ltd. V. Powertech Industries Inc. provides a good illustration of the confusion that can arise in the administration of proxies voted through the book-based system. A brokerage firm held about 2.2. million shares of the subject company's stock, some 300,000 of which it held directly as a registered shareholder and the balance being held by it through two depository companies in which it participated. The brokerage purported to vote substantially all the shares held by it for client accounts on the basis of

[70] Section 51(1) of the *CBCA*.
[71] Section 153(1) of the *CBCA*.
[72] (1997), 34 B.C.L.R. (3d) 357, 32 B.L.R. (2d) 310 (C.A.)
[73] Stuart B. Morrow, Proxy Contests and Shareholder Meetings, (2003) 36 U.B.C.L. Rev. 483-518.

> the two omnibus proxies provided by the depository corporations, having neglected that part of the shares to be voted were in registered form. The proxies submitted by it were held to be valid as it was able to establish that it had not voted more shares than it was entitled to vote directly (the registered shares) or by proxy at the meeting.

ii. Analysis

Communication with beneficial shareholders is a pre-condition to ensuring that they can meaningfully exercise their rights of ownership including voting and participation at shareholders meetings. In light of the increasing proportion of shareholding through intermediaries in Canada, the lack of a facilitative mechanism in the *CBCA* that allows for communication between the corporation and beneficial shareholders results in sub-optimal accountability and oversight of corporate management. On this basis, the *CBCA* should be amended to (i) require registered owners to furnish corporations with a list of beneficial owners, subject to reasonable exceptions such as in cases where beneficial owners have requested to have their names withheld; and (ii) facilitate a process to allow for communication between corporations and beneficial shareholders.

Similar to the analysis above on proxy solicitations and exemptions, the issue of communication with beneficial shareholders falls better within the scope of corporate law than securities laws. However, to the extent that National Policy 54-101 creates a satisfactory process for addressing the relevant issues, it is recommended that the *CBCA* incorporate it or adopt it by reference, which would have the benefit of minimizing costs to stakeholders.

F. Proportionate Liability Scheme

i. Current Situation

Both the *CBCA* and provincial securities laws contain proportionate liability schemes. Bill S-11 introduced a proportionate liability scheme into the *CBCA*.[74] Previously, all defendants who were involved in financial preparation of information were jointly and severally liable for any financial loss resulting from an error, omission, or misstatement in financial information required by the *CBCA*. Under the old regime, the auditors of a corporation, for example, might be liable for 100% of the loss incurred by the plaintiff even if they were only 25% to blame. As a response to these concerns about unfairness, the *CBCA* now create a framework of modified proportionate liability for claims for financial losses arising out of an error, omission or misstatement in respect of financial information required by the *CBCA*.

The scheme works as follows: A defendant or third party is generally only liable for the portion of the loss that related to their proportionate responsibility for the loss. However, if a plaintiff cannot collect against any particular defendant (because of insolvency, for

[74] Sections 237.1 – 237.9 of the *CBCA*.

example), the plaintiff can apply to court to reallocate the uncollectable amount amongst the other defendants. The maximum that the other defendants can be additionally liable for is 50% of their original proportionate liability. Joint and several liability continues for fraud and for certain classes of plaintiffs, including the Crown, charitable organizations, unsecured trade creditors, and individuals and corporations who have less than the prescribed threshold.

Provincial securities regulators have instituted a proportionate liability scheme that operates on different premises. For example, the *OSA* was recently amended to add a statutory framework for civil liability for misrepresentations and omissions in respect of continuous disclosure. It includes provisions on proportionate liability where each defendant is responsible for his/her proportion of the loss.[75] Defendants are responsible for the lesser of their proportionate share of liability or the statutorily imposed liability ceilings. For example, a reporting issuer has a liability ceiling which is the greater of 5% of its market capitalization and $1 million, a director or officer has a liability ceiling which is the greater of $25,000 or 50% of his/her aggregate compensation, and an expert has a liability ceiling which is the greater of $1 million or the revenue earned from the reporting issuer in the 12 months prior to the misrepresentation.[76]

ii. Analysis

The existing situation allows for opportunistic behaviour by private parties to use or argue in favour of the scheme that is most favourable to them. The *OSA's* scheme is very defendant friendly and focuses almost exclusively on the negative impact of liability on defendants. The *CBCA* is friendlier to certain classes of plaintiffs. The *CBCA's* approach is more balanced and reflects an appreciation that certain classes of plaintiffs should not be required to bear the risk of loss vis-à-vis certain defendants.

There is no particular policy reason to have two separate schemes operating concurrently. The current situation imposes unnecessary costs on stakeholders by creating uncertainty in the marketplace about rights and obligations. Effort should be made by corporate and securities law regulators to harmonize the two liability schemes.

[75] Section 138.6 of the *OSA*.
[76] See section 138.1 of the *OSA*.

5. Conclusion

Corporate and securities laws have different policy goals, jurisdictional reach and enforcement mechanisms. On the basis of these differences, this report has surfaced several guiding principles which can be used to support a rational allocation of responsibility between corporate and securities laws in Canada.

The existing model of overlapping regulatory jurisdiction between the federal *CBCA* and provincial securities laws provides some benefits but also imposes significant costs on stakeholders. This report has analyzed alternatives to the current regulatory model would preserve the mandate and policy goals of corporate and securities laws while significantly reducing the costs to stakeholders.

Given the challenges inherent in drastic reform of the regulatory structure of corporate and securities laws, this report focused on mechanisms to achieve better co-operation, co-ordination and harmonization within the current regulatory model of corporate and securities laws, including (i) the establishment of a joint committee of corporate and securities law administrators; (ii) Incorporation by reference to the other regulatory framework; (iii) Exemptions or recognition based on compliance with the other regulatory framework; and (iv) Using forms of legal instruments that allow for ease of amendments and continued harmonization.

On the basis of the guiding principles highlighted above, this report concluded that: Insider trading is more appropriately within the jurisdiction of securities laws as opposed to corporate law, while corporate governance, defensive measures to takeovers, proxy solicitations and exemptions, and communication with beneficial shareholders are more appropriately within the jurisdiction of corporate law as opposed to securities laws. It also concluded that there is little justification for differing proportionate liability schemes in the *CBCA* and provincial securities laws.

To the extent that exclusive jurisdiction cannot be achieved, the report recommended that regulators work to harmonize the relevant rules in each regulatory framework. The least cost would be imposed on stakeholders if one regulatory framework incorporated the relevant rule by reference to the other regulatory framework or if a system of recognition or exemptions were created.

Author's Biography

Poonam Puri is a tenured Associate Professor of Law at Osgoode Hall Law School, York University. She is a graduate of the University of Toronto Faculty of Law (LL.B. Silver Medalist) and Harvard Law School (LL.M.).

Professor Puri has significant expertise in corporate and securities law, corporate governance, corporate finance and law and economics. Professor Puri was recently a Visiting Professor at Cornell Law School (2000-2001) and is an award-winning teacher having been a recipient of the Osgoode Hall Law School Teaching Award and a nominee for the York University-wide teaching award.

In addition to numerous articles and reports, Professor Puri is co-author/co-editor of 3 books: *Corporate Governance and Securities Regulation in the 21st Century* (Toronto: Lexis-Nexis/Butterworths, 2004), *Canadian Companies' Guide to the Sarbanes-Oxley Act* (Toronto: Lexis-Nexis/Butterworths, 2004) and *Cases and Materials on the Law of Partnerships and Business Organizations in Canada* (Carswell, forthcoming September 2004).

In 2003, Professor Puri was a consultant to the Ontario Securities Commission, preparing a cost-benefit analysis of the Multi-Jurisdictional Disclosure System in light of the *Sarbanes-Oxley Act* of 2002.(with A. Sen).