Alleviating the Corporate Social Responsibility Reporting-Performance Inconsistency: A Tentative Proposal of the “Reflexive Law Plus” Model

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Abstract

The present research identifies corporate reporting-performance inconsistency as a major issue that undermines the current practice of corporate social responsibility (CSR). The inconsistency manifests in that companies either avoid disclosing negative information in their CSR reports or use vague and empty expressions to cover their CSR inaction. In most situations, instead of providing a complete and balanced picture and causing companies to re-examine their own CSR behaviour, CSR reporting has been declining into a strategic corporate communication tool that primarily serves firms’ own interests. Such a problem greatly challenges the fundamentals of CSR and raises hard questions as to the reliability of private regulation and corporate self-regulation pertaining to CSR reporting.

Taking Canada as a field of research, the present study combines theoretical with empirical research methodology in order to thoroughly investigate the problem of the CSR reporting-performance inconsistency and provide a plausible solution to it from a law and regulation perspective. The main empirical research methods it takes are qualitative interviews and documentary analysis. In particular, the present research builds on the literature and empirical observations to explain the inconsistency and identify the regulatory gaps that currently exist in CSR reporting. As a side issue, it also questions the primary purpose of the CSR reporting regime, suggesting that CSR reporting should be used to transform irresponsible corporate performance and serve broader public goals.
Inspired by the reflexive law literature and the empirical evidence, the present research develops a concrete model of “reflexive law plus” to address the CSR reporting-performance gap. “Reflexive law plus”, as named by the present research, is a refined form of reflexive law, in the sense that it is faithful to the fundamentals of the reflexive law theory, yet incorporates regulatory design components that can better catalyze and consolidate the self-referential capacity of the companies involved in CSR reporting. The present research holds that “reflexive law plus” provides a sound solution to remediate the inconsistency because it is pertinent to the regulatory circumstance in which CSR reporting is situated.
Preface

This dissertation is an original intellectual product of the author, Si Hao. The fieldwork reported in this dissertation was covered by UBC Ethics Certificate number H13-01143.
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Introduction

In his classic work, Anthony Downs vividly describes the shift of public attention, which he calls the “issue-attention cycle”, as it relates to many major social problems, such as poverty, racism, environmental degradation and unemployment.\(^1\) According to Downs, public interest regarding those problems that “once was elevated to national prominence” wanes, as people realize that solving the problems is difficult and costly, meanwhile people who suffer most from the issues are the powerless minorities.\(^2\) Consequently, heightened concern about the problems and enthusiasm for solving them gradually retreat to low interest and faded attention, with the problems remain largely unresolved.

The present research observes a similar pattern with respect to the social and environmental crises that large, publicly-traded companies are responsible for. These crises, usually manifesting in the forms of land pollution, water contamination, sweatshops, or health and safety accidents, garner widespread attention and public outcry immediately after they happen. In the wake of such incidents, questions regarding the purpose of corporation have been hotly debated and corporate social responsibility (CSR) has emerged as a buzz word for news reports and critics. Unfortunately, the debates and discussions gradually quiet down as the public diverts its

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\(^1\) Anthony Downs, “Up and Down with Ecology: The 'Issue-Attention Cycle’” (1972) 28 Public Interest 38 (describing the public attention cycle in the face of ecological problems). Downs identifies five stages of the “issue-attention cycle”, which starts from “the pre-problem stage”, turning to “alarmed discovery and euphoric enthusiasm” to solve the problem, moving to “realizing the cost of significant progress”, then to “gradual decline of intense public interest”, and eventually to “the post-problem stage”. See: 39-41.

\(^2\) Ibid. Downs highlights three conditions in which a given problem is likely to go through the “issue-attention cycle”. In particular, he notes that public attention on a certain issue tends to shift when 1) the majority of people in society are not suffering directly from the problem, 2) solving the problem requires fundamental changes in social institutions that may threaten the vested interest of a majority or a powerful minority of the population, and 3) there is no intrinsic excitement within the issue that may interest the majority public for a long period of time. See: 41-42.
attention from these incidents, yet the undesirable environmental or social practices underlying the crises have only changed slightly or remain the same.\(^3\) Two major supply chain incidents, the Rana Plaza building collapse and the Foxconn workers suicides, are cases in point.\(^4\)

The “issue-attention cycle” explains precisely why the achievements of the CSR movement, which started more than two decades ago, have so far been very limited and unsubstantial.\(^5\) This is exactly the challenge that the CSR scholars are facing: although the research of CSR has had significant implications for effecting changes in the performance of corporations and motivating them to avoid the recurrence of past disasters, the importance of the research has been very much underestimated because of the public’s lack of sustained interest in CSR-related matters.

It is within this context that the present research unveils. With the general purpose of elevating CSR and generating sustained attention to it, the present research takes CSR

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\(^3\) Referring to Downs’ three conditions of “issue-attention cycle”, the present research finds that public attention on CSR-related crises did not last long, since: the population who suffered directly from these incidents was small numerically and isolated geographically; in addition to corporate performance changes, addressing such issues requires fundamental shift of consumers’ purchasing habits; people quickly got occupied with newly emerged issues as the incident lost its appeal.


\(^5\) See infra note 227-230 for the literature that corroborates such a view.
reporting as the starting point. This is because: first, CSR reporting has been the most developed component of CSR during the past two decades; second, the problem of CSR has been primarily manifested in how companies maneuver CSR reporting to sing high praise for themselves. The decisive role of CSR reporting in the CSR movement also highlights the urgency of the research, as CSR will become groundless if it “[degenerates] into costly exercises in paper pushing or excuses for avoiding real action”. In terms of CSR reporting, the present research finds that behind the social and environmental crises that large, publicly-traded companies are responsible for are those companies’ glossy CSR reports that are full of positive information, with the crises either lightly mentioned or not mentioned at all. As the ensuing chapters will show, this CSR reporting-performance inconsistency is ubiquitous. It would primarily serve corporate interests rather than promote social progress, if firms claim that they are committed to CSR yet make performance changes only at a superficial level or remain inaction.

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6 Ronen Shamir, “The De-Radicalization of Corporate Social Responsibility” (2004) 30:3 Crit Sociol 669 (positing that the actions taken by many corporations in terms of CSR are symbolic and actually strategic moves toward "shaping the meaning of CSR in ways that do not threaten entrenched commercial interests and in ways that invest the term with a voluntary, self-regulatory meaning").

7 Archon Fung, Mary Graham & David Weil, Full Disclosure: The Perils and Promise of Transparency (Cambridge University Press, 2007) at 106 (explaining why certain government-mandated disclosure policies are effective and why others are not).

8 For instance, there was no mentioning of the workers’ suicides in Foxconn’s 2010 and 2011 CSR reports. See: Foxconn CSER Annual Reports, online: <http://ser.foxconn.com/SelectLanguageAction.do?language=1&amp;jump=/csr/Annual_Report.jsp> (last visited June 12, 2016). In Loblaw’s 2013 CSR report, although the Rana Plaza collapse was mentioned, the report actually used the incident as an example to show how the company took the lead in being committed to responsible supply chain management. See: Loblaw, 2013 Corporate Social Responsibility Report, online: <http://www.loblaw.ca/content/dam/lclcorp/pdfs/Responsibility/Reports/CSRR/en/2013/CSRR-en-2013.pdf>, at 16.

9 See Section 3.1-3.3 for the illustration, literature review and empirical examination of the CSR reporting-performance gap.
Therefore, a key purpose of the present research is to address the CSR reporting-performance gap.

The present research combines theoretical inquiry with empirical examination. It is comprised of six chapters. Chapter one introduces and defends the methodology of the entire research, with the emphasis on describing the empirical research process. Chapter two examines the notion of CSR reporting within both conceptual and theoretical frameworks, providing important background information concerning the research thesis and explaining why the present research investigates CSR reporting from an organizational learning perspective. Chapter three identifies the research thesis based on practical examples, the literature and empirical data, and puts forward the primary research question of the doctoral dissertation: from a law and regulation perspective, how can the ubiquitous CSR reporting-performance discrepancy be alleviated? It further hypothesizes that the reflexive law approach would be a plausible solution to the discrepancy. Chapter four takes a close examination of the research hypothesis and the regulatory context. In particular, it advocates that: 1) CSR reporting should be officially mandated through either legislation or regulatory rules; and 2) the reflexive law approach may be used to alleviate the CSR reporting-performance inconsistency. Furthermore, acknowledging that an elaboration on the meaning of the reflexive law approach necessitates a thorough empirical examination, Chapter four identifies empirically where the problems lie with respect to the current CSR reporting field. Chapter five develops a concrete model of “reflexive law plus” based on the reflexive law literature and the empirical evidence. In particular, it outlines six regulatory design components required
by “reflexive law plus”. The chapter then illustrates the pertinence of the “reflexive law plus” model by comparing it to traditional regulation and other contemporary forms of regulation. **Chapter six** concludes the dissertation and identifies the research contributions and limitations. It also proposes a future research agenda based on the present research.

The present research makes one of the first scholarly attempts to systemically analyze and respond to the CSR reporting-performance inconsistency. It enriches the new governance scholarship and fills the research gap in the literature that has barely used qualitative research methodology to study the problem with CSR reporting. The research result sheds light on the CSR advocacy practice and informs policy making in Canada in terms of constructing the Canadian regulatory regime surrounding CSR reporting. It also has a wider application beyond national boundaries since the issue that the present research centres on is a worldwide phenomenon that challenges the fundamentals of CSR.
Chapter 1: Research Methodology

Introduction

The present research combines theoretical with empirical research methodology to support the thesis argument.

Theoretically, it accords with the mainstream regulatory literature and frames the reflexive law theory within the new governance paradigm. It adopts the broader regulation and governance literature to critically analyze the benefits and limitations of the reflexive law approach in addressing the CSR reporting-performance discrepancy.\textsuperscript{10} It cogently shows why the reflexive law approach, compared to traditional regulation and other contemporary regulatory forms, provides a more pertinent cure for the CSR reporting-performance inconsistency.

Empirically, the study focuses on making a thorough, contextual-based analysis of the research thesis. The empirical research facilitates a detailed portrayal of the CSR reporting field in Canada and solicits a comprehensive discussion in terms of where the problems lie and what promoting factors there are for realigning CSR reporting with corporate performance. These empirically grounded observations not only carry

\textsuperscript{10} See infra note 376-380 and the accompanying texts for an explicit discussion of the relationship between reflexive law and new governance.
significant academic value in themselves, but also inform the present research in refining the reflexive law approach and enriching the regulatory design components.

In particular, this chapter addresses why the qualitative research methodology has been adopted and what the research limitations are. In terms of the procedural issues, it introduces the interview recruitment, the data collection and the data analysis process.

1.1 Justifying the Research Methodology

1.1.1 Empirical & Qualitative

The choice of the empirical research methodology is buttressed by three considerations. First, the research question of this project, which requires a thorough investigation of the current CSR reporting practice to identify where the problems lie, cannot be fully answered by theory-based textual analysis. To comprehensively respond to the practical, concrete dimension of the research thesis, it is necessary to learn from the field. Without a thorough empirical investigation, one does not have a solid ground to interpret how CSR reporting functions in the practical world, how companies and people deal with the reporting process, and how they comprehend the process.

Second, the thesis argument, which is backed by the theory of reflexive law, requires an elaboration on the empirical ground. This is because reflexive law is a theory that exists on a broad and abstract level. In order to put the theory to use, the meaning of reflexive law ought to be substantiated in concrete settings.\(^{11}\) The empirical portion of the research

\(^{11}\) This is the standard practice of the reflexive law literature. See Section 4.3.4 for a discussion of the literature.
was therefore designed to provide a detailed description of the current CSR reporting field as well as its deficiencies, in order to precisely elaborate on the meaning of reflexive law in the present research and to refine the theory of reflexive law on that basis.

Third, existing empirical research on parallel topics has advanced our understanding of the dynamic of companies as regulatory respondents, which motivates the current research. For instance, to explore the reasons of firms’ resemblance and discrepancy in environmental performance, i.e. why most firms are able to perform within a behavioural range yet only some move “beyond compliance”, Gunningham et al. conducted interview-based case studies of fourteen firms in their environmental performance and made seminal findings, which provide important policy implications for regulatory designs and the greening of pulp and paper industry.  

As Section 1.2.1 will further illustrate, In the context of the present thesis, a number of publicly-traded Canadian companies were chosen as the samples for the empirical research. While quantitative research methodology has been extremely popular among existing literature concerning CSR reporting issues in Canada, qualitative research on the topic has been hard to find. Among the existing literature in Canada, most concentrates on analyzing the content of CSR reports, not the process of reporting and its connection with corporate performance, which necessitates an in-depth qualitative research about the CSR reporting instrument to fill the research gap.  

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13 Most research on this subject in Canada is based on content analysis of CSR reports. For instance, see: Daniel Zeghal & Sadrudin A Ahmed, “Comparison of Social Responsibility Information Disclosure Media Used by Canadian Firms” (1990) 3:1 Account Audit Account J (discussing the media vehicles used by Canadian companies for CSR disclosure in...
1.1.2 Interviews

The majority of the information that feeds the empirical research comes from in-depth, one-on-one research interviews. An interview is an important source of evidence because the affairs of an organization should be reported and interpreted through the eyes of individuals involved in everyday operations of it. Corporate management, frontline employees who prepare CSR reports, external consultants, advisors and lawyers who facilitate the reporting process, and CSR-conscious institutional investors all play an important role in shaping the impacts of CSR reporting within and beyond a company. The interviews therefore aim at exploring, presenting and theorizing these impacts.

In essence, the interviews aim for two purposes: first, to examine how people in publicly-traded companies and their stakeholders comprehend the meaning of CSR reporting and what their roles and obligations are in the firms’ undertaking of CSR reporting; and second, to investigate their assumptions with respect to corporate performance in CSR aspects and how these assumptions are related to their day-to-day engagement with CSR reporting.¹⁴

¹⁴ The first part of the research purposes is inspired by Conley & Williams, whose seminal empirical research aims to investigate “the meaning of corporate social responsibility” to people in corporations and their various stakeholders,
The interviews were designed following a semi-structured pattern. Compared to structured interviews, asking questions in a semi-structured format facilitates a deeper and more focused exploration of the research thesis, because semi-structured interviews leave enough room for new research to concentrate on the important questions left unanswered by prior interviews, while building upon the prior research experience and findings. In addition, the open-ended nature of semi-structured questions enables the research participants to reflect more broadly on their own experience and raise illuminating points that otherwise may be disregarded. As Conley & Williams illustrate, “in addition to the substantive information that may be provided, the informant’s selection of some topics, avoidance of others, and relative emphasis on particular subjects is itself an invaluable form of data.” With respect to the present research, during the research interviews, when asked about their own experience in preparing and producing CSR reporting documents, participating individuals were encouraged to provide thoughts on the overall structure and functioning of their firms in CSR matters. This brought about further rounds of discussion on individual-tailored questions. A few new issues, such as the issue of knowledge gaps among lower-level corporate employees who feed

and the potential impact, within a company and beyond, of a firm’s undertaking CSR initiatives”. See: John M Conley & Cynthia A Williams, “Engage, Embed, and Embellish: Theory versus Practice in the Corporate Social Responsibility Movement” (2005) 31 J Corp Law 1 at 8.

According to the literature, senior corporate managers possess three personas, as an individual, a person holding a particular position (e.g. CEO) and a representative of the corporation. See: Robert J Thomas, “Interviewing Important People in Big Companies” (1993) 22:1 J Contemp Ethnogr 80 at 85. To allow the expression of critical opinions and avoid rigidity, the present research is especially interested in seeking views and experience-based accounts from an individual’s perspective. This stance was well-articulated in the interview consent form and communicated to the interviewees.

15 See Section 1.2.3 for an outline of the interview questions.
16 Conley & Williams, supra note 14 at 8.
information to the CSR reporting staff yet were uninformed of the large picture of CSR reporting, were identified during this process.\textsuperscript{17}

To relieve the concerns of potential interviewees and ensure the yield of high-quality data, the present research has agreed to keep the names of both the organizations and the interviewees anonymous.\textsuperscript{18} In retrospect, this decision has proved to be wise. At the contact stage, many interviewees explicitly expressed their concerns regarding confidentiality. During the interviews, several paused until they were assured that neither their names nor the companies’ names will be acknowledged. When chatted with after the interviews, almost all of the respondents confided that their answers to the questions may be more conservative if the interviews are not anonymous.

Despite the anonymity of the interview data, the present research is confident that the data collected are still reasonable data. As the next section will further illustrate, in the study of the sample firms, information drawn from interviews was supplemented by secondary data, and key factual evidence provided by one person was checked against narratives of another. Although the academic value of the entire research may be lessened to some extent owing to the anonymity, there is currently no better means to gain high-quality data that are of a sensitive nature while in the meantime fulfilling the ethical expectations for researchers.

\textsuperscript{17} See Section 4.4.1.1 for a discussion of this problem and related issues.
\textsuperscript{18} For this reason, in later chapters, firms and persons will appear in coded names (see Table 1). However, drawing a balance between information and confidentiality, the research will provide necessary background information concerning the targeted companies as well as the occupations and positions of the individual interviewees.
1.2 Explaining the Interview Research Process

1.2.1 The Scope of the Research

As briefly aforementioned, to balance the research width and depth, the present research sets the empirical focus on publicly-traded Canadian companies. This choice was made based on two considerations. First, from the perspective of possibility, large publicly-traded companies provide extremely rich and accessible data for study. Because these companies tend to have a longer history of CSR reporting compared to private companies, the CSR reporting records from them are more complete and consistent. Also owing to the securities disclosure requirements imposed on these firms, their reporting documents are publicly accessible online and can easily be retrieved for cross-reference. Second, from the perspective of necessity, while there are a small number of private companies and other entities, such as universities and NGOs, also reporting on CSR issues, the majority of CSR reports available in the market are generated by large publicly-traded companies. Research targeted on these enterprises is thus more representative and urgent. In addition, large publicly-listed companies are under combined external pressure—such as institutional investors and proxy voting agencies—to build their CSR profile, which provides a unique perspective for evaluation.

Out of the following two considerations, Canada has been chosen to be the targeted country for research. First, compared to the abundance of the qualitative research studies with regard to CSR reporting in other countries, scholarly discussion concerning CSR disclosure in Canada is extremely scarce and one-dimensional, which necessitates an in-
depth interview-based qualitative research. Second, the current reporting practice in Canada is vibrant with unique characteristics that deserve a country-specific research of CSR reporting. For instance, according to Canadian Business for Social Responsibility (CBSR), different from many jurisdictions, in Canada the private sector has been leading and setting the agenda for CSR, while the government has been in catch-up mode. Also a thorough analysis of company and investor typology indicates that Canadian companies in general rank very low (i.e., 26 out of 29 countries) in integration of environmental and social information with financial information, yet Canadian investors show extremely high interest (i.e., 3 out of 23) in CSR performance metrics compared to investors in other countries. In light of the growing demand for research on CSR reporting in this country, a comprehensive study of the thesis is expected to fill the research gap.

Inspired by the literature on a related CSR topic, the present research was initially designed as a sector-specific study that centres on the retail industry, with interviewees serving a role of senior-level management. However, owing to the low turn-over rate of the interview requests and the knowledge gap expressed by the interviewees regarding

19 The lack of academic debate in Canada about CSR reporting was also mentioned in the literature. See: Aaron Dhir, “The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights” (2009) 47:1 Osgoode Hall Law J 47, at 54 (noting that “[t]o date, the concept of social disclosure has received scant consideration in Canadian academic legal literature”). Also see supra note 13 and the accompanying texts for an overview that shows existing Canadian literature in terms of CSR disclosure is dominated by quantitative content analysis.

20 CBSR, Government and Corporate Social Responsibility: An Overview of Selected Canadian, European and International Practices (Vancouver, 2001). CBSR is a nation-wide non-profit organization in Canada that is dedicated to advancing corporate citizenship and responsibility.


22 Sector-specific study is a more common research strategy for corporate social and environmental matters. For example, see: Gunningham et al., supra note 12 (focusing on the pulp and paper industry). The research seeks opinions from senior managers and board of directors primarily because of their unique role in the corporate hierarchy. Being designated as directors or senior managers gives prima facie evidence of their involvement in corporate operation and CSR reporting. Therefore, views from those at the top are important sources of evidence for the study and cannot be replaced by other sources. In addition, this kind of research evidence is lacking in the academic literature with respect to CSR reporting. See supra note 13 and the accompanying texts.
how CSR reporting actually operates in the field, the original research plan was modified on two dimensions in order to achieve the intended research breadth and depth.23

For one thing, being aware of the knowledge gap between corporate senior managers who make decisions and execute actions at a distance and CSR staff who are involved in day-to-day operation of the decisions, the present research enlarged the touch of the interviewees and solicited views from people with more diverse roles in the process of CSR reporting. In particular, to strengthen the robustness of the interview data, the research sought for multiple visions within the same company and paired interviews from people serving at two different positions for data analysis. For instance, it interviewed both the frontline CSR reporters and people at the senior ranks in the same company. When that was not feasible, an alternative was to interview managers in different functional departments to see whether they perceived the situation of CSR reporting differently, and if so why. This combination allows for a fuller understanding of how people in the practical world interpret the meaning of CSR reporting and how they connect it with corporate performance in CSR aspects. In addition to industry people,24 this study also sought ideas from a few well-established CSR experts, who either were outside the corporations but perform significant roles on the chain of CSR reporting or

23 Because a great number of companies in the retail industry in Canada are private companies, the proposed candidates for the interviews who satisfied the criteria of serving as senior management in publicly-traded companies are a relatively small number of people. Furthermore, among the 21 interview requests sent by e-mail and followed up by telephone calls, only seven people responded and only four agreed to be interviewed. When asked to express their views regarding how CSR reporting was implemented in their firms respectively, while showing wholehearted support for it, most interviewees acknowledged that they do not have hands-on experience with respects to how CSR reporting actually operated in their companies and suggested that the frontline staff of their firms who produced the CSR reports and the external consultants who facilitated the process could be better sources of information.

24 In the present thesis, industry people refers only to people working in the three industries that the present research centres on.
served in multiple institutional contexts over a long career and were familiar with the sectors in research. They provided valuable outsiders’ perspectives on CSR reporting of the targeted industries.

For another, to accumulate more profound interview data, the present research decided to have mining and banking as the two additional industry sectors to focus on. The cross-sector approach is feasible in the current research context, because the research thesis, the CSR reporting-performance inconsistency, is a phenomenon that has spread across different business sectors. The existing examples of the issue has not exhibited significant inter-sector differences. Furthermore, although the available interview data is not enough to run a sector-specific research, in accumulation with the interview data from the two other industries, it has a strong explaining power and is enough to provide a robust account of the CSR reporting-performance inconsistency. In retrospect, the cross-sector study has not only yielded rich and high-quality data for analysis, but also posed a unique and interesting research stance that facilitates a comprehensive understanding of the research question.

In terms of the time span of the research, although the present research tries to reflect the most updated conditions of CSR reporting in the field, owing to the volume of fieldwork

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25 As will be shown in the coded list of the interviewees, these external voices came from people in a relatively wide array of occupations, such as staff from stock exchanges, consultants, lawyers, managers of institutional investing agencies, staff from industry associations, and officer of an international organization.

26 The three industries were picked up because large publicly-listed companies have been densely spread in these sectors in Canada and they are all featured for their global reach and close ties with stakeholder groups, which provides a common platform for comparison. The comparability of the three industries in Canada were later confirmed by the field research, since many respondents in one industry explicitly referred to examples of the other two industries to illustrate their points.

27 See Section 3.1 for the illustration of the problem using practical examples.

and documentary analysis, a five-year range has been established for in-depth study. The research interviews were conducted from September 2013 to August 2014, covering issues during the reporting period between 2009 and 2013.\textsuperscript{29}

1.2.2 The Interview Recruitment

Altogether, 26 interviewees participated in the research interviews. The interviewees came from three sources: prior personal contacts, cold e-mails/calls, and people encountered at industry conferences. Among the three, cold e-mails/calls yielded the majority of the informants.

Table 1 A Coded List of the Interviewees

<table>
<thead>
<tr>
<th>No.</th>
<th>Group</th>
<th>Interviewee</th>
<th>Industry</th>
<th>Company</th>
<th>Source of Recruitment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Industry</td>
<td>Senior Manager 1</td>
<td>Retail</td>
<td>R1</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>2</td>
<td></td>
<td>Manager 1</td>
<td>Retail</td>
<td>R1</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>3</td>
<td></td>
<td>Senior Manager 2</td>
<td>Retail</td>
<td>R2</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>4</td>
<td></td>
<td>Manager 2</td>
<td>Retail</td>
<td>R2</td>
<td>Cold E-mail</td>
</tr>
</tbody>
</table>

\textsuperscript{29} To make sure that the more recent development of CSR reporting in the targeted companies is covered, the present research also examines the 2014 CSR reports of these firms and identifies major changes in the research notes, which are incorporated in the data display as it relates to these companies.
<table>
<thead>
<tr>
<th>No.</th>
<th>Group</th>
<th>Interviewee</th>
<th>Industry</th>
<th>Company</th>
<th>Source of Recruitment</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td></td>
<td>Senior Manager 3</td>
<td>Retail</td>
<td>R3</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>Manager 3</td>
<td>Retail</td>
<td>R3</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>7</td>
<td></td>
<td>Senior Manager 4</td>
<td>Mining</td>
<td>M1</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>8</td>
<td></td>
<td>Manager 4</td>
<td>Mining</td>
<td>M1</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>9</td>
<td></td>
<td>Senior Manager 5</td>
<td>Mining</td>
<td>M2</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>10</td>
<td></td>
<td>Manager 5</td>
<td>Mining</td>
<td>M2</td>
<td>Conference</td>
</tr>
<tr>
<td>11</td>
<td></td>
<td>Board Director 1</td>
<td>Banking &amp; Mining</td>
<td>B1, M2</td>
<td>Personal Contact</td>
</tr>
<tr>
<td>12</td>
<td></td>
<td>Manager 6</td>
<td>Banking</td>
<td>B2</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>13</td>
<td></td>
<td>Senior Manager 6</td>
<td>Banking</td>
<td>B3</td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>14</td>
<td></td>
<td>Consultant 1</td>
<td>Retail</td>
<td></td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>No.</td>
<td>Group</td>
<td>Interviewee</td>
<td>Industry</td>
<td>Company</td>
<td>Source of Recruitment</td>
</tr>
<tr>
<td>-----</td>
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</tr>
<tr>
<td>15</td>
<td>Consultant 2</td>
<td>Mining</td>
<td></td>
<td></td>
<td>Conference</td>
</tr>
<tr>
<td>16</td>
<td>Consultant 3</td>
<td>Mining</td>
<td></td>
<td></td>
<td>Personal Contact</td>
</tr>
<tr>
<td>17</td>
<td>Consultant 4</td>
<td>Banking</td>
<td></td>
<td></td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>18</td>
<td>Industry Association</td>
<td>Senior Officer 1</td>
<td>Retail</td>
<td></td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>19</td>
<td></td>
<td>Officer 1</td>
<td>Retail</td>
<td></td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>20</td>
<td></td>
<td>Senior Officer 2</td>
<td>Mining</td>
<td></td>
<td>Conference</td>
</tr>
<tr>
<td>21</td>
<td></td>
<td>Senior Officer 3</td>
<td>Mining</td>
<td></td>
<td>Conference</td>
</tr>
<tr>
<td>22</td>
<td>Institutional Investing</td>
<td>Senior Manager 7</td>
<td></td>
<td></td>
<td>Personal Contact</td>
</tr>
<tr>
<td>23</td>
<td></td>
<td>Manager 7</td>
<td></td>
<td></td>
<td>Personal Contact</td>
</tr>
<tr>
<td>24</td>
<td>International Organization</td>
<td>Officer 2</td>
<td></td>
<td></td>
<td>Cold E-mail</td>
</tr>
<tr>
<td>No.</td>
<td>Group</td>
<td>Interviewee</td>
<td>Industry</td>
<td>Company</td>
<td>Source of Recruitment</td>
</tr>
<tr>
<td>-----</td>
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<td>--------------</td>
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<td>---------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>25</td>
<td>Legal Service</td>
<td>Lawyer 1</td>
<td>Mining</td>
<td></td>
<td>Conference</td>
</tr>
<tr>
<td>26</td>
<td>Stock Exchange Officer 3</td>
<td>Officer 3</td>
<td></td>
<td></td>
<td>Cold E-mail</td>
</tr>
</tbody>
</table>

First and foremost, in the present research, companies are important vehicles that link the research with individual interviewees in the industry. Therefore, for cold e-mails, the names of companies were selected in the first place so that the potential interviewees can be identified. In particular, the present research referred to a few lists, such as S&P/TSX 60 and S&P/TSX Composite Indexes, to identify companies with large market capitalizations in the Canadian equity market in the three business sectors. 20 companies were finally chosen, based on the consistency of their CSR reporting history and the accessibility of information with respect to corporate decision making and implementation on environmental and social dimensions, such as the management structures and arrangements with respect to environmental and social matters. The senior management and CSR officers of these companies were shortlisted as the potential

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30 Both indexes are authoritative in Canada. They are calculated and managed by S&P Dow Jones Indices, using a measure of market capitalization to weigh the companies included. TSX 60 is a subset of the TSX Composite. It has 60 constituents, all of which are companies with large market caps in the Canadian securities market, with a view of sector balance. In comparison, TSX Composite involves a broader scope and incorporates publicly-traded companies that are under-represented in TSX 60.
industry interviewees. Then I did a search on the Internet to look up for their contact information. Based on publicly available information as of fall 2013, 60 candidates were identified for cold e-mail contact. Next, I sent individualized interview invitations via e-mail to these candidates. In the initial contact e-mail, I documented the research purpose and other necessary information, inviting them to participate in the study. With people who indicated a willingness to be interviewed, I followed up by sending each a copy of the consent form and made further explanation regarding how the interview would be conducted. As to the persons who did not respond to the invitation e-mail, I sent them a reminder e-mail several days afterwards, and made telephone calls or leave voice messages if their numbers were available. Trying not to be desperate or pestering, I did not go further to seek responses from people who remained silent after being reminded once. Out of the same consideration, I also discontinued with people who agreed to be interviewed in the first place yet did not respond to my follow-up e-mails or calls. In general, from July 2013 to June 2014, among the 60 people who were contacted by cold e-mail, 18 agreed to be interviewed. However, only 17 actually attended the one-on-one interviews. As shown in Table 1, the eight companies that these industry interviewees work for naturally become the sample companies for in-depth questions.

In addition to sending cold e-mails, I also invited a few industry people whom I met at conferences to participate in the research interviews. Five interviewees were recruited in

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31 The companies’ websites, Canadian Law List and LinkedIn were the main sources used for identifying the contact information of the candidate interviewees.

32 These companies are all large scale, with a high degree of public visibility and acknowledgement, and have a consistent history of CSR reporting since 2009 or prior to 2009.
this manner. The remaining four informants were put in touch by contacts in my own network. The gaps in the interview list will be discussed in Section 1.4.

The snowballing technique, which has been frequently used to solicit interviews by asking interviewees to put the researcher in contact with other potential interviewees, was tried out but not eventually adopted in the present research.\(^{33}\) This is because: for one thing, the research was concerned that the potential influence of the power relationship within the company may hurt the independence of the industry interviewees’ opinions, because the senior managers interviewed tended to nominate either their subordinates, who may be pressured to say or not say something, or the corporate spokesperson, who had been trained in representing the company to the outside world.\(^{34}\) For another, asking the interviewees to put me in contact with people they thought suitable for the interviews may discredit the anonymity of the research.\(^{35}\)

1.2.3 Data Collection & Analysis

Depending on the interviewees’ availability and interests in the topics, each interview lasted from 45 minutes to 1.5 hours. The interviews were all tape-recorded upon the permission of the interviewees, in order to maintain accuracy and richness of data. They

\(^{33}\) In an unusual case, I was given the e-mail addresses of two persons, to whom I contacted by sending them interview requests. But these seem more like cold calls rather than snowballing since in both situations, I followed the requests of the introducers that I shall not have their names mentioned when approaching the new candidates.

\(^{34}\) This situation was to some extent confirmed in the interview practice. For instance, in one occasion, one senior manager, who declined the interview invitation, upon my request passed my e-mail to the director of CSR. The CSR head showed a great interest in the research topic and agreed to be interviewed in the first place, yet suddenly he refused further contact, saying he wouldn’t be interviewed “given competing demands and priorities” (e-mail on file with the author, November 8, 2013).

\(^{35}\) This concern was at first expressed by the interviewees. In a couple of situations, the interviewees refused my requests for nomination on the basis that they thought the interviews were anonymous and putting me in touch with people they knew would betray the anonymity.
were then carefully transcribed and cataloged under a group of identified themes and sub-themes. These themes will be further explored in Chapter 2-4.

Since the research interviews were designed as semi-structured, an outline was used to open up the questions. Specifically, the interviews asked, inter alia,

1. How CSR-related information has been managed in the corporation and how the firm communicates internally and externally on CSR matters;

2. What the company’s general approaches and established policies to CSR reporting are;

3. What functional and operational adjustments the firm has made are in accommodating CSR reporting;

4. How and to what extent has the adoption of CSR reporting triggered the company’s internal management and self-regulatory processes;

5. How the interviewees sense the necessity of scaling up the regulation on CSR reporting, i.e. whether it will be advisable to keep the open-endedness of the regulatory structure and defer to corporations themselves to champion and self-adopt CSR reporting, or to make CSR disclosure a mandate through law.

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36 The themes and sub-themes were not pre-identified. Rather, they were generated after thorough reading and back-and-forth check with the transcripts.

37 Some of the questions were inspired by Conley & Williams, 2005, supra note 14. In their ethnographic interviews that aim at comparing CSR theory with practice, they report (p. 6):

“We compare the theory and practice of the CSR movement by addressing such questions as what these participants seek to accomplish, whether they are achieving those ends, and what the social consequences of their activities—both intended and inadvertent—may be”.

22
Although it seems convenient to bundle up the interview data to show how many interviewees are for or against a certain viewpoint, on second thought, the present study is hesitant to take such an endeavor. First, the purpose of the current empirical research is not to generalize. Rather, it is intended to raise issues and exemplify how these issues can illuminate the research theories and the regulatory practices. Second, within the current context, making quantitative generalization of the interview data can be misleading. During the interviews, some topics were favoured by a great number of informants yet others were very lightly responded to. However, it is too facile to claim that the former questions are better grounded than the latter. Moreover, in many occasions, the interviewees’ expressed stances were inconsistent with their reasoning. Therefore, instead of calculating the numbers of similar propositions, this research pays particular attention to how the interviewees supported their arguments and whether their argumentation can be backed up using other sources of data. Third, generalizing the interview data in a quantitative way may jeopardize the depth of the research. The interview provides an invaluable platform for the researcher to test her presumptions—to tease out some issues and to raise new issues for further rounds of discussion. Such a back and forth process cannot simply be reduced into numbers and percentages.

1.3 Supplementary Data

Collecting qualitative data by interviews is a frequent design when the research is about business firms. However, owing to two reasons, it is problematic to base the conclusion

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38 Donald R Cooper & Pamela S Schindler, Business Research Methods, 9th ed (London, UK: Mcgraw Hill, 2005), at 204 (noting that interview is “the primary data collection technique for gathering data in qualitative methodologies”).

23
entirely on interviews. First, the interviewees are individuals while the research subjects are companies. Although the affairs of an organization should be reported and interpreted through the eyes of individuals involved in everyday operations of it, the two are by no means identical, especially under the condition when the personal views were solicited.\textsuperscript{39} Second, the interviewees’ opinions were generated from the information filtered through their lens, which may be subjective, selective and bounded by their knowledge sets. As Officer 1 notes:

\begin{quote}
I can imagine that people might respond by saying that reporting is not driving changes in their company—they’re already doing the things and they’re just reporting on it. And they might genuinely believe that. It can still be wrong. They’re just not aware of how much reporting is changing things. It also depends on how long they’ve been to the company, if they’re in relatively new positions and if they’re new persons who have only been there for a couple of years. Sometimes opinions can be wildly misleading.\textsuperscript{40}
\end{quote}

For the above-mentioned reasons, additional sources of evidence were introduced to corroborate and cross-check with the interview data. In particular, the supplementary data came from two sources, documentary data and ethnographic data.

Documentary data was mainly collected from the companies’ websites and the System for Electronic Document Analysis and Retrieval (SEDAR), an open-access document retrieval system for mandatory filings from Canadian publicly-traded companies.\textsuperscript{41} It was

\textsuperscript{39} See Thomas, supra note 14 for a discussion of the three personas of corporate senior managers.
\textsuperscript{40} Interview transcripts on file with the author, November 19, 2013.
\textsuperscript{41} An introduction as well as access to SEDAR can be found at <http://www.sedar.com/sedar/sedar_en.htm> (last visited June 12, 2016).
in the form of corporate securities filings, CSR publications, memoranda, and other public filings. The present research is interested in collecting clues from these sources regarding: first, how the process of CSR reporting has been developed and institutionalized within the targeted companies through the years; second, whether the information collected in the previous CSR reports has been used by the companies to refine corporate environmental and social policies, upgrade management systems, engage stakeholders and set up corporate substantive goals, etc.; third, how CSR information interacts with corporate financial filings in the case of each company; fourth, whether and how the improvement or degradation of corporate environmental and social performance compared to the previous year is reflected in the companies’ CSR reports. These four aspects were paid particular attention because they provide indispensable background of how CSR reporting functions in each firm and serve as a basis for questions and discussion during the semi-structured interviews. To lead the research interviews in a more effective way, related information from multiple documentary sources was collected and cross-checked ahead of each interview, with incompatible and unclear statement flagged and asked for clarification in the research interviews.

The present research has also been informed by media sources, online databases, government policy statements and academic research paper. This secondary data, as discussed as it arises in the ensuing chapters, not only prepares this study with prerequisite knowledge for the development of interview questions, but also works to “fact check” the corporate self-reporting documents. For instance, by comparing the content of news coverage and corporate self-reporting documents in a given year with
respect to one of the targeted firms, I found that the CSR report from the firm missed important information concerning the controversy on its site cleanups, while the issue was heavily debated in multiple media sources. This discrepancy corroborates the existence of the CSR reporting-performance gap in this particular firm. Then during the interview, I asked both the front-line reporter and the senior manager to explain how the decisions with respect to what to report and what not to report were made and to express views surrounding the absence of such information.42

The method of ethnographic observation was drawn from Conley & Williams, who took use of business ethnography to explore the meaning of CSR to people in corporations and stakeholder groups.43 However, instead of participating in CSR conferences and then conducting mass follow-up interviews, the present research only applied this method at a primitive level, namely attending CSR conferences and training sessions, engaging formal and informal interactions with industry participants during these gatherings, and keeping ethnographic notes.44 The original purpose of attending these events was to clear thoughts and gain some “insider” knowledge. However, in retrospect, watching how the issue of the CSR reporting-performance gap was debated among practitioners allows

42 This refers to M1. See Section 3.3.1 for further discussion of this event.
43 Conley & Williams, supra note 14, at Section II. According to Conley & Williams, business ethnography is a variation on anthropology’s ethnographic method. It involves participant observation of gatherings as well as wide-ranging interviews of the participants.
44 During the fieldwork, I attended three national- and international-wide industry conferences in 2014 that all have a close tie with the present research thesis. They are Convention of Canadian Institute of Mining, Metallurgy and Petroleum (“CIM”), National Conference of Institute of Corporate Directors (“ICD”), and the annual Conference of Principles for Responsible Investment (PRI) in Person. Among the three, I presented my tentative research findings formally at the CIM Convention and discussed informally with other participants at the other two occasions. In addition, I attended the Accountability Project Sustainability Practitioner Course, a series of training sessions designed exceptionally for CSR practitioners and were featured for in-person task-focused discussion and collaboration in small work groups (i.e. around four to five people in each group and altogether three groups). This relatively close, intimate class arrangement allowed me to interact in depth with CSR practitioners during class participation and at coffee and lunch breaks.
access to rich information that complements the interview data.\textsuperscript{45} In particular, the formal and informal interactions with people in the field provide an invaluable entry-point for grasping the overall industry stances toward CSR reporting.

1.4 The Limits of the Empirical Research & the Justification

While striving for a comprehensive empirical study, in retrospect, the present research is limited in two aspects. First, the research was conducted within a limited timeframe. Because of the time horizon of the research, this study only provides a temporal snapshot of the trajectory of CSR reporting in companies, with broader issues and more recent development to be addressed by future investigations. Second, the interview sampling is imperfect. Although it covers a satisfactory spectrum of population and occupations, as can be seen from the interview list, a fairly small number of companies were concentrated on and the number of informants from each company was far too small to furnish anything but hints of what is happening in the field.

However, the two shortfalls are almost unavoidable. With respect to the first issue, fieldwork in itself is time-consuming and labor-intensive, especially for a single researcher, not to mention the pre-fieldwork preparation and the post-fieldwork analysis of data. Although there is a time lag between the fieldwork and the generation of the research results, the present research remains current and has both academic and practical value, because recent CSR crisis cogently shows that the problem of the CSR reporting-

\textsuperscript{45} For instance, both the research interview and the ethnographic data show that rather than apprehending key CSR issues as significant in their own right to the business, practitioners tended to sense CSR reporting from a pragmatic and strategic perspective, emphasizing the business case of practicing CSR reporting. See Section 4.4.1.5 for a more detailed analysis.
performance inconsistency does not fade, but persists and even intensifies. A case in point is the recent Volkswagen emission scandal, which evidently exhibits the widening gap between what was reported and what was done in terms of CSR. In terms of the second limit, for the present qualitative research, the biggest hurdle was gaining access to the field. As precisely described in the literature, despite that corporate people are highly visible, they are not easily accessible. Even for seasoned qualitative researchers, interviewing corporate insiders, especially senior managers and directors, is still a challenging task. The difficulty in negotiating for entrance explains why the present research only involves a small number of companies and from each company one or two interviewees. Nevertheless, the shortfall of samples has been compensated to a great extent by collecting and cross-checking data from different sources and from individuals.

46 In September 2015, the US Environmental Protection Agency alleged that many Volkswagen cars being sold in the United States had been installed special software (known as a “defeat device”) in diesel engines that artificially reduced nitrous oxide (NOx) emissions during the emission testing for certain air pollutants. Later, the Chief Executive of Volkswagen admitted that the company had cheated during emissions tests of its vehicles since 2009. According to the news reports, as many as 11 million vehicles world-wide were equipped with the alleged software. Without the emission cheating software, the engines in fact emitted NOx pollutants up to 40 times above what is allowed in the United States. See: EPA, “Volkswagen Light Duty Diesel Vehicle Violations for Model Years 2009-2016”, online: EPA <http://www2.epa.gov/vw>; Volkswagen, News Release (September 22, 2015), online: <http://www.volkswagenag.com/content/vwcorp/info_centre/en/news/2015/09/Volkswagen_AG_has_issued_the_following_information.html>; Jack Ewing, “Volkswagen Says 11 Million Cars Worldwide Are Affected in Diesel Deception”, The New York Times (September 22, 2015), online: <http://www.nytimes.com/2015/09/23/business/international/volkswagen-diesel-car-scandal.html?_r=0> . (Last visited June 12, 2016.)

However, before the deceit was discovered, the auto giant was reputable as a global leader in CSR and was for many years in a row listed on the Dow Jones Sustainability Indices (DJSI). The company had an accomplished track record of CSR reports, with ambitious goal setting, sound records of emission-reduction and strong external assurance. Ironically, in its 2014 CSR report, Volkswagen said that its emission of NOx in its cars and trucks had dropped by 45% since 2010, which has now been proven false.

47 Although the names of the senior managers and directors were listed on the companies’ websites and can be found in the companies’ reporting documents, the contact information of these people was not readily available. A 40-hour search on the Internet only yielded the e-mail addresses of 60 industry people. Among the 60 industry people who were contacted for interview, only 18 responded with a yes and only 17 actually took the interview. Not to mentioned that some respondents were repeatedly reminded.


49 See ibid.
both inside and outside the corporations.\textsuperscript{50} Moreover, the present research is aware that companies exhibit significant variations in their scopes and sophistication of CSR reporting. As a result, being the first among its kind, rather than trying to cover the CSR reporting details of a large group of companies, the present research aims to examine the CSR reporting-performance relationship in concrete practical situations and serves as a starting point for further debates.

**Summary of Chapter 1**

This chapter introduces the methodology of the present research and defends its choices. In general, the present research combines theoretical and empirical research methodology to corroborate the thesis argument. It sets the empirical focus on publicly-traded Canadian companies. Canada has been chosen to be the targeted country for research, because: first, scholarly discussion of CSR disclosure is scarce in Canada; second, the Canadian CSR reporting practice shows unique characteristics that deserve a country-specific research. Besides, the present research limits its research breadth to three business sectors, retail, banking and mining.

The choice of empirical research methodology is buttressed by three considerations. First, the research question cannot be fully answered by a theory-based analysis. Second, the thesis argument, which is backed by the theory of reflexive law, requires an elaboration on the empirical ground. Third, existing empirical research on parallel topics has gained a fruitful result. In specific, considering that the existing literature on CSR reporting is

\footnote{See supra note 42 and the accompanying texts for an illustration of the cross-reference. More examples will be given in Section 3.3 and 4.4.}
mostly quantitative-based, the present research takes interview-based, qualitative research methodology to fill the research gap.

The majority of the information that feeds the empirical research comes from in-depth, one-on-one research interviews. The interviews were designed following a semi-structured pattern. Each interview lasted from 45 minutes to 1.5 hours. The 26 interviewees who participated in the research interviews were recruited from prior personal contacts, cold e-mails/calls, and by meeting people at the industry conferences. To relieve the concerns of potential interviewees and ensure the yield of high-quality data, the present research has agreed to keep the names of both the organizations and interviewees anonymous.

To ensure the research credibility, additional sources of evidence have been introduced to corroborate and cross-check with the interview data. In particular, the supplementary data come from two sources, documentary data and ethnographic data. The documentary data is primarily in the form of corporate securities filings, CSR publications, memoranda, and other public filings. It provides important clues on issues such as: how the process of CSR reporting has been developed and institutionalized within the companies, whether the companies use previous CSR reporting to refine their policies and elevate internal management systems, and how the improvement and degradation of corporate environmental and social performance compared to the previous year is reflected in the companies’ CSR reports. Moreover, the study has also used media sources, online databases and government policy statements to “fact check” the corporate self-reporting documents. The ethnographic data was gained by attending CSR conferences and training
sessions, engaging formal and informal interactions with industry participants during these gatherings, and keeping ethnographic notes.

While striving for a comprehensive empirical study, in retrospect, the present research is limited in two aspects. First, the research was conducted within a limited timeframe and only provided a temporal snapshot of CSR reporting in companies. Second, the interview sampling is imperfect, as it covers only a fairly small number of companies. Regarding the first aspect, although there is a time lag between the fieldwork and the generation of the research results, the present research remains current and has both academic and practical value, because recent CSR crisis, the Volkswagen emission scandal, cogently shows that the problem of the CSR reporting-performance inconsistency does not fade, but persists and even intensifies. With respect to the second aspect, the shortfall of samples has been compensated by collecting and cross-checking data from different sources and from individuals both inside and outside the corporations.
Chapter 2: The Research Background

Introduction

This chapter provides necessary background information as it relates to the research thesis. It carefully examines what CSR reporting is on a conceptual and analytical basis. It then explains why CSR reporting can be viewed as a corporate learning tool and therefore studied from the perspective of organizational learning. It also digs deeply into the Canadian CSR reporting field, noting the uniqueness of Canada and of the Canadian regulatory structure in terms of CSR reporting.

In the first part, the present chapter briefly introduces the definition and the theoretical underpinning of CSR from a fiduciary perspective. It offers an explicit discussion on the factors surrounding business case, voluntary action, and legal obligation that are intertwined in shaping the direction of CSR. It then differentiates the descriptive and normative perspectives of CSR reporting, noting that although this research generally adopts a descriptive view, both dimensions are to be considered and discussed. In addition, it justifies why CSR reporting instead of other synonymous terms is used in this thesis. Based on the literature, this research defines CSR reporting as the corporate-dominated process of developing plans and procedures for gathering information, disseminating a CSR report and analyzing stakeholder reactions toward the report. By establishing this definition, it not only distinguishes CSR reporting from CSR reports, but also draws a line between CSR reporting and corporate transparency.
Next, this chapter examines the relationship between CSR reporting and corporate learning, arguing that CSR reporting can be viewed as a corporate learning process and studied from the perspective of organizational learning. Such a view expands the research horizon of the present research and provides a more nuanced look into the research problem. In addition, it encourages a reference to the organizational learning literature to address the issue of the CSR reporting-performance inconsistency.

Furthermore, this chapter presents a thorough introduction of the Canadian CSR reporting context, including Canada’s uniqueness in terms of the primary impetus for companies to publish CSR reporting, the Canadian regulatory regime that only regulates CSR reporting at the periphery, and the policy-making debate in Canada with regard to mandatory CSR reporting. All these characteristics have shaped CSR reporting to what it is today.

2.1 Corporate Social Responsibility (CSR) Reporting: An Overview

Since the CSR reporting-performance inconsistency is the central theme of the present research, first and foremost, it is necessary to inspect how the terms of CSR and CSR reporting are defined respectively in the present research. In terms of CSR, this includes the inquiry of what means for business to be socially responsible, where CSR is derived from theoretically, why CSR bears a business case meaning, and how CSR is linked with governmental laws and regulation. With respect to CSR reporting, the present chapter examines the meaning of CSR reporting on both descriptive and normative dimensions, explains why the present research uses CSR reporting instead of other synonymous terms, and differentiates CSR reporting from corporate transparency.
2.1.1 What Is CSR? What Means to Be Socially Responsible?

2.1.1.1 The Definition of CSR

Although there is little dispute that CSR goes beyond charitable causes,\(^{51}\) the literature is still filled with heated debates at least at two dimensions with respect to the definition of CSR. Firstly, scholarly work departs over whether an over-arching definition of CSR is desirable. On the one hand, the universalists argue that it is preferable to maintain a standardized definition of CSR because otherwise what means to be socially responsible is often vague, incomparable and subjective.\(^{52}\) On the other hand, the individualists claim that “[t]he notion of what is socially responsible is situated by contemporary needs and concerns and thus cannot be pinned down in precise and unchanging terms”.\(^{53}\)

The second debate point with respect to the definition of CSR addresses whether corporate economic performance is considered an integral component of CSR.\(^{54}\) One group of definitions of CSR, the inclusivist, suggests that in addition to legal and ethical responsibility, CSR includes corporate economic responsibility that serves the company’s core business.\(^{55}\) Supporters of this view argue that economic responsibility is the “first

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\(^{52}\) The terms universalists and individualists used in the present thesis are borrowed from Chiu, who nevertheless seems to take a middle ground by arguing for a thin form of standardization which preserves the capacity of individualized corporate reflection and response. See: Iris H-Y Chiu, “Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR--A Path Paved with Good Intentions” (2010) 22 Fla J Int Law 361 at 361–62. Also see: Wan Saiful Wan-Jan, “Defining Corporate Social Responsibility” (2006) 6:3-4 J Public Aff 176 (noting that the lack of a widely agreed definition of CSR contributed to misunderstandings and cynicism toward the concept itself).


\(^{54}\) A similar observation is made by Wan-Jan, who differentiates definitions of CSR as an ethical stance from those of CSR as business strategy. See: Wan-Jan, supra note 52.

\(^{55}\) For example, Industry Canada adopts the inclusive definition of CSR. It defines CSR as “a company’s environmental, social and economic performance and the impacts of the company on its internal and external
and foremost social responsibility of business”. On the contrary, the counter-argument holds that CSR refers only to “activities that companies undertake to directly benefit society” and it should exclude corporate economic performance that is mainly aimed at enhancing corporate profitability.

With respect to the first discussion, the present thesis is in sympathy with the view that there is a need for a common ground that “[gives] meaning to the setting of any targets or goals”. However, it also realizes that CSR is context-based and ought to be individual-tailored according to each firm’s unique circumstance. As to the second dispute, although a firm’s motivation to practice CSR may be a mix of self-interest and desire to benefit society, CSR as a definition ought to transcend a company’s economic performance. It is unacceptable that a company claims being socially responsible by merely maximizing its economic profit. Meanwhile, an over-expanded definition of CSR would undermine the value of CSR as a promise to resolve social issues brought about by large corporations.

For these above-mentioned considerations, the present research defers to Waddock’s stakeholders”. See: Industry Canada, “Governance for Sustainability”, online: Industry Canada <https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/h_rsa00577.html> (last visited June 12, 2016).


57 Sandra Waddock, Building the Institutional Infrastructure for Corporate Social Responsibility (Working Paper No. 32, John F Kennedy School of Government, 2006) at 5. Also see: Henry Mintzberg, “The Case for Corporate Social Responsibility” (1983) 4:2 J Bus Strategy 3 (stating that CSR can be practiced in four forms: the purest form of CSR is when CSR is practiced for its own sake; less pure is when CSR is undertaken for enlightened self-interest of the firms; a third form is when CSR is viewed as a sound investment; and the fourth, the least pure form, favours for practicing CSR in order to avoid interference from governmental and legislative authorities that use more forceful methods to address the same issues).

58 Adaeze Okoye, “Theorising Corporate Social Responsibility as an Essentially Contested Concept: Is a Definition Necessary?” (2009) 89:4 J Bus Ethics 613, at 623 (arguing that CSR is an essentially contested concept and there is need for a “common reference point” although universal meaning for CSR is unnecessary).

59 For a detailed discussion of the harms and exploitation made by corporations to the society, see: Joel Bakan, The Corporation: The Pathological Pursuit of Profit and Power (Free Press, 2004).
definition that describes CSR as “activities that companies undertake to directly benefit society”.60

The scope of CSR is also a controversial topic. Arguably, information that could fall into the realm of CSR includes issues related to climate change, human rights, supply chain ethics, workplace safety, environmental performance, community investment and much more. However, in order to gain profound research results while keeping the study manageable, instead of visiting the full spectrum of CSR, the present thesis merely concentrates on its environmental and social aspects.61 This decision was made because environmental and social issues have traditionally formed the core of most CSR approaches and they constitute the backbone of the current CSR reporting architecture in most corporate entities.

2.1.1.2 The Theoretical Base of CSR

From a legal perspective, the theoretical discussion surrounding CSR is intertwined with the debate concerning the purpose and the best interests of the corporation. In academia, two contradicting viewpoints are in prevalence as to this matter. At one side of the spectrum is the shareholder primacy theory, or sometimes called the shareholder-centric

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60 Waddock, supra note 57, at 5. Also some literature trades in the word “responsibility” for “accountability”. However, according to Parker, “CSR requires responsibility”. She argues that responsibility goes beyond accountability since it encompasses the meaning of obligations and rules in addition to ideals and values. See: Christine Parker, “Meta-Regulation: Legal Accountability for Corporate Social Responsibility” in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds, New Corp Account Corp Soc Responsib Law, (Cambridge: Cambridge University Press, 2007) 207, at 213. The present thesis is sympathetic with this view. Therefore, although it treats the two expressions as synonymous, it prefers to use the word responsibility instead of accountability.

61 According to Lin, corporate social and environmental disclosure includes issues of “labor, occupational safety, product safety, environmental protection, and consumer protection”. The present thesis adopts such a definition for environmental and social. See: Li-Wen Lin, “Corporate Social and Environmental Disclosure in Emerging Securities Markets” (2009) 35 N C J Int Law Commer Regul 1, at 3 (noting the three regulatory models of CSR reporting adopted in emerging securities markets and their respective challenges).
mode, which argues that making profits for shareholders is the primary purpose of the corporation and corporate directors and managers should focus on serving the interests of shareholders.\(^{62}\) On the contrary, the other standpoint, the stakeholder theory,\(^ {63}\) holds that the best interests of a corporation should take into account parties that the company interacts with. In line with the latter contention, a growing body of literature suggests that corporate directors need to consider the interests of other corporate constituencies and even sometimes “subordinate shareholder interests to those of employees, communities, or other groups affected by corporate activities”.\(^ {64}\)

Among corporate law scholars, it has been widely recognized that the shareholder versus stakeholder debate was derived from Berle and Dodd in the 1930s.\(^ {65}\) In a published journal article, Berle argues that corporate law is essentially trust law and therefore, “all powers granted to a corporation or to the management of a corporation ... are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears”.\(^ {66}\) Dodd, who disagrees with Berle, states that corporate law transcends

\(^{62}\) For example, see: Stephen M Bainbridge, “In Defense of the Shareholder Wealth Maximization Norm” (1993) 50 Wash Lee Law Rev 1423 (arguing that the principle of shareholder wealth maximization is both a valid positive account of corporate law as well as a legitimate normative proposition). For a definitive statement of this view, also see: Milton Friedman, “The Social Responsibility of Business Is to Increase Its Profits”, \emph{NY Times} (13 September 1970) at 33.

\(^{63}\) This theory is in line with the definition of stakeholders as “anyone affected by the actions of a corporation other than the shareholders themselves, among them employees, consumers, communities, governments, the environment, [etc.]”. See: David Rosenberg, “Delaware’s Expanding Duty of Loyalty and Illegal Conduct: A Step Toward Corporate Social Responsibility” (2012) 52 St Clara Law Rev 81, at FN 8.

\(^{64}\) Ronald M Green, “Shareholders as Stakeholders: Changing Metaphors of Corporate Governance” (1993) 50 Wash Lee Law Rev 1409 at 1411 (posing that the corporate law metaphor of prioritizing shareholder interests is misleading, especially in situations where corporate responsibilities to other corporate constituencies cannot be justified by long-term shareholder benefit).

\(^{65}\) Lisa M Fairfax, “The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms” (2005) 31 J Corp Law 675, at 676 (noting that the shareholder versus stakeholder debate “has received prominent attention since the Berle and Dodd debate). But see: C A Harwell Wells, “Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century” (2002) 51 Univ Kans Law Rev 77, at 79 (noting that the debate between Berle and Dodd was “very much a part of the debates over management overreaching and corporate power”).

the traditional trust conception and expands to a wider set of beneficiaries. He notes that managers “should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders”.

This dialogue gave rise to more recent research on the issue and the argument continues today.

The above-mentioned debate, along with its successors, has a direct bearing on incorporating CSR into the corporate paradigm. This is because the modern business law creates the “division of power” corporate form, which “[vests] powers in corporate directors to manage the affairs of a corporation”.

In exchange of financial and managerial benefits, directors and officers are mandated by law to abide by a series of duties and obligations. The fiduciary duty, which includes duty of loyalty and duty of care, is one obligation imposed on corporate directors and senior managers. The law of fiduciary duty requires board of directors and senior managers to act in good faith and

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68 For instance, a more recent debate on the issue is between Green and Bainbridge, see: Green, supra note 64; Bainbridge, supra note 62. For a parallel debate in Canada, see: Corporate Stakeholder Conference Symposium, (1993) 43 U. Toronto L.J. 297 onward. The shareholder-stakeholder debate also stimulates the progressive corporate law movement in 1990s, which questions the private law nature of corporations and seeks changes from within. Well-recognized forerunners of the progressive law view see: Ralph Nader, Mark Green & Joel Seligman, Taming the Giant Corporation (W. W. Norton, Incorporated, 1977) (supporting federal corporate chartering to render more comprehensive protection to corporate constituencies other than shareholders in the face of corporate monopoly and state judiciary handicap). This school of thoughts were crystalized by two occasions, one the book Progressive Corporate Law edited by Lawrence E. Mitchell and the other a symposium held at the Washington & Lee University Law School in 1992. See: Lawrence E Mitchell, ed, Progressive Corporate Law (Westview Press, 1995); Symposium: New Directions in Corporate Law, (1993)50 Wash. & Lee L. Rev. 1373. Although the progressive corporate law movement advocates “structural changes in corporate law itself designed to serve the interests of nonshareholders with a stake in a corporation’s activities, such as ‘other constituency’ statutes that expand directors’ discretion”, it is in general viewed by critics as being modest and piecemeal. See: Antony Page & Robert A Katz, “Is Social Enterprise the New Corporate Social Responsibility?” (2010) 34 Seattle Univ Law Rev 1351 at 1383.
reasonably believe the decision made is in the best interests of the corporation.\textsuperscript{71} Under the shareholder primacy model, the paramount duty of directors and managers is to maximize value for shareholders. This mode allows limited room for CSR, because it refrains companies from making unprofitable but socially beneficial decisions.\textsuperscript{72} In contrast, following the stakeholder model, “benefiting shareholders remains a goal, but not an overriding one”.\textsuperscript{73} Since directors and managers also assume a legal duty to be attentive to the interests of non-shareholders, such as the employees and the communities, they are refrained from making socially and environmentally harmful decisions, despite the fact that the corporate activities under such decisions may benefit the interests of the corporation and its shareholders. As summarized by the literature, the key disagreement between the two modes with respect to the law of fiduciary duty is “duty to owners alone versus duties to many constituencies”.\textsuperscript{74}

That said, on second thought, the line between the two models is not as obvious as the theorists advocate. Some could argue that being a responsible corporate citizen is also compatible with the shareholder-centric mode, since a management decision that carries social and environmental significance may in the long run benefit the corporation in terms of reputation gains and therefore can be justified in front of the board. Likewise, as will be further discussed in the following section, there are indeed a few practical

\textsuperscript{71} At the federal level, Canadian Business Corporations Act prescribes that directors and managers should “act honestly and in good faith with a view to the best interests of the corporation”. See: \textit{Canada Business Corporations Act}, RSC 1985, c. C-44, s. 122(1)(a). The texts of the provincial statutes convey a similar meaning. For instance, see: \textit{Business Corporations Act} (BC), SBC 2002, c. 27, s. 142(1)(a).

\textsuperscript{72} Rosenberg, \textit{supra} note 63, at 82 (noting that under the shareholder wealth maximization model, "managers pursue outcomes that are designed to generate the greatest long-term profits for the corporation without regard to the consequences to those outside the corporation"). Also see: Bakan, \textit{supra} note 59 at 37 (arguing that under the shareholder-centric mode, "[c]orporate social responsibility is thus illegal--at least when it is genuine").

\textsuperscript{73} Wells, \textit{supra} note 65, at 81.

\textsuperscript{74} \textit{Ibid}. 

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examples in which companies seek win-win solutions that both increase the profitability of the firms themselves and benefit their stakeholders.\textsuperscript{75} The problem, viewed by the present research, is not to argue against the shareholder-centric model when it comes to CSR, but rather to avoid pursuing it to the extreme and making it as an excuse for corporate inaction. A principle that provides protection for shareholders against management entrenchment, the shareholder primacy metaphor should not become a barrier for practicing CSR.

In practice, for decades, the shareholder versus stakeholder debate is more of a case-law discussion than of a statutory law account, since “[statutory] corporate law says little about the [fiduciary duty] owed by directors and managers to entities outside the corporation itself”.\textsuperscript{76} The only exception is in the context of takeover. For instance, over 40 U.S. states have now implemented legislations that either permit or require directors to consider the interests of corporate constituencies other than shareholders when deciding whether to take an offer.\textsuperscript{77} With respect to case law, the literature argues that the shareholder-centric model is the norm.\textsuperscript{78} This stance was most explicitly shown in the US case \textit{Dodge v. Ford}, which has been often cited as a leading case that affirms the

\begin{itemize}
  \item \textsuperscript{75} Michael E Porter & Claas Van der Linde, “Green and Competitive: Ending the Stalemate” (1995) 73:5, Harv Bus Rev 120 (illustrating how corporations that adopt the resource-productivity strategies can increase profit and competitiveness while being environmentally responsible).
  \item \textsuperscript{76} Rosenberg, supra note 63. Although the author speaks about the phenomenon in general, the present thesis confirms that this situation applies in both US and Canada.
  \item \textsuperscript{78} Robert C. Clark, \textit{Corporate Law} (Boston and Toronto: Little, Brown 1986), at 682 (noting that courts have not retreated from the assumption that the “residual” purpose of a business corporation is to make profits for its shareholders).
\end{itemize}
principle of shareholder primacy. However, more recent case law has witnessed a more liberal interpretation of the model. For instance, in Canada, in Peoples Department Stores Inc. (Trustee of) v. Wise (“Peoples”), the Supreme Court of Canada explicitly mentioned in the judgment that the interests of the environment is a factor in determining the best interests of the corporation. Later, in BCE Inc. v. 1976 Debentureholders (“BCE”), the same court, while repeating the doctrine adopted in Peoples, added three more aspects. First, the court emphasized that the best interests of the corporation is a long-term rather than short-term concept. Second, the court made aware that compliance with statutes is only a minimal requirement for the directors. Third, the image of business enterprises ought to be comparable to a good, responsible corporation citizen. Likewise, it is argued that recent developments in the courts of Delaware, the primary source of corporate law in the United States, “suggest that directors owe a duty of loyalty to stakeholders outside

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79 Dodge v. Ford Motor Co., [1919] 170 N.W. 668 (holding that Henry Ford has to operate the company in the interests of its shareholders rather than in the benefit of employees or customers). In the case, the Michigan Supreme Court made a famous quote (at 684):

> There should be no confusion .... A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to ... other purposes.

However, see: Lynn A Stout, “Why We Should Stop Teaching Dodge v. Ford”, (2008) 3 Va Law Bus Rev 163 (arguing that the judicial decision in Dodge v. Ford is a misinterpretation of corporate purpose and at odds with the doctrine of American corporate law). For the counter-argument against Stout, see: Jonathan R. Macey, “A Close Read of an Excellent Commentary on Dodge v. Ford”, 3 Va Law Bus Rev 177 (arguing that the “other-constituency” provisions prescribed in many states cannot be “construed to permit managers to benefit non-shareholder constituencies at the expense of shareholders” and reiterating that the goal of the corporation is shareholder wealth maximization).

80 Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] SCC 68, [2004] 3 S.C.R. 461, at para.42. “[I]t may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of [...] the environment”.

81 BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, at para. 38. “The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation”.

82 Ibid. “The content of [fiduciary] duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meet its statutory obligations”.

83 Ibid, at para.66, 82. “Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders [...] This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen”. However, the impact of the case was undermined by an amended statutory provision in the province of Ontario, which explicitly limits the fiduciary responsibility to a duty “to the corporation”. See: Ontario Business Corporations Act (R.S.O.1990, c. B.16), s.134.
the corporation”.

Nonetheless, in both circumstances, the judicial recognition is limited in its scope, which makes it still highly disputable with respect to the theoretical basis of CSR in law. In specific, under the Canadian circumstance, it is permissive rather than mandatory for directors to consider the interests of stakeholders, while in the US situation, CSR was mainly reduced to law obedience. For this reason, although the space has been created, it is safe to argue that the shareholder-centric mode is still the leading pattern.

2.1.1.3 The Business Case for CSR

In contrast to the lack of an overarching definition of CSR, an overwhelmingly popular belief among the literature and practitioners is that “good corporate citizenship is also good business”, i.e. practicing CSR makes business sense. According to this view, corporate financial, social and environmental goals can all be pursued at the same time, since a more responsibly managed firm “will be more likely to avoid consumer boycotts,

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84 Rosenberg, supra note 63, at 82 onward (discussing the aftermath influence of the decision made by the Delaware Supreme Court in Stone v. Ritter, in which the court affirmed that directors’ duty of good faith is a subset of the director duty of loyalty). See: Stone v. Ritter, 911 A.2d. 362 (Del. 2006) for additional detail. Early judicial recognition was also made in the context of takeover. In the landmark case Unocal Corp v. Mesa Petroleum Co., the Delaware Supreme Court confirms that directors and managers could consider the interests of other corporate constituencies when determining the nature of the threat incurred by a takeover bid. See: Unocal Corp v. Mesa Petroleum Co., 493 A.2d. 946 (Del. 1985).

85 Ed Iacobucci, “Indeterminacy and the Canadian Supreme Court’s Approach to Corporate Fiduciary Duties” 48 Can Bus LJ 232.

86 Although Rosenberg discussed the case Stone v. Ritter under the heading of CSR, he actually explores the situation in which corporate directors deliberately choose to make a decision that violates law or regulation for corporate cost saving purpose. See: Rosenberg, supra note 63. This observation is consistent with that of Hess, who explains, “[a] common view finds that a corporation that meets the requirements of the law is socially responsible”. See: David Hess, “Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness” (1999) 25 J Corp Law 41, at 45.

87 David Vogel, The Market for Virtue: The Potential and Limits of Corporate Social Responsibility (Washington, DC: Brookings Institution Press, 2006), at 11 (noting that the business case argument is "the most important driver of corporate interest in CSR").
be better able to obtain capital at a lower cost, and be in a better position to attract and retain committed employees and loyal customers.” 88

The idea “doing good by doing well” appeals to CSR advocates who look to inspire firms to become more socially responsible as well as corporate directors and managers who seek changes of the companies toward being more socially and environmentally conscious. 89 Although this belief has been challenged academically owing to a lack of consistent study results in terms of the relationship between CSR and corporate profitability, the influence of the view is still vast. 90 For instance, this business case scenario for CSR has been frequently taught at business schools and cited in the literature as a major justification for practicing CSR. 91 It also underlies the business model of many socially responsible investment (SRI) funds. 92 Additionally, it benefits the innovation of

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89 The quotation “doing good by doing well” has been frequently used in the academic literature and cited by practitioners. For example, see: Simon Zadek, Doing good and doing well: making the business case for corporate citizenship (Conference Board, 2000); Aneel Karnani, “‘Doing Well by Doing Good’: The Grand Illusion” (2011) 53:2 Calif Manage Rev 69; Alexander Chernev & Sean Blair, “Doing Well by Doing Good: The Benevolent Halo of Corporate Social Responsibility” (2015) 41:6 J Consum Res 1412. However, it is unclear where this expression was derived from.

90 See Vogel for an explicit analysis of the inconclusive nature regarding academic research on this topic. Vogel, supra not 87, at 29-35. Also see: Conley & Williams, supra note 14, at 14 (arguing that from their empirical work, “[w]ith the exception of those in the socially responsible investment business, we have not heard anyone make a robust claim that CSR can be shown to boost the traditional bottom line”).


92 Other common metaphors used for investments that integrate profits with moral considerations are conscious capitalism, ethical investment and ESG investing.
corporate forms, in particular, the creation of social enterprises, which are marked as both for-profit and mission-driven.\(^{93}\)

Letting alone the fact that some CSR proponents are pessimistic about the companies’ strategic embrace of CSR, \(^{94}\) it is fair to note that the business case argument for CSR has helped to popularize the notion of CSR and to some extent softened the shareholder versus stakeholder debate that underlies CSR. The danger, however, according to the present research, is that the increased embrace of the business case justification for CSR may not linearly translate into more CSR-conscious performance.\(^{95}\) On the contrary, in lack of moral and social beliefs, the market-based arguments for CSR can easily reduce CSR into a collection of symbolic actions. As noted by the literature, driven by the business case explanation, instead of genuinely identifying with the value of CSR, many companies simply act “as if CSR matters”.\(^{96}\) They create illusive corporate images showing that the companies are strongly committed to CSR while in fact being business as usual. Therefore, despite its tentative success in fostering the CSR agenda, the business

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\(^{93}\) Social enterprises are defined as “business that aim to generate profits while advancing social goals”. See: Page & Katz, supra note 68 at 1353.

\(^{94}\) See infra note 227-30 for the literature that represents this view.

\(^{95}\) A related discussion surrounding the business case topic see: Lisa M Fairfax, “Board Diversity Revisited: New Rationale, Same Old Story” (2010) 89 N C Law Rev 855 (showing that the widespread acknowledgement of the business case for board diversity has yet to translate into actual changes in board diversity and arguing that such stagnation is most likely owing to the overemphasis on the business case and underemphasis on the social and moral justifications); Ronen Shamir, “Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility” (2010) 6:1 Annu Rev Law Soc Sci 531, at 544 (positing that the business case scenario provides a key underpinning in corporate resistance to governmental regulation).

\(^{96}\) Vogel, supra not 87, at 73 (emphasis in original). According to Vogel, there indeed is a subset of firms whose social commitments are internally driven. However, for many companies, practicing CSR is simply a defensive strategy to prevent competitive disadvantage.
case strategy should be carefully implemented and monitored. Most importantly, it should not crowd out the moral rationale of CSR.  

2.1.1.4 The Links between CSR & Governmental Law and Regulation

Along with its development from being a niche activity to a mainstream phenomenon, CSR as a research topic has caught the eyes of researchers in many disciplines. The literature has cogently summarized that CSR is a field where “market forces, voluntary action and legal obligation [intertwine]”. However, in contrast to the major management literature that embraces the business case scenario, legal scholars are concerned more about how CSR could fit within the existing legal and regulatory environment and whether law should be used to facilitate or even enforce CSR. With respect to CSR, “[a] tension has emerged between what has grown to be the two wings of CSR: the voluntary, pro-self regulation wing and the mandatory, pro-regulation wing”.

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97 See: Fairfax, supra note 95. This contention echoes to the views expressed by some literature that responsible institutions must have “an inner commitment” to do good. For example, see: Parker, supra note 60 at 214.

98 This section concentrates on introducing how CSR is related to state law and regulation. Although CSR also intertwines with transnational law, especially in terms of transnational voluntary CSR standards, the present research chooses to focus on law and regulation that are backed by a governmental authority, which arguably is the default stance when it comes to the literature on CSR and the law. Likewise, owing to its limited scope, this section discusses governmental laws and regulations in general, without making a differentiation between traditional forms of law and new regulatory methods. However, it is aware of this variation and leaves more detailed analyses to later chapters, which will address the concept of reflexive law. According to Conley & Williams, new governance forms of regulation with respect to CSR were driven by the lack of traditional governmental regulation of corporate conduct. They view CSR practice as a test case of the new governance paradigm. See: Conley & Williams, supra note 14, at Section V.


100 Amiram Gill, “Corporate Governance as Social Responsibility: A Research Agenda” (2008) 26 Berkeley J Intl L 452 at 462 (arguing that the regulation of corporate governance and CSR can be coordinated against the background of New Governance and encompass both corporate self-regulation and meta-regulation). Shamir expresses similar views.
While the self-regulatory proponents argue for voluntary, self-reliant models of CSR, the regulatory advocates prefer to rely on governmental laws and regulations to promote the adoption and implementation of CSR policies within firms.\(^\text{101}\) As McBarnet puts, it essentially is a debate of CSR “beyond the law or through the law”.\(^\text{102}\)

From a historic perspective, CSR was initiated as a self-regulated and market-driven attempt. Corporate managers and directors voluntarily engaged in more socially responsible activities out of various considerations, such as reputation and long-term profitability, or because they were driven by a sense of doing the right thing. Other informal mechanisms such as pressures from shareholders and consumers also functioned during this process, yet they did not change the voluntary nature of CSR. However, while corporate voluntarism still being the norm, with the worldwide advent of corporate scandals in ethical aspects and the growing jeopardies that multi-national corporations made in host countries, more and more researchers began to question the capacity and willingness of companies to genuinely cope with social and environmental problems. In particular, they were concerned whether the small wins made by the voluntary CSR movement were building momentum for expected social changes or just cosmetics for business as usual.\(^\text{103}\) In the face of the enormous corporate power, some argue that more

\(^{101}\) See infra note 104 for a list of the pro-regulation literature.

\(^{102}\) McBarnet, supra note 99, at 43.

\(^{103}\) For examples of doubts regarding corporate voluntarism, see: Edward S Herman, Corporate Control, Corporate Power: A Twentieth Century Fund Study (Cambridge; New York: Cambridge University Press, 1982), at Chap.7 (showing concern over CSR as a viable machinery of reform in the face of the autonomy and power of the business system); Vogel, supra note 87, at Chap.7; Kellye Y Testy, “Linking Progressive Corporate Law with Progressive Social Movements” (2001) 76 Tulane Law Rev 1227, at 1239 (noting that CSR may “become just another commodity that businesses sell in the service of short-term shareholder wealth maximization, rather than the basis for any substantive change in the way business is done”).
stringent governmental intervention should be in place to prevent the wrongdoings of large, publicly-traded corporations and CSR needs to be a part of this endeavour.104

According to the literature, beneath the interplay of corporate self-regulation and external pressure for legalization of corporate social duties lies in the corporations’ attempt to “shape the notion and practice of CSR as an essentially voluntary and nonenforceable issue”.105 As a result, the strategic maneuver of CSR by corporations, as exemplified by many companies’ unilateral or ad hoc projects such as adopting a code of conduct, producing a CSR report or developing specific projects to improve social and environmental practices, could be a useful supplement to governmental regulation in the short run, yet in the long run it cannot and should not replace governmental law and regulation because it is ultimately restricted by its purpose of serving the corporations’ own interests. As Vogel puts, “[t]he most effective strategy for reconciling private

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104 Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press, 2002), at 245 (arguing that the lack of CSR is "a failure of legal regulatory institutions to interact with corporate organizations to make them open and permeable"); Bakan, *supra* note 59; Geoffrey Chandler, “The Curse of ‘Corporate Social Responsibility’”, (2003) 2 New Academy Review 1 (viewing voluntary CSR as a smokescreen that obscures the governmental failure to demand accountability from companies); McBarnet, *supra* note 99 at 27–29 (summarizing viewpoints that call for legal regulation to facilitate CSR).

Although both try to engage official laws and regulations in promoting more responsible corporate performance, the pro-regulation stance toward CSR differs considerably from the pioneer scholarly effort that argues against imposing social obligations upon corporations and seeks changes within corporate law. See *supra* note 68 for a description of the progressive corporate law movement, which is a major branch of the legal academy that distances itself from the shareholder primacy norm in corporate governance. In articulating the differences between the two approaches, Lawrence Mitchell argues:

There have been critics throughout the history of the corporation who have recognized its distinctly public nature. For the most part, however, they have directed their efforts toward superimposing social obligations upon the corporation. The essays in this book take a different approach. They each look to the way in which the public goals of the corporation can be improved from within. Instead of regulating the uses to which the tool is put, these commentators look to redesign the tool itself…” (*Progressive Corporate Law, supra* note 61, at xiv).

*Cf.* Testy, *supra* note 103 (coordinating both approaches under the heading of “new” corporate social responsibility and treating progressive corporate law and the “new” CSR movement as synonymous). Nevertheless, Testy acknowledges that CSR “can ill afford a singular focus on either imposing regulations from outside the corporation, or revising governance structures within, but must instead address both and more in a complex, interdisciplinary approach”. Testy, *ibid*, at 1251.

business goals and public social purposes remains what it has always been, namely effective government regulation”. It is therefore the stance of the present thesis that CSR needs not only to be encouraged, but also be facilitated and in certain circumstances be enforced by the rule of law. It will return to this issue in Chapter 4.

2.1.2 What Is CSR Reporting?

Although lots of CSR-related theoretical issues are still in controversy, CSR reporting as a practical matter has gained dramatic leverage in industrial practice, especially with respect to publicly-traded companies. For example, it has been reported that 75% of the companies in the S&P 500 Index, the most commonly followed equity indices of the US stock market, published CSR reports in 2014, a remarkable rise compared to 20% in 2011. Also according to CorporateRegister, the world’s largest directory of corporate non-financial reports, the global output of CSR reports exceeded 6,500 in 2012 alone, compared to less than 1,600 in 2002. Meanwhile, large professional data service platforms have unanimously started to provide elevated services on environmental, social, and governance (ESG) data, because institutional investors and proxy voting agencies have expressed growing interests in CSR information in recent years. As a result, influential data service providers, such as Bloomberg, Thomson Reuters and MSCI, all have their service lines surrounding ESG information. According to Bloomberg, the number of users accessing its ESG

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107 See Section 1.2.1 for reasons of focusing on publicly-traded enterprises. That said, the present research disagrees with the viewpoint that CSR is about big business, although it acknowledges that large companies have more resources and capacity to be committed to CSR. See: Wells, supra note 65 at 80.

108 The S&P 500, or the Standard & Poor’s 500, is an American stock market index based on the market capitalizations of 500 large companies that are listed on the NYSE or NASDAQ. It is one of the best representations of the US stock market.


110 See: CorporateRegister, CR Perspectives 2013: Global CR Reporting Trends and Stakeholder Views, at 3.

111 At the provide side, influential data service providers, such as Bloomberg, Thomson Reuters and MSCI, all have their service lines surrounding ESG information. According to Bloomberg, the number of users accessing its ESG
result, more and more jurisdictions in the world have taken steps to encompass CSR reporting within their legal frame.\textsuperscript{112} In this vein, it is tremendously important to comprehensively explore the conception of CSR reporting, so as to precisely apprehend

\begin{quote}
\end{quote}

\textsuperscript{112} To date, the most common governmental reaction is promulgating laws or regulatory standards that require publicly-listed companies to make CSR disclosure regularly. This practice is especially popular in European countries. In 2014, the EU parliament adopted and the EU council further approved the Directive on disclosure of non-financial and diversity information by large companies (the “Directive”), asking member States to transpose the Directive into national legislation by December 2016. See: European Commission, “Non-Financial Reporting”, online: [http://ec.europa.eu/finance/accounting/non-financial_reporting/index_en.htm] (explaining the Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings). Accordingly, a number of EU member states, such as France and Denmark, have already developed initiatives and laws to regulate CSR reporting from large, publicly-traded companies. See: France Diplomatie, “The French Legislation on Extra-Financial Reporting: Built on Consensus” (2012), online: [http://www.diplomatie.gouv.fr/en/IMG/pdf/Mandatory_reporting_built_on_consensus_in_France.pdf] (discussing the NRE Act 2001 that requires listed companies disclose the environmental and social impacts of their activities and the counter-measures in their annual report, as well as Article 225 of the Grenelle II Act 2010 that asks companies to report “on how they take into account the social and environmental consequences of [their] activity and [their] social commitments in favour of sustainable development”) (last visited June 12, 2016). Also see: DanWatch, “The Impact of the Danish Law on CSR Reporting” (2011), online: [http://germanwatch.org/de/download/10649.pdf], at 4-5 (reporting that the Danish Parliament approved law requiring that since 2009, “[l]arge companies must supplement their management’s review with an account of social responsibility”, which includes “considerations for human rights, social relations, environmental and climate considerations as well as combating corruption, inter alia”) (last visited June 12, 2016).

Another commonly held arrangement is formalizing CSR reporting by acknowledging it in public policy documents and delegate stock exchanges to finalize the requirements. For instance, in South Africa, the King III Code recommends that entities produce a report integrating their financial and CSR performance or explain why they do not. This policy is adopted as a listing requirement for the Johannesburg Stock Exchange (JSE). See: JSE Limited Listings Requirements, § 8.63, online: JSE [https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf] (last visited June 12, 2016). Likewise, Singapore Exchange (SGX) also makes it mandatory for all listed companies to publish CSR reports. See: SGX, “Guide to Sustainability Reporting for Listed Companies”, online: [http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Sustainability_Reporting_Guide_and_Policy_Statement_2011.pdf] (last visited June 12, 2016). This regulatory type has a close affinity with the former one, since despite their lack of legal status, the requirements of CSR reporting in this category have nevertheless been officially endorsed. Therefore, some literature treats the two as both being “mandatory”. For instance, see: Ioannis Ioannou & George Serafeim, “The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries”, online: SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799589] (examining the regulatory mandates on firms in China, Denmark, Malaysia and South Africa). However, the present thesis argues that it is not enough for stock exchanges to have CSR reporting as part of their listing requirements. The biggest limitation of this arrangement is that the exchanges may be unwilling to punish listed companies out of business concerns. See: Marcel Kahan, “Some Problems with Stock Exchange-Based Securities Regulation” (1997) 83:7 Va Law Rev 1509. The thesis will come back to this theme at Section 4.2.2.2.
and appropriately respond to the trend in scholarly debate. The following text is therefore an endeavour toward that direction.

2.1.2.1 The Descriptive & Normative Perspectives of CSR Reporting

A distinction between the descriptive and the normative dimensions of CSR reporting lays the foundation of the present research and therefore should be emphasized prior to resolving the difficulty in defining the concept of CSR reporting.

From a normative perspective, CSR reporting is viewed as a governance instrument that functions by measuring and comparing corporate performance in CSR aspects.\textsuperscript{113} However, as will be documented in the ensuing chapter, because corporations have “both incentive and opportunity to manipulate CSR”,\textsuperscript{114} in reality, the strategic use of CSR reporting by companies is the norm rather than the exception.\textsuperscript{115} As a result, how a corporation performs in terms of CSR has extremely weak connection with how well it is in CSR reporting. It is therefore imprecise in a descriptive sense to envision CSR reporting as a performance measurement tool with respect to CSR. On the contrary, from a descriptive perspective, CSR reporting has mostly reduced to a communication tool and a risk management tool.\textsuperscript{116}

\textsuperscript{113} David Hess, “Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency” (2007) 17:3 Bus Ethics Q 453 (arguing that social reporting can be an important form of New Governance regulation).

\textsuperscript{114} Conley & Williams, supra note 14, at 35.

\textsuperscript{115} For instance, Hess notes that the present CSR reporting “almost exclusively emphasizes only the positive aspects of the firm’s performance”. Hess, 2007, supra note 115, at 456.

\textsuperscript{116} In the management literature, CSR reporting is often discussed from the perspective of communication and risk management. For example, see: David Wheeler & John Elkington, “The End of the Corporate Environmental Report? Or the Advent of Cybernetic Sustainability Reporting and Communication” (2001) 10:1 Bus Strategy Environ 1. Also see: Jan Bebbington, Carlos Larrinaga & Jose M Moneva, “Corporate Social Reporting and Reputation Risk Management” (2008) 21:3 Account Audit Account J 337. In terms of the legal literature, Dhir also argues that “[t]he reporting of social information should be viewed as an integral part of a business’ overall risk management strategy”.

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The purpose of this analysis is to clarify that the problem of the CSR reporting-performance inconsistency, as will be further described in Chapter 3, actually falls into the descriptive and empirical realm rather than the normative one. In normative theory, a CSR report is supposed to reflect the authentic state of corporate performance in CSR aspects, be it positive or negative. It is this full picture of CSR that has the potential of empowering corporate stakeholders and driving corporate directors and managers to self-examine internally and respond accordingly. However, in practice, more often than not, the picture that a CSR report displays falls short of being a complete and balanced portrayal of the reality. The theory-practice gap determines that solutions posed by the literature in a normative sense need to be tested and justified empirically, to see if they also work on the descriptive ground. However, this issue has been largely ignored in the existing CSR literature. To remediate this research gap, the present study combines theoretical analysis with empirical findings to exhibit a fuller picture of the CSR reporting field. In addition, it considers whether the viewpoints put forward theoretically can be empirically corroborated. For this reason, although the present research generally adopts a normative view in its argument, both normative and descriptive dimensions are to be considered and discussed.

See: Aaron A Dhir, “Shadows and Light: Addressing Information Asymmetries through Enhanced Social Disclosure in Canadian Securities Law” (2008) 47 Can Bus Law J 435 at 462 (positing that the current Canadian securities law provides a sufficient legal basis for the disclosure of material social information).

117 For instance, the literature addresses the reflexive law theory largely from an analytical, normative perspective. See: Section 4.3.1 and 4.3.4 for the literature on this topic.

118 Specifically, the present research focuses on using the empirical, descriptive data to inform the normative issues of theory building and policy making with respect to CSR reporting.
2.1.2.2 The Definition of CSR Reporting & the Synonymous Terms

For the purpose of the present research, CSR reporting is defined as the sum of corporate-dominated processes and activities surrounding CSR information collection, report production and post-report actions.\textsuperscript{119} By making such a definition, the present research differentiates CSR reporting from CSR reports and it focuses on the former, since the process of generating a CSR report is the key to incentivizing improvement of corporate self-regulation in CSR. As Chiu noted, “[w]hat is reported, how it is reported, and the reception of what is reported are all part of the wider discourse on framing the conception(s) of CSR itself”.\textsuperscript{120}

Like CSR, CSR reporting is not a universally agreed term. Other terms that are used synonymously by the literature include non-financial reporting, triple-bottom-line (TBL) reporting, corporate citizenship reporting, corporate responsibility reporting, corporate sustainability reporting, and ESG reporting. The following text briefly examines three most widely used phrases in addition to CSR reporting and explains why the present research adopts CSR reporting instead of other terms.

The term used most frequently by accounting professionals is TBL reporting. TBL is an abbreviation of people, planet, and profit.\textsuperscript{121} As such, TBL reporting provides

\textsuperscript{119} The present research refers to CSR reports in a broad sense. On the one hand, it recognizes that in practice, the manifestation of CSR reports is by no means identical between firms. Instead, they are in various forms. For instance, there are standalone CSR reports as well as CSR components integrated in corporate annual reports. Different from hardcopy reports, some CSR reports are paperless and were disseminated with contemporary forms of communications, such as blog and twitter. In addition, as previously mentioned, since CSR reporting activities are statutory in certain jurisdictions yet voluntary in others, depending on the circumstances, CSR reports may be either regulatory or non-regulatory. On the other hand, however, the present research does not confine itself to a particular type of CSR reports, since the problem this study focuses on exists generally in the CSR reporting practice, despite the forms of its outputs.

\textsuperscript{120} Chiu, \textit{supra} note 52 at 366.

\textsuperscript{121} The concept TBL was arguably coined by John Elkington. See: Elkington, \textit{supra} note 91.
information on business activities concerning these three aspects. The concept of TBL posits that the success of a corporation should not only be measured by the traditional financial bottom line, but also by two additional bottom lines—corporate social/ ethical and environmental impact. Although this term has gained popularity in industry, the academic literature finds it untenable and inherently empty. Norman & MacDonald criticize the concept as being a “good old-fashioned single bottom line plus vague commitments to social and environmental concerns” that is “exceedingly easy for almost any firm to embrace” and allows firms “to make almost no commitment whatsoever”. Elsewhere, Livesey worries that the metaphor of the TBL constructs CSR as “a measureable outcome to be objectively determined” and therefore can be easily fit into business discourse, yet it “left unchallenged certain fundamental values of economic and management models”.

Another term that is equally favoured by industry, especially institutional investors, is ESG reporting. ESG reporting, based on the notion of ESG, encourages corporate reporting on issues related to the environmental, social and governance aspects of business operations. It conveniently links the environmental and social aspects, two key components of CSR, with corporate governance. The rationale behind the convergence is twofold: first, corporate governance mirrors “the company’s conscience

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122 Ibid.
123 Wayne Norman & Chris MacDonald, “Getting to the Bottom of ‘Triple Bottom Line’” (2004) 14:2 Bus Ethics Q 243 (arguing that the TBL rhetoric is misleading and may be used by firms to avoid truly effective social and environmental reporting).
124 Ibid, at 256.
126 Although it is not clear where this term exactly comes from, ESG has been frequently adopted by the major data service platforms as a non-traditional way of examining corporate performance. See supra note 111.
and long-term commitment” to various constituencies and this long-term, sustainable component is aligned with the essence of CSR; second, corporate governance can be used as a vehicle for pushing management to consider broader social and ethical considerations, which are required by CSR. However, although corporate governance has shifted “from a functional, economic focus on agency problems within a private law sphere to a public policy approach that seeks to protect investors and non-shareholder stakeholders”, corporate governance is still a corporation-oriented and business-amenable notion. The shortcoming of the governance-CSR intersection is that it may shape CSR in ways that compromise its transformative potential, because many corporate governance issues, such as board diversity and executive compensation, are only a surface reaction to CSR. Despite their improvements in corporate governance, companies can nevertheless “use their power to structure and dominate a CSR discourse that devolves into little more than a public relations exercise—a post-regulatory version of regulatory capture”.

Corporate sustainability reporting is an expression that has been frequently used in the academic literature as well as by the Global Reporting Initiative (“GRI”) in its reporting guidance. This term was derived from the concept of sustainable development or sustainability, which is a very important guiding norm in environmental law. A widely

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127 Gill, supra note 93 at 455.
128 Ibid at 456.
129 Shamir, supra note 6.
130 Conley & Williams, supra note 14 at 36.
131 The Global Reporting Initiative (GRI) is arguably the most influential standards provider of voluntary CSR reporting worldwide. For a detailed summary of the organization and the standards and a critical comment on both, see: Galit A Sarfaty, “Regulating through Numbers: A Case Study of Corporate Sustainability Reporting” (2012) 53 Va J Int Law 575.
agreed definition of sustainable development or sustainability is “development that meets
the needs of the present without compromising the ability of future generations to meet
their own needs”.\(^{133}\) Despite its environmental origin, the notion of sustainability now
covers a full spectrum of economic, environmental and social factors and concentrates on
the integration of these factors.\(^{134}\) However, since sustainability was initially associated
with environmental and ecological development, the phrase runs the risk of being
misunderstood among corporate management and even government officials as narrowly
referring to environmental sustainability.\(^{135}\)

While the majority literature uses these above-mentioned terms interchangeably, some
holds that there are important differences in the varying connotations.\(^{136}\) Although
agreeing that there are indeed divergences with respect to the different expressions of
CSR reporting, the present thesis treats these phrases as synonymous, since the


\(^{134}\) According to United Nations, these three factors are universally recognized as three pillars of sustainability. See:
President of the 65th Session, General Assembly of the United Nations, “Sustainable Development”, online: UN

Accountants of Canada (CPA Canada) criticizes that although the FSDS acknowledged the need to integrate
environmental, economic and social factors, it unfortunately focused only on environmental sustainability, “a term that
is not defined and is much narrower in scope than sustainable development”. See: CPA, “Re: Comments on Planning
(June 13, 2013), at 2-3, online: CPA <https://www.cpacanada.ca/en/the-cpa-profession/about-cpa-canada/cpa-canadas-
key-activities/government-relations/other-government-input/Environment-Canada-Consultation-on-the-Federal-
Sustainable-Development-Strategy> (last visited June 12, 2016).

The research interviews with practitioners reinforced this conclusion. In fact, the study adopted the term corporate
sustainability reporting instead of CSR reporting in the first place. However, when asked to express their views
regarding corporate sustainability reporting, quite a number of interviewees responded by only addressing the
environmental progresses their companies have made in the past and how the companies incorporated those issues in
their reporting documents. They started talking about social factors only after being reminded that sustainability
encompasses broader aspects such as social. Because of the widespread misunderstanding, the research then changed
the expression to CSR reporting.

\(^{136}\) For instance, Williams differentiates the term CSR from corporate citizenship based on Matten & Crane. She notes
that CSR conveys a meaning of duties while corporate citizenship signifies more of privileges. See: Cynthia A
differences among various expressions of CSR reporting are irrelevant to the present thesis. However, the present research prefers to use the expression CSR reporting rather than its synonyms because CSR reporting is a generic name that describes corporate reporting of this kind. It is unambiguous and easily understood, an important advantage in research interviews, as shown in experience.\textsuperscript{137}

The present research centres on official forms of regulation with respect to CSR reporting. In addition to official governmental regulation, in the field of CSR reporting, there are unofficial, private regulatory bodies, such as the GRI, that have become key players in setting CSR reporting standards using various indicators.\textsuperscript{138} However, the present research does not concentrate on these unofficial forms of regulation because the unofficial forms of regulation in terms of CSR reporting are challenged by concerns of legitimacy and credibility. As the literature notes, “[o]rganizations that produce indicators may become more preoccupied with perpetuating their existence and raising their status, rather than using the indicators as a tool to shape behaviour”.\textsuperscript{139}

2.1.2.3 CSR Reporting & Corporate Transparency

A well-articulated research theme that is closely related to but often mistakenly coupled with corporate reporting is corporate transparency. To clarify the ambiguous relationship between the two concepts, this section takes a brief look at corporate transparency and

\textsuperscript{137} The expression CSR reporting was better comprehended and accepted by interviewees in the research interviews. See supra note 125 for more information.

\textsuperscript{138} See: supra note 131 for a brief introduction of the GRI.

\textsuperscript{139} Sarfaty, supra note 131, at 607. For critics of the GRI, also see: Klaus Dingwerth & Margot Eichinger, “Tamed Transparency: How Information Disclosure under the Global Reporting Initiative Fails to Empower” (2010) 10:3 Glob Environ Polit 74.
explains why the present research goes further than the thesis of corporate transparency and has important separate value.

Corporate transparency embodies an aspirational goal that corporations make full and credible disclosure to the public of information that concerns their operation and performance. Undoubtedly, corporate self-reporting of how CSR aspects impact the company and how it reacts to those challenges may lead to increased corporate transparency on CSR issues. However, the problem is that plenty of the literature takes corporate transparency as an uncontestable consequence of CSR reporting. This view is questionable on both normative and descriptive grounds, because: for one thing, from a normative perspective, corporate transparency should not be the sole purpose of CSR reporting; for another, from a descriptive perspective, CSR reporting does not necessarily improve corporate transparency.

As to the normative reason, the literature has forcefully argued that CSR reporting functions on two major dimensions. First, it facilitates the flow of information and increases communications with corporate stakeholders, destined to achieve corporate transparency; second, it aims to improve corporate performance on CSR matters by shaping corporate management processes regarding CSR reporting, influencing corporate

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140 Many scholarly work in this area either uses corporate disclosure and transparency interchangeably or views transparency as an uncontestable consequence of CSR reporting. Among the literature that concerns this subject, some pieces use “transparency” in the title of their articles, yet the entire work is centred on CSR disclosure with little or no mentioning of how the two are related. For instance, see: Cynthia A Williams, “The Securities and Exchange Commission and Corporate Social Transparency” (1999) 112:6 Harv Law Rev 1197 (arguing that requiring expanded corporate reporting on social and environmental issues is in line with the language, purpose and legislative history of the US securities law). Also see: Hess, 2007, supra note 115. In other situations, the literature, especially that based on quantitative research, counts CSR reporting as a taken-for-granted proxy of transparency when the research is on how transparent a company or industry is compared to its counterparts. For example, see: Lizet Quaak, Theo Aalbers & John Goedee, “Transparency of Corporate Social Responsibility in Dutch Breweries” (2007) 76:3 J Bus Ethics 293.
culture, and motivating key individuals inside the companies to be more CSR-conscious.\textsuperscript{141} Focusing unilaterally on corporate transparency can lead to “transparency for its own sake rather than actual improvements in [corporate] behaviour”.\textsuperscript{142}

Consequently, as the literature notes, disclosure for the aim of corporate transparency “is only a part of the story—though a very important part—and not the whole story”.\textsuperscript{143}

With respect to the descriptive defense, it is necessary to distinguish information availability from corporate transparency.\textsuperscript{144} A natural gap between information disclosure and corporate transparency is that “simply placing information in the public domain does not guarantee that it will be used or used wisely”.\textsuperscript{145} According to the literature, transparency policies are effective only when the information they produce becomes embedded in the everyday decision-making routines of information users and information disclosers.\textsuperscript{146} Successful corporate transparency programs thus incorporate a sequence of events to ensure that both information users and information disclosers actually take into account the information disclosed and respond accordingly. However, these institutional

\textsuperscript{141} The literature adopts various expressions to describe the purposes of CSR reporting beyond corporate transparency. For instance, MacLean and Rebernak suggest that CSR reporting process should “serve a dual role: It should communicate externally with the company’s stakeholders while also informing the company’s internal management processes”. See: Richard MacLean & Kathee Rebernak, “Closing the Credibility Gap: The Challenges of Corporate Responsibility Reporting” (2007) 16:4 Environ Qual Manag 1 at 3. Furthermore, Sulkowski & White argue that CSR reporting serves “a valuable function in the marketplace and ultimately relates to companies behaving in a manner that is desired by society”. See: Sulkowski & White, supra note 36, at 512. More explicitly, Eccles & Serafeim posit that in addition to providing information to counterparties, corporate reporting serves another function, which they term as the “transformation function”. According to them, CSR disclosure may influence corporations to bring performance changes either actively or under the pressure of counterparties. See: Robert G Eccles & George Serafeim, "Corporate and Integrated Reporting: A Functional Perspective" (2014) [unpublished], online: SSRN <http://papers.ssrn.com/abstract=2388716> (last visited June 12, 2016).

\textsuperscript{142} Sarfaty, supra note 131, at 608.

\textsuperscript{143} Hess, 1999, supra note 86 at 43.

\textsuperscript{144} Fung, Graham & Weil, supra note 7, at xiv (suggesting that “[e]ffective [transparency] policies did not simply increase information. They increased knowledge that informed choice”).

\textsuperscript{145} Ibid at 51.

arrangements are currently lacking in CSR reporting. To make things worse, corporations are increasingly engaging in “strategic ambiguity” in their CSR reporting, which hurts the credibility of information and undermines corporate transparency.\textsuperscript{147} As a result, CSR reporting may not be conducive to corporate transparency and could even be counter-productive to it.

For these above-mentioned reasons, the present research studies CSR reporting beyond the theme of corporate transparency. By paying attention to an important research thesis that has been underemphasized in the literature, \textit{i.e.} the deviation of CSR reporting from corporate actual performance, it makes the research of CSR reporting more comprehensive and more concrete.

\section{2.2 CSR Reporting as an Organizational Learning Process}

What sets this study apart from the previous legal research on CSR reporting and makes it uniquely significant is that the present research considers CSR reporting from organizational learning prospects. This view is implicit throughout this entire dissertation, from the description of the empirical findings to the theoretical remodeling of reflexive law. This section explains the reasons of working from such a perspective and how it gives the present study a vintage point in pinpointing the research thesis.

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\textsuperscript{147} Michael R Siebecker, “Trust & Transparency: Promoting Efficient Corporate Disclosure through Fiduciary-Based Discourse” (2009) 87 Wash Univ Law Rev 115, at 115 (noting that the existing disclosure regime are not trusted by consumers and investors because it fails to provide reliable CSR information).
\end{flushright}
2.2.1 The Links between CSR Reporting & Organizational Learning

The study of corporate performance as it relates to CSR reporting is grounded in the exploration of how corporations learn and put learning into practice.\(^{148}\) While the literature has yet to provide a theoretical definition of organizational learning, the existing research tends to agree on that organizational learning is inseparable from the handling and processing of information—“knowledge” in many scholars’ writing.\(^{149}\) The research of organizational learning thus primarily concerns the process of how information is shared and assimilated within the organizations. One pivotal point that combines organizational learning with the present research of CSR reporting is the contention that “[a]n entity learns if, through its processing of information, the range of its potential behaviours is changed”.\(^{150}\) A further observation is that “the type of change that leads to an improved fit between an organization and environmental or other

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While the current thinking of organizational learning is dispersed in multiple disciplines, scholars attribute the origin of research on organizational learning to behavioural studies of organizations. See: Antal et al, “Introduction”, in Meinolf Dierkes et al eds, *Handbook of Organizational Learning and Knowledge* (Oxford University Press, 2001), at 3 (citing several behavioural psychologists as “the founding fathers” of organizational learning); Barbara Levitt & James G March, “Organizational Learning” (1988) 14:1 Annu Rev Sociol 319, at 320 (noting behavioural studies of organizations as the building blocks of organizational learning). Many debates in the present research area are inherited from Argyris & Schon, who distinguish two types of organizational learning, which they name as “single loop learning” and “double loop learning” respectively. They argue that most organizations have limited learning systems that allow them to only work on single loop learning, which is the learning process that addresses errors in corporate strategies rather than the underlying norms of the corporations. See: Chris Argyris & Donald A Schön, *Organizational learning: a theory of action perspective* (Addison-Wesley Pub. Co., 1978).

\(^{149}\) In the literature, the term “information” and “knowledge” are often used interchangeably. According to the literature, “information is a necessary medium or material for eliciting and constructing knowledge”. Ikujirō Nonaka et al., “A Theory of Organizational Knowledge Creation: Understanding the Dynamic Process of Creating Knowledge”, in Meinolf Dierkes et al, eds, *Handbook of Organizational Learning and Knowledge* (Oxford University Press, 2001), at 492.

\(^{150}\) George P Huber, “Organizational Learning: The Contributing Processes and the Literatures” (1991) 2:1 Organ Sci 88, at 89. Huber further refines this contention in three aspects: first, learning can be either conscious or unconscious; second, learning can be either correct or incorrect; third, the behavioural changes induced by learning can be either observable or in the form of insights and awareness (at 88-89).
contingencies”, the so-called “beneficial change”, “involves a degree of learning”.\textsuperscript{151} To relate these understandings with the research thesis of the present study, when the CSR reporting-performance inconsistency is questioned, what is explicit in the phenomenon is that corporations fail to align their reporting with their performance, while what is implicit is that corporations learn insufficiently from their process of CSR reporting. Corporate learning is thus a nexus that bridges CSR reporting and corporate actual performance in CSR aspects. In this sense, it makes great sense to study CSR reporting from an organizational learning prospect and to refer to the organizational learning literature to obtain insights into how to develop the CSR reporting process into a corporate learning practice.

\subsection*{2.2.2 The Advantages of Viewing CSR Reporting from the Prospects of Organizational Learning}

According to the present research, studying CSR reporting from the prospects of organizational learning is meaningful in at least three aspects. First, as the discussion in the previous paragraph vividly shows, studying CSR reporting from the perspective of organizational learning expands the research horizon of the present research and provides a more nuanced look into the research problem. It helps the present research identify that the lack of corporate learning could be an important factor underlying the CSR reporting-performance inconsistency, as the examination of where

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the problems lie with respect to the CSR reporting practice resonates with what the organizational learning literature identifies as “barriers to organizational learning”. ¹⁵²

Second, organizational learning leads the way to which the theoretical framework of the present research is identified and refined. According to the organizational learning literature, “conscious and systematic” organizational learning processes “involve a critical and reflective attitude toward the information being processed, and that lead to actions to which organizational actors feel internally committed”. ¹⁵³ This stance corroborates the adoption of the reflexive law approach in addressing the CSR reporting-performance gap, as both organizational learning and reflexive law emphasize the role of corporate self-reference in promoting corporate behavioural changes. ¹⁵⁴ Furthermore, the “reflexive law plus” model proposed by the present research, which is built upon reflexive law yet involves additional institutions to reinforce corporate self-reference, is also significantly inspired by the notion of organizational learning. ¹⁵⁵

Third, the research of organizational learning is firmly grounded in practice. The literature on how companies treat or fail to treat CSR reporting as a process of learning provides important empirical-based observations that enrich the present research inquiry

¹⁵² Ariane Berthoin Antal, et. al., “Barriers to Organizational Learning”, in Meinolf Dierkes et al, eds, Handbook of Organizational Learning and Knowledge (Oxford University Press, 2001), at 865. See Section 4.3 for further analyses.
¹⁵⁴ The thesis will come back to this point at Section 5.1.
¹⁵⁵ The present research inherits from the organizational learning literature the overarching thesis that it is not enough to impose external requirements on companies to report on CSR, because companies vary in the extent to which they learn, i.e. they assimilate and internalize the requirements differently. As a result, external triggers and internal thrusts should be both considered in policy development regarding CSR reporting with the purpose of stimulating corporate learning. Based on this understanding, the present research advocates for additional institutions as they relate to the reflexive law approach, since these aspects are targeted at promoting and deepening corporate self-reference, an indispensable component of corporate learning, within the reporting firms. See Section 5.1 for an analysis of the corporate self-reference function and see Section 5.2 for a discussion of the additional institutions proposed by the “reflexive law plus” model.
and corroborate the empirical findings of the present research. In particular, the present research gains insights from the organizational learning literature in explaining what underlying factors shape companies the way they are. In addition, organizational learning enlightens the current study in terms of organizing and presenting the empirical data.

2.3 The Canadian CSR Reporting Context

The present research is rooted in the Canadian context. Since the cultural and institutional background underpinning CSR reporting varies so much on a global scale, it is almost impossible to precisely describe the CSR reporting context unless the geographic area is identified. In particular, owing to the regulatory complexity, the literature criticizes that the conceptual framework of CSR reporting lacks a clear regulatory regime. This complexity necessitates a local perspective for a precise and in-depth research. In line with this understanding, the empirical work that bolsters the thesis argument of the present research was conducted surrounding a few Canadian companies and with Canadian practitioners. In addition, the policy implication that the present research proposes is Canadian-based. Under such a setting, it is necessary to provide the necessary

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156 One of the most authoritative and comprehensive publications of organizational learning is from Dierkes, et al.. See: Meinolf Dierkes et al., eds, *Handbook of Organizational Learning and Knowledge* (Oxford University Press, 2001).
157 A key problem underlying the CSR reporting-performance inconsistency identified by the empirical research of this study is the lack of learning practices within certain firms. See: Section 4.4.1 for the description.
158 According to the organizational learning literature, the adoption of learning ultimately depends on “the specific culture, leadership styles, and structural features” of the companies. See: Dierkes et al., *supra* note 156, at 756. This literature provides a roadmap for the empirical exploration of the potential opportunities for realigning CSR reporting with corporate performance. See Section 4.4 for the discussion.
details with respect to the Canadian CSR reporting context, especially the regulatory context, in this overview chapter.

2.3.1 The Uniqueness of Canada in CSR Reporting

Viewed by the present research, in Canada, the impetus for companies to disclose CSR information is derived primarily from societal expectations and industrial pressure, rather than from regulatory agencies and laws. Both the literature and the empirical research have corroborated this point.

In terms of societal expectations, stakeholders, in particular investors, have played a decisive role. According to the data provided by Bloomberg Inc., Canadian investors show an extremely high interest in CSR performance metrics compared to investors in other countries. A possible reason is that the mainstream institutional investors in Canada, particularly pension funds, have become more receptive to socially responsible investment (SRI). For instance, a record number of shareholder proposals were filed by pension and mutual funds in recent years calling on companies to publish CSR reports.

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161 Robert Eccles & George Serafeim, “Accelerating the Adoption of Integrated Reporting”, in Francesco de Leo & Matthias Vollbracht, eds, CSR Index 2011 (InnoVatio Publishing Ltd, 2011) at 80–82. The Bloomberg data was provided to the authors and not publicly available.

162 According to a study of the Boston Consulting Group, public pension fund investing in Canada encompasses a combined asset of more than C$ 1.1 trillion, which equals to 45% of Canada’s gross domestic product. See: The Boston Consulting Group, Measuring Impact of Canadian Pension Funds (October, 2015), online: <http://toronto.bcg.com/images/file202972.pdf> (last visited June 12, 2016).
using the GRI guidelines or to make improved disclosure on climate change and supply chain management.¹⁶³

Moreover, in Canada, non-state actors, such as non-governmental organizations (NGOs) and private standard-setting bodies, are deeply involved in defining the CSR reporting territory. For one thing, the NGOs, such as Shareholder Association for Research and Education (SHARE), provide a major SRI research and advocacy forum in Canada.¹⁶⁴ By actively involved in proxy voting and engagement on behalf of large institutional investors, SHARE helps to shape the investment environment surrounding publicly-traded companies and therefore uplift the importance of CSR and CSR reporting in the business practice. For another, the UN Global Compact (UNGC) and the GRI, two worldwide standard-setting bodies for CSR, both have a strong local reach in Canada.¹⁶⁵ While promoting the adoption of their protocols respectively, these organizations perform important educational roles to popularize CSR reporting in Canada.

The industrial pressure in Canada for CSR reporting comes largely from peer companies and industry associations. In particular, among the three industries that the present research is focused on, mining has the most developed and robust industry association

¹⁶³ This point was corroborated in the empirical research. For instance, the front-line CSR reporting manager of M2 mentioned during the interview that “our company started reporting against the GRI out of a shareholder resolution by institutional investors”.

¹⁶⁴ For more detailed information about shareholder proposals on this topic, see the shareholder proposal database provided by the Shareholder Association for Research & Education (SHARE), online: SHARE <http://www.share.ca/shareholderdb> (last visited June 12, 2016).

¹⁶⁵ Among other things, SHARE maintains a database of shareholder proposals filed with Canadian companies.

¹⁶⁶ It has been noted that SHARE has included the UNGC as an international benchmark to guide Canadian pension funds in voting their shares. See: Benjamin J Richardson, Socially Responsible Investment Law: Regulating the Unseen Polluters: Regulating the Unseen Polluters (Oxford University Press, USA, 2008) at 410. The Global Compact Network Canada was launched in 2013 to further strengthen its local tie in Canada. The GRI has organized regional events and set up multi-stakeholder working groups in Canada since 1999. It has also endorsed a number of GRI Certified Training Partners to provide Certified Training courses for CSR reporting managers and specialists in Canada.
code for companies to abide by. One prominent example is the Toward Sustainable Mining (TSM) program developed by the Mining Association of Canada (MAC). Since 2004, MAC requires facilities with operations in Canada to participate in the TSM as a condition of membership in MAC. While the TSM is in essence a principles-based management framework for CSR at the site level, it has a direct bearing on CSR reporting as member companies are asked to report on an annual basis their adherence to the TSM indicators and to have their reported results externally verified every three years. A further discussion of the TSM will be made in Section 4.4.2.1.

2.3.2 The Canadian Regulatory Regimes that Address CSR Reporting at the Periphery

The regulatory field of CSR reporting in Canada is a mixture of corporate self-regulation, private regulation and governmental regulation. In line with the pro-self-regulation approach toward CSR reporting, Canada has not set particular legal or regulatory requirements for CSR reporting as it relates to publicly-traded companies. Although the existing legal and regulatory structure in terms of securities regulation, pension funds

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166 In comparison, some industry associations, such as the Retail Council of Canada (RCC), are more protectionist. As one RCC manager notes during the interview: “I think the role of an industry association is always to fend the interest of the industry and provide companies with different resources. At the moment, because [CSR reporting] is not mandatory, I see our role as providing the resources for companies and connecting them to the right people”. (Interview transcripts on file with the author, June 23, 2014.)

A plausible reason for mining to accommodate the most stringent industry association code could be that the social license to operate weighs extremely heavy in the mining industry and any infringement of the social license by a particular company tarnishes the reputation of the industry as a whole. As one senior officer of MAC puts:

The value of TSM is not only for the companies but for the industry. Since we started reporting with verified data in 2006, the adoption [rate] of community engagement systems in the reporting mines has gone up from 50% to 90% — that is pretty powerful statement for us to make. When it comes to advocating on the effort of the industry, the credibility that comes along, the industry-wide performance improvement, is very significant. (Interview transcripts on file with the author, June 9, 2014.)


regulation, and banking regulation may influence CSR reporting to various extent, in general the Canadian regulatory regimes merely address CSR reporting at the periphery.

2.3.2.1 Securities Regulation

Securities regulation is the most salient and most frequently cited regulatory regime that has a connection with CSR reporting in Canada.169 Pursuant to the securities laws of the major jurisdictions in Canada, if a publicly-listed company releases a document containing a misrepresentation, it gives rise to a cause of action for civil liability.170 The misrepresentation of certain information in publicly-listed companies’ CSR reports may incur civil liability, if the information is deemed as material fact.171 Since “materiality is an inherently ambiguous and fact-dependent concept”,172 there long exists a debate in both academia and practice regarding whether certain CSR information is material and therefore should be regulated pursuant to securities laws and regulations.173

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169 The current Canadian securities regulatory framework is provincial-based. Each of the 10 provinces and the three territories has its own securities acts, despite substantial harmonization efforts and initiatives for creating a national regulator over the past years. Some parts of the securities acts have been coordinated nationwide under National Instruments (NI) and National Policies (NP). For a complete introduction of the Canadian securities system and reform initiatives, see: David L Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (LexisNexis, 2014), Chapter 17. In terms of securities laws in Canada, given that the Toronto Stock Exchange (TSX) is the major venue for publicly-traded companies to be listed on, the present thesis centres on introducing the Securities Act promulgated in the province of Ontario, where the TSX is located, as well as rules and policies implemented on a national basis.

170 For example, see: *Ontario Securities Act*, R.S.O.1990, s.138.3 (1).

171 Material fact is defined as “a fact that would reasonably be expected to have a significant effect on the market price or value of the securities”. *Ontario Securities Act*, R.S.O.1990, s.1 (1). See infra note 309 for an introduction of the Canadian market impact test for materiality.

172 Johnston, Rockwell & Ford, supra note 169 at 187.

Specifically, so far, two policy statements concerning environmental reporting has been released. First, Ontario Securities Commission (OSC) issued a Staff Notice, outlining the result of a targeted review of compliance with the disclosure requirements pursuant to National Instrument 51-102 Continuous Disclosure Obligations and concluding that material environmental information is currently underprovided.\textsuperscript{174} It further emphasizes the importance of environmental reporting in public companies’ continuous disclosure documents.\textsuperscript{175}

Furthermore, Canadian Securities Administrators (CSA) published Staff Notice 51-333 \textit{Environmental Reporting Guidance}, which, according to CSA, clarifies the existing environmental disclosure obligations in continuous disclosure (CD) documents, emphasizes that only material environmental information needs to be included in CD documents, and cautions that voluntary disclosure may incur secondary market liability.\textsuperscript{176} Although in the document, CSA backs up publicly-listed companies’ disclosure of material environmental information in their continuous disclosure documents, the guidance explicitly acknowledges that it does not mean to expand the reporting obligation beyond what was required by securities law, nor change the regulatory landscape of corporate reporting.\textsuperscript{177}

\textsuperscript{174} See: OSC Staff Notice 51-716, \textit{Environmental Reporting} (February 29, 2008).
\textsuperscript{175} According to the OSC, the environmental matters that may become material facts include: financial liabilities related to the environment, asset retirement obligations, financial and operational effects of environmental protection requirements, environmental policies fundamental to operations, and environmental risk. See: \textit{ibid}.
\textsuperscript{176} See: Canadian Securities Administrators (CSA) Staff Notice 51-333, \textit{Environmental Reporting Guidance} (October 27, 2010). CSA is a non-regulatory body that issues National Policies to coordinate policies across the country. However, it lacks enforcement powers and each jurisdiction remains free to take its own approach. So it is fair to take the CSA release as a policy suggestion rather than a binding regulatory document.
\textsuperscript{177} As CSA puts: “this notice clarifies existing disclosure requirements relating to environmental matters and does not create any new legal requirements or modify existing ones”. \textit{Ibid}, at 3.
Viewed by the present research, both documents are limited in their capacity in dealing with CSR reporting, which is growing in its complexity. For one thing, the discussion they made is narrowly confined to environmental reporting, leaving other aspects of CSR untouched. For another, they both are reluctant to take additional implementation or enforcement efforts to fortify their stances, making themselves pretty weak in practical adoption.

2.3.2.2 Pension Funds Regulation

Pension funds regulation is connected with the public regulation of CSR reporting in the sense that dictating investors rather than the companies is an indirect and subtle way of promoting CSR reporting on the part of publicly-traded firms. Currently, pension ESG disclosure was supported by many countries around the world.178

Ontario has become the first Canadian province to require pension plans to disclose whether they incorporate ESG factors in the funds’ investment policies and procedures.179 Effective on January 1, 2016, pension plan administrators must file an annual Statement of Investment Policies and Procedures (SIPPs) disclosing, among other things, “information as to whether environmental, social and governance factors are incorporated into the plan’s investment policies and procedures and, if so, how those factors are incorporated”.180

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178 Richardson, supra note 165, at 304-07 (introducing the internationally expanded trend for pension ESG disclosure in the UK, Australia, and several EU countries). Also see Section 2.1.1.2 for a discussion of the relationship between CSR and ESG.

179 Currently other provinces have not followed suit.

This new piece of requirement ends a 14-year discussion on the issue in Canada. The advocate for ESG disclosure as it relates to pension funds was firstly introduced in 2002 as a Private Member’s Bill to the parliament, yet failed to pass.\textsuperscript{181} It was introduced again in 2009, which scored a partial success in 2011 when the Ontario government announced plans for adoption.\textsuperscript{182}

Because pension funds represent an important branch of institutional investors, who fuel the publicly-listed companies with investment, the pension ESG disclosure mandate is going to increase the portfolio managers’ demand for corporate CSR information and therefore will stimulate public companies’ supply of CSR reporting. However, as the literature notes, the pension funds regulation has key weaknesses. First, the regulatory focus is on the investment policies, not practices, so it is difficult to know the actual steps that pension funds take to assimilate the CSR information. Second, the regulatory authority has not provided any guidance on what the ESG factors in the circumstance of pension funds investing are, leaving room for the funds to determine their own notions.\textsuperscript{183} Besides, researcher has found that in practice, the pension ESG disclosure is boiler-plated and vacuous and therefore has not incurred any significant impact on the regulatory structure of CSR reporting.\textsuperscript{184}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{181}] Bill S-3, An Act to Amend the Pension Benefits Standards Act, 1985.
\item[\textsuperscript{182}] Bill C-441, An Act to Amend the Pension Benefits Standards Act, 1985 (disclosure of environmental, social and governance investment factors).
\item[\textsuperscript{183}] Richardson, supra note 165, at 308.
\item[\textsuperscript{184}] Ibid, at 309-311.
\end{itemize}
\end{footnotesize}
2.3.2.3 Public Accountability Statements Regulations (PASs)

The only sector-specific regulatory requirement that slightly addresses CSR reporting is in the banking section.185

Since 2002, for banks, trust and loan companies and domestic insurance companies with equity of one billion dollars or more, annual public accountability statements (PASs) describing their contribution/investment to the Canadian economy, society, and the environment have been legally mandated.186 In its promulgation, a PAS was recommended as a tool for “dialogue and discussion about ways to enrich and strengthen the relationship between [financial] institutions and the communities they serve”.187 It provides a convenient venue for banks to show the progress they have made in serving the communities in terms of economic, social and environmental. As a result, large Canadian banks started to develop their CSR reporting based on the PASs and many of them still keep PASs as a component of their annual CSR reports.188

In fact, the PASs regulation largely is focused on the community impact of the banks, so not necessarily the entire spectrum of CSR issues. The only reference to CSR in the PASs regulation is in the definition of “community development”, which means “the social,

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185 This requirement is particularly for companies in the financial industry, including banks, trust and loan companies, and insurance companies. The discussion of this section is concentrated on banks. As far as the present research knows, in Canada, there are no other sector-specific laws or public regulation that deal with CSR reporting, although the industrial self-regulatory efforts are commonly seen.

186 Public Accountability Statements (Banks, Insurance Companies, Trust and Loan Companies) Regulations (SOR/2002-133, March 21, 2002); Bank Act, S.C. 1991, s. 459.3(1); Canada Gazette Part II, Vol. 136, No. 8, Ottawa, Queen's Printer, at 810-813. This requirement is not applicable to credit unions.


188 The empirical research of the present study corroborates this view. The three banks in the empirical research universally incorporate PAS elements, sometimes the entire PAS report, in their CSR reports, although some interviewees mention that their banks have realized the differences in PASs and CSR reporting and are seeking separation for future reporting.
cultural, economic or environmental enrichment of a community”\(^\text{189}\). Although the PASs regulation was helpful for banks to consciously think about CSR at an early date compared to most companies in other business industries and it gives banks solid things to put in their CSR reports, the reporting tradition started by PASs has to some extent misled banks to equate CSR to charitable causes and frame their CSR reports as public relations (PR) documents.\(^\text{190}\) It is disappointing to see that the CSR reports of many large banks are full of information on community initiatives, philanthropy, employee diversity, and even the setting up of automated teller machines, but are short of reporting on the environmental and social risks that the banks are exposed to in their lending practices.

By reviewing the current legal and regulatory setting in Canada with respect to CSR reporting, the present research finds that the legal and regulatory structure surrounding CSR reporting is very loosely-framed. In fact, neither the general nor the sector-specific legal and regulatory requirements have explicitly mandated CSR reporting. Therefore, it is arguably true that the legal status of CSR reporting in Canada is ambiguous, even uncertain.

2.3.3 The Policy-Making Debate surrounding Mandatory CSR Reporting

Owing to the regulatory uncertainty, the policy attempts to introduce public law and regulation to the area of CSR reporting have never stopped.\(^\text{191}\) CBSR is the leading actor in this effort. It made its stance explicitly in a 2001 report, in which it suggests that the

\(^{189}\) Bank Act, S.C. 1991, s. 459.3(1).

\(^{190}\) The PASs requirements centre on charitable donations and philanthropic activities that banks have provided to communities. For instance, in the PASs regulation, the phrase "charitable donations" is used four times while the words social and environmental are used only once each. See: supra note 186.

\(^{191}\) See supra note 20 for an introduction of CBSR.
Canadian government should “assume a leadership role rather than a facilitative role in encouraging CSR practices”. Another important figure that has played a key role in the research and advocacy of CSR reporting is the Chartered Professional Accountant (CPA Canada), formerly Certified General Accountants of Canada (CGA-Canada). It is noteworthy pointing out that there was a dramatic transition in CGA’s view regarding CSR reporting. In its 2005 publication, CGA emphasized that “it is too early to render reporting mandatory”. However, realizing the problems of reporting quality and comparability in the CSR reporting practices, while encouraging companies to self-regulate, CGA later advocated for the establishment of firmer minimum regulatory requirements to CSR reporting.

In addition, there also have been sector-specific initiatives that seek to introduce mandatory CSR reporting into the field of public regulation. In 2005, upon the report of a subcommittee of the Standing Committee on Foreign Affairs and International Trade (SCFAIT), the Canadian government sponsored a series of national roundtables to review the actions of Canadian petroleum and mining companies overseas. In March 2007, the final Advisory Group Report arising from the roundtables was released. It made explicit recommendations surrounding the establishment of a Canadian CSR Framework (the “Framework”). According to the report, one main component of the Framework incorporates “CSR reporting obligations based on the Global Reporting Initiative, or its

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192 See: CBSR, supra note 20, at 6.
193 CGA-Canada has united with CPA Canada since October 2014.
equivalent during an initial phase-in period, at a level that reflects the size of the operation”. 196

The key argument, according to the advocates for governmental regulation, posits that mandatory CSR reporting is beneficial for the improvement of reporting quality, standardization and peer-to-peer comparisons. 197 The formalized effort, however, encounters both political and practical barriers. Politically, both the government and the business sectors seem comfortable with the status quo. For one thing, the government sees its role as a facilitator rather than a supervisor of CSR reporting. 198 For another, companies as well as the industry associations expect the government to “provide relief from regulatory burden” as many companies already have CSR reporting programs in place. 199 Showing concern about the unwarranted success of existing mandatory disclosure programs in other regulatory domains, they hold that the voluntary approach does better in encouraging creativity and fostering competition, while the mandatory rules will add regulatory burden and result in boilerplate reports. 200 Practically, the

197 CGA, 2011, supra note 195.

Although the regulatory burden arguments are less common in the academic literature nowadays, the industry still frequently refers to it. For instance, during the research interviews, when asked about whether they sided with the view of making CSR disclosure a mandate through law, the majority of the industry interviewees showed their concerns of regulatory burden. As Senior Manager 2 mentioned: “Because the companies are facing so much regulation and so
mandatory attempt faces hurdles in implementation and compliance. In terms of implementation, since many CSR information is qualitative in nature and does not have a clear unit of measure, it is difficult for the regulators to verify its accuracy. This poses questions as to how the regulators can effectively identify noncompliance and consequently take enforcement measures. As noted by the formerly Certified General Accountants of Canada (CGA),

“Sustainability issues are qualitative in nature and vary depending on a company’s size, industry, and location. Given the complexity and variability, not only is it difficult to establish standards, it is also difficult for governments to monitor and enforce compliance. Furthermore, as governments often find themselves having to develop regulations that accommodate all interests, there is a fear that a mandatory standard would be diluted, and as a result, would likely have little impact in driving CSR and corporate sustainability reporting”.  

Moreover, there exists another important factor that may complicate compliance. According to most mandatory reporting proposals, companies would be punished for not reporting, not for reporting inadequately and selectively. This stance, together with the practical difficulty in measuring reporting adequacy, leaves room for cosmetic

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200 CGA, 2011, supra note 195. The distrust of the public toward governmental regulation of disclosure programs is witnessed by the literature as well. According to Graham, “[a] disconnect has developed between broad claims by politicians that such systems reduce risks, promote informed choice, and further public participation in government and specific requirements that are limited in design, flawed in execution, and uncertain in effect”. See: Mary Graham, *Democracy by Disclosure: The Rise of Technopolitism* (Brookings Institution Press, 2002), at 157.

201 CGA, 2005, supra note 194, at 85 (noting that CSR information “is more qualitative in nature and, therefore, more difficult to interpret, verify, and audit”).

202 CGA, *ibid*, at 88.

203 See supra note 112 and the accompanying texts for an introduction of representative mandatory CSR reporting proposals.
compliance. For instance, it would be highly likely that “[t]he companies hand-picked information they wanted the public to know rather than picking information the public actually wanted companies to provide”.204

It seems that the policy-making debate surrounding mandatory CSR reporting has quietened in Canada as new disclosure themes have emerged to occupied the public’s attention. In recent years, policymakers and advocacy groups have worked hard on disclosure themes such as gender diversity on board,205 conflict minerals reporting206 and pension ESG disclosure.207 This shift of attention observes the “issue-attention cycle” as Anthony Downs describes.208 However, while the public’s attention to CSR reporting may have declined owing to the ambiguity of CSR issues, the strong corporate opposition, the scapegoating of new disclosure targets and the lack of an immediate threat, the problems with CSR reporting practices remain severe. As the ensuing chapter will cogently show, the CSR reporting-performance gap is ubiquitous and it greatly challenges the fundamentals of CSR.

206 Bill C-486 Conflict Minerals Act was introduced to the parliament yet defeated on September 24, 2014.
207 Pension ESG disclosure has become a legal mandate in Ontario since January 1, 2016. See Section 2.3.2.2 for the introduction.
208 Downs, supra note 1.
Summary of Chapter 2

This chapter examines the notion of CSR reporting on both conceptual and theoretical grounds, providing important background information concerning the research thesis. This present research is rooted in the Canadian context. The scope of the research is limited to the environmental and social aspects of CSR in order to facilitate an in-depth examination of the topic of CSR reporting.

The chapter is organized as follows. Firstly, it discusses CSR and CSR reporting conceptually. The present research agrees with the literature that defines CSR as “activities that companies undertake to directly benefit society”. From a legal perspective, the theoretical discussion of CSR sources from the shareholder versus stakeholder debate concerning the purpose and the best interests of the corporation. Fueled by case law, this debate has a direct bearing on interpreting the law of fiduciary duty and the legitimacy of practicing CSR within the corporate context. As to this matter, the present study notes that the shareholder-centric model is the norm, despite the existence of some liberal interpretation of the model. However, it argues that the shareholder-centric model should not become a barrier that prevents companies from practicing CSR.

From a practical perspective, the present study is aware that the business case scenarios are commonly used to explain CSR, but contends that the increased usage of the business case justification for CSR may not linearly translate into more CSR-conscious performance. To address this concern, the present chapter analyzes two contrasting
stances toward the regulation of CSR: one that favours corporate self-regulation and one that advocates for governmental intervention. The present study takes the view that corporate self-regulation can be a useful supplement to governmental regulation, but it cannot replace governmental regulation because corporate self-regulation is ultimately restricted by its purpose of serving the corporations’ own interests.

In terms of CSR reporting, this chapter makes a series of distinctions in order to advance a profound illustration of the meaning of CSR reporting. First, it draws a distinction between the descriptive and normative dimensions of CSR reporting. While normatively CSR reporting is intended to be a governance instrument that functions by measuring and comparing corporate performance in CSR aspects, in practice, CSR reporting has become a strategic corporate communication tool that falls short of providing a complete and balanced picture of the companies. This theory-practice gap not only shows that the issue of the CSR reporting-performance inconsistency is current and necessitates a thorough investigation, but also inspires the present research to combine theoretical analysis with empirical findings in order to more precisely describe the CSR reporting field. Second, the present study differentiates CSR reporting from CSR reports and other synonymous terms and notes that it prefers the term CSR reporting, which conveys more nuanced meaning than CSR reports and is the generic and unambiguous name of reporting of this kind. Based on the above understanding, the present research defines CSR reporting as the corporate-dominated processes of developing plans and procedures for gathering information, disseminating a CSR report, and addressing post-reporting issues such as stakeholder feedback. Third, the present chapter distinguishes CSR reporting from
corporate transparency, arguing that corporate transparency only explains one dimension of CSR reporting while under-addressing the role of CSR reporting in inducing changes in corporate performance.

Secondly, this chapter explains why the present research examines CSR reporting from an organizational learning perspective. Organizational learning research explores how organizations learn and put learning into practice. Organizational learning has a direct bearing on the present research thesis in that it explains why companies are capable of changing their performance as a result of the processing of information—CSR reporting within the present context. When the CSR reporting-performance inconsistency is questioned, what is explicit in the phenomenon is that corporations fail to align their reporting with their performance, while what is implicit is that corporations learn insufficiently from their process of CSR reporting. Therefore, it makes great sense to utilize the organizational learning perspective in the present research. In addition, studying CSR reporting from the perspective of organizational learning is beneficial because: 1) it expands the research horizon of the present research and provides a more nuanced look at the research problem; 2) it is the basis for elaborating on why corporate self-reference, which is in essence an organizational learning tool, ought to be reinforced in the proposed “reflexive law plus” model; and 3) it generates insights into how to stimulate corporate learning as it relates to CSR reporting, because the organizational learning literature is firmly grounded in practice and provides important empirical observations that enrich the present research inquiry.
Thirdly, the chapter references the literature and other secondary data to provide necessary details regarding the Canadian context of CSR reporting. It notes that CSR reporting in Canada is unique because the impetus for companies to disclose CSR information is derived primarily from societal expectations and industrial pressure, rather than from regulatory agencies and laws. In line with the pro-self-regulation approach toward CSR reporting, Canada has not set particular legal or regulatory requirements for CSR reporting and the existing regulatory regime only addresses CSR reporting at the periphery. Because of this regulatory uncertainty, the policy attempts to introduce public law and regulation to the area of CSR reporting have been ongoing in Canada. Although various initiatives and advocacies have called for mandatory CSR reporting, the policy-making debate regarding this subject has quietened in Canada as new disclosure themes have emerged to occupied the public’s attention. However, while the public’s attention to CSR reporting may have declined, the problems with CSR reporting practices remain ubiquitous and severe.
Chapter 3: The Research Thesis: The CSR Reporting-Performance Inconsistency

Introduction

While CSR reporting has been steadily practiced by a considerable number of publicly-traded companies in North America for more than a decade, only recently has CSR scholarship sporadically acknowledged that the issue of the CSR reporting-performance inconsistency as it relates to publicly-listed enterprises needs an urgent and immediate fix.209

This chapter opens with a brief description of three real-life examples that arouse attentions to companies’ multi-faceted and paradoxical CSR profile. They suggest the inconsistencies between the corporate image projected through CSR reporting and the corporate actual practices in CSR. On top of that, this chapter builds on the literature to explain the phenomenon of the CSR reporting-performance inconsistency. To make a stronger case for the necessity of the present research and to prepare for the framing of the research question, the present chapter also examines the empirical portion of the research to gain a more vivid picture of how the problem of the CSR reporting-performance discrepancy is manifested in the field.

209 See infra note 237-243 for the representative literature that addresses the CSR reporting-performance inconsistency.
Based on the aforementioned three segments of illustration, the present research poses the following research question of the entire doctoral dissertation: from a law and regulation perspective, how can the ubiquitous CSR reporting-performance discrepancy be alleviated? As the ensuing chapter will elaborate on, the present research advocates for a two-step solution to address the problem. First, it calls for the imposition of governmental regulation on CSR reporting. Second, it proposes shaping the regulatory requirements into a form of reflexive law.

The purpose of the present chapter is twofold. First, it strives to show that the CSR reporting-performance decoupling is a problem that should be carefully considered and academically valued. Second, it seeks to provide a thorough explanation of why the present study focuses on the legal and regulatory dimension of the problem.

3.1 Three Examples

This section presents a series of real-life examples that offer a unique perspective to the issue of CSR reporting. They inspire the current research to put focus on how CSR reporting has been diverged from corporate actual performance and how to alleviate the inconsistency. Although the present study sets the research focus on publicly-traded Canadian companies so as to balance the research width and depth, since the CSR reporting-performance inconsistency is indeed a worldwide phenomenon, the examples provided here are not limited to Canadian firms. They nevertheless represent companies in mining, retail and banking—a spectrum of industries that the empirical research centers on.
Barrick Gold Corp. (Barrick), a Canadian mining company headquartered in Toronto, is the largest gold mining company in the world. At first sight, Barrick has an impressive, award-winning CSR profile.\(^{210}\) It is one of the few publicly-listed companies in North America that has established a CSR Advisory Board, which has John Ruggie, author of the United Nations Guiding Principles on Business and Human Rights, serve as a special consultant. It has laid down comprehensive CSR codes and policies, and published externally-assured annual CSR reports for more than a decade.\(^{211}\)

On the other hand, however, other evidence in the public domain tells a different story. Online sources reveal that the company has long been a target of local and international community protests and not-for-profit organizations’ accusations in terms of environmental damage and human rights abuses.\(^{212}\) Records show that one major Chilean project of the company was fined and later halted for failure to meet local environmental

\(^{210}\) For instance, Corporate Knights awarded Barrick the 4th of best 50 corporate citizens in Canada in 2013. Corporate Knights, “2013 Best 50”, online: Corporate Knights <http://www.corporateknights.com/reports/2013-best-50> (last visited June 12, 2016). Corporate Knights Inc. is an independent Canadian-based media company that publishes the world’s largest circulation magazine with an explicit focus on CSR. It also publishes the annual Best 50 Corporate Citizens in Canada and the annual Global 100 Most Sustainable Corporations in the world. Nevertheless, Corporate Knights was challenged in terms of the metrics it uses for measurement. See: Chris MacDonald, “Corporate Knights Gets Sustainability Wrong” (23 January, 2013), online: Canadian business <http://www.canadianbusiness.com/companies-and-industries/corporate-knights-gets-sustainability-wrong> (last visited June 12, 2016). Barrick was also praised for its efforts to “raise industry standards” in developing countries.

\(^{211}\) On Barrick’s company website, there is a section titled Responsibility, under which the company makes very detailed documentation of its policies in different key CSR areas. The website also exhibits archived data of its environmental, community, safety and health performance since 2010 in addition to its annual CSR reports since 2002. See: online: Barrick <http://www.barrick.com/responsibility/default.aspx> (last visited June 12, 2016).

standards in 2013. Furthermore, the company has a solid record of lobbying against bill C-300, a private members bill introduced to “promote environmental best practices and to ensure the protection and promotion of international human rights standards in respect of the mining, oil or gas activities of Canadian corporations in developing countries”. 

Barrick is not an exception. Another cogent example, the Body Shop, a well-known global retailer of beauty products, also has a mixed public image. Although the Body Shop has positioned itself as a socially responsible company and was a pioneer in CSR reporting in the 1990s, findings and allegations from various sources against the Body


214 Bill C-300 was tabled in the House of Commons in 2009 and passed its second reading. However, the bill was eventually defeated by a loss of just six votes (140 to 134) in the chamber. For a detailed documentation of the voting and house debate, see: online: open parliament <https://openparliament.ca/bills/40-2/C-300/?page=1> (last visited June 12, 2016). According to the lobbyist registry, a Hill and Knowlton lobbyist, Mr. Don Boudria, who was working on behalf of Barrick, had 22 communications with Liberal MPs before the voting. It has been reported that he lobbied those MPs to vote against the bill. For media coverage on Barrick and other mining companies’ lobbying see: Steve Rennie, “Mining Industry Lobbied Nine of 24 MPs Who Helped Kill Ethics Bill”, online: The Globe and Mail <http://www.theglobeandmail.com/news/politics/mining-industry-lobbied-nine-of-24-mps-who-helped-kill-ethics-bill/article1241708/> (last visited June 12, 2016).

215 The Body Shop labels its products as “natural products inspired by nature”. It has long championed the advocacy against animal testing on cosmetic products and on fair trade. It claims on its website and elsewhere that the Body Shop “was the first cosmetics company to develop direct relationships with communities in return for natural ingredients and accessories”. Online: The Body Shop <http://www.thebodyshop.com/services/aboutus_anitroddick.aspx> (last visited June 12, 2016).

For a summary of the history of CSR reporting made by the Body Shop, see: Hess, 1999, supra note 86, at 72. The author reports that (citations omitted):

Shop have raised a red flag regarding the company’s CSR-friendly image.\textsuperscript{216} In particular, the Body Shop was criticized for not being truthful with the public on animal testing and the ingredients of its products.\textsuperscript{217} In addition, commentators argue that the Body Shop’s community fair trade program is a marketing ploy and its benefits to the local communities are in question.\textsuperscript{218}

One more illustration comes from the Australia and New Zealand Banking Group (ANZ), the third largest bank by market capitalization in Australia. On the upside, ANZ is a signatory to the Equator Principles,\textsuperscript{219} and was frequently ranked the most sustainable bank globally in Dow Jones Sustainability Indices (DJSI).\textsuperscript{220} On the downside, however, ANZ is not only the largest financier of coal mining projects in Australia,\textsuperscript{221} but also fails

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218 It has been argued that the Body Shop had unilaterally broken the condition of fair trade when it addressed the Kayapo Indians in Brazil. See: Saulo Ptean, “Broken Promises”, \textit{BRAZZIL} (1996) 16. Online: BRAZZIL, <http://www.brazzil.com/p16dec96.htm> (last visited June 12, 2016). Terrence Turner, an anthropologist from the University of Chicago who speaks fluent Kayapo, comments that the Body Shop's work with the Kayapo is a public relations ploy, which aids the company in promoting its image while offering the Kayapo little trade in exchange. Terence Turner, “Neoliberal Ecopolitics and Indigenous Peoples: The Kayapo, the ‘Rainforest Harvest’, and The Body Shop”, 98 Yale F&ES Bulletin 113, online:<http://environment.yale.edu/publication-series/documents/downloads/0-9/98turner.pdf> (last visited June 12, 2016). Also see: McSpotlight, “What’s Wrong with the Body Shop?”, online: <http://www.mcs spotlight.org/beyond/companies/bs_ref.html#46> (last visited June 12, 2016).


221 For instance, ANZ’s lending to Whitehaven’s Maules Creek mine was twice as large as any other contemporary coal mine under construction in Australia. After many attempts and protests that tried to convince ANZ to pull its funds out of the Whitehaven project failed to work, ironically, on January 7 2013, a media release, purportedly from the bank, announced the bank had withdrawn its $1.2bn loan from the Whitehaven coal mine project on environmental and
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to publicly acknowledge its continued funding to the projects.\textsuperscript{222} Greenpeace therefore named ANZ Australia’s dirtiest bank.\textsuperscript{223}

The list can go on and on.\textsuperscript{224}

The present research does not attempt to reach a definitive conclusion about whether the companies mentioned here are indeed socially responsible performers. Rather, it discusses these examples because they each represents a company with a mixed and even paradoxical CSR profile. Collectively, they are indicative of a popular phenomenon among business enterprises that challenges the credibility of the current CSR practices.

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\textsuperscript{224} For instance, it was noted that “[t]he Enron statement on Corporate Social Responsibility was one of the best published by any company but it turned out to have little connection with reality”. See: Henry Bosch, “Corporate Social Responsibility”, submission to the Australian Corporations & Markets Advisory Committee (2006), at 4, online: CAMAC <http://www.camac.gov.au/camac/camac.nsf/byheadline/pdfsubmissions_2/$file/hbosch_csr.pdf> (last visited June 12, 2016).

Other prominent examples acknowledged by scholars include Ford, Toyota, General Motors, PG&E and BP. See: Miriam A Cherry, “The Law and Economics of Corporate Social Responsibility and Greenwashing” (2013) 14 UC Davis Bus Law J 281 (noting that the BP portrayed itself as being environmentally responsible and championing the use of clean energy while its internal record shows continuing safety and environmental violations), Jacob Vos, “Actions Speak Louder than Words: Greenwashing in Corporate America” (2009) 23 Notre Dame J Law Ethics & Public Policy 673, at 675-678 (illustrating the phenomenon of corporate greenwashing and proposing counter-measures to address the problem). Also see: Janet Luft Mobus, “Corporate Social Responsibility (CSR) Reporting by BP: Revealing or Obscuring Risks?” (2012) 15:2 J Leg Ethical Regul Issues 35 (showing that companies under the voluntary CSR reporting regime has strong incentives to exaggerate positive performance and understate unflattering information). While agreeing that the above-mentioned examples are to different extents associated with greenwashing, the present thesis views the issue from a neutral perspective and identifies the problem as corporate reporting-performance decoupling, which has been largely underexplored by prior research.
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They suggest that companies use CSR reporting as a tool to establish positive CSR images and diverge public attention from corporate actual performance.

In particular, these examples have raised hard and universal questions about the inconsistencies between the corporate image projected through CSR reporting and the corporate actual practices in CSR. As such, they reveal that what corporations report in terms of CSR does not necessarily translate into their practices. This divergence mirrors the current debate surrounding CSR: while some literature holds that practicing CSR is of mutual benefits to both the industry and the society, more and more scholars become skeptical of or even cynical about the value of CSR in inducing real corporate behavioural changes. To serve as a catalyst for further investigation into the issue, the following section is going to examine the scholarly debate in more detail.

3.2 The Literature

A review of the literature unpacks general concerns regarding the current practice of CSR for its emptiness and vagueness. For instance, in pondering what CSR has really accomplished in the past years, Moskowitz comments that the history of CSR “has

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225 See supra note 91 for a list of the representative literature. See Section 2.1.1.3 for a full elaboration on this viewpoint.

The literature is also filled with abundant case studies exemplifying how generating CSR reporting facilitates communications with stakeholders and attains corporate transparency. For example, See: Hess, supra note 86 (analyzing the Body Shop and Ben & Jerry’s cases); Charles J Fombrun & Violina Rindova, “The Road to Transparency: Reputation Management at Royal Dutch/Shell” in Majken Schultz, Mary Jo Hatch & Mogens Holten Larsen, eds, Expressive Organ Link Identity Reput Corp Brand Link Identity Reput Corp Brand (Oxford University Press, 2000) 77 (demonstrating the Royal Dutch Shell case).

226 Although the present research is a Canadian based one, to overcome the insufficiency of Canadian academic literature on the topic of CSR reporting gaps, this section borrows extensively from U.S. literature that addresses the identical topic. While acknowledging the limitation, the present research believes that the analysis still holds and is not jeopardized by the US-dominant literature review, in that the problem of the CSR reporting-performance discrepancy is a worldwide phenomenon and the research of this question is supposed to have a wider application beyond national boundaries.
consisted of 95 percent rhetoric and 5 percent action”. In his discussion of the transnational implication of the Alien Tort Claims Act in terms of human rights protection, Collingsworth concludes that “any progress made in ‘corporate social responsibility’ is simply on paper”. Bakan, a pioneer legal scholar, posits CSR being “business as usual”. More vocal is Rosenthal, who points out that “being superb at disclosing, not controlling” is a fundamental problem with the current CSR regime.

The literature also provides thoughts surrounding mandatory CSR reporting. Firstly, a consensus has been reached among researchers that there are significant limits of purely relying on voluntary CSR reporting. Secondly, the literature interprets mandatory CSR reporting in a very broad sense. In the literature, not only has legislative and regulatory methods been discussed, but also stock exchange rules that prescribe CSR reporting as part of the listing requirements are viewed by many as being mandatory in nature.

Thirdly, while earlier scholarly work concentrated on whether CSR reporting should be officially regulated, the emphasis has recently shifted toward whether we need a more structured legal regime to regulate it, and if so, what kind of legal regime would work. As to this matter, despite some controversies, the literature shows a strong tendency toward

229 Bakan, supra note 59, at 28.
230 Elisabeth Rosenthal, “I Disclose ... Nothing”, N Y Times Late Ed East Coast (22 January 2012) SR.1
231 For instance, see: Sarfaty, supra note 131; Snyder, supra note 204; Thomas McInerney, “Putting Regulation before Responsibility: Toward Binding Norms of Corporate Social Responsibility”, (2007) 40 Cornell Int Law J 171.
232 For example, see: Ioannou & Serafeim, supra note 112; Dhir, 2008, supra note 116; Galit A Sarfaty, “Human Rights Meets Securities Regulation” (2013) 54 Va J Int Law 97, at 104-105 (putting stock exchanges regulation of CSR reporting under the theme of “mandatory regulations”). However, as will be further illustrated in the ensuing subsection, the present research sides with the view that in order to align CSR reporting with corporate actual performance in CSR, it is not enough for stock exchanges to require CSR reporting as part of their listing rules.
taking use of the existing securities disclosure system to regulate CSR reporting.\textsuperscript{233} In addition, a growing body of literature frames CSR reporting as a corporate governance matter.\textsuperscript{234} Finally, the literature disagrees on the functional orientation of CSR reporting. As earlier mentioned, some scholars take corporate transparency and “right to know” as the main purpose of CSR disclosure.\textsuperscript{235} In contrast, other researchers note that one pivotal objective of CSR reporting is to transform corporate irresponsible performance and to align corporate behaviour with broader public goals.\textsuperscript{236}

In particular, digging into CSR reporting and the regulation of it in the private sphere, scholarly work notices the existence of the corporate reporting-performance gap in CSR and further argues that voluntary regulation is insufficient to bridge such a gap. For instance, Adams phrases the problem as the CSR reporting-performance “portrayal gap” and cautions that private regulatory forms, such as the GRI standards and the industry-led

\textsuperscript{233} For instance, see: Williams, supra note 140; Hess, supra note 86; Monsma & Buckley, supra note 173; Dhir, supra note 116. However, this dissertation disagrees with using expanded securities disclosure system to fully replace the regulation of CSR reporting, since securities disclosure and CSR disclosure should serve different audience and have different purposes. Securities disclosure focuses narrowly on CSR information that is financially material, while CSR reporting exhibits a fuller picture of corporate performance in CSR aspects. Also see: Harry Hummels & Diederik Timmer, “Investors in Need of Social, Ethical, and Environmental Information” (2004) 52:1 J Bus Ethics 73 (arguing that investors with a financial orientation and ethical investors have different information needs for CSR information).

\textsuperscript{234} See: Gill, supra note 93; Douglas M Branson, “Corporate Governance Reform and the ‘New’ Corporate Social Responsibility” (2001) 61 Univ Pittsburgh Law Rev 605 (noting that the contemporary CSR movement is an element of good corporate governance).

\textsuperscript{235} See: Section 2.1.2.3 for a discussion of the relationship between CSR reporting and corporate transparency.

\textsuperscript{236} For instance, Graham views CSR reporting as part of the “new disclosure systems”, “those that aim to reduce health, safety, and environmental risks”. She contends that the new disclosure systems differ from conventional information disclosure programs in that in terms of the new systems, “information was viewed as a way to change behaviour, not simply as a public right”. See: Graham, supra note 200 at 15-16. For the literature that sides with this view, also see: Sharon M Livesey & Kate Kearins, “Transparent and Caring Corporations? A Study of Sustainability Reports by the Body Shop and Royal Dutch/Shell” (2002) 15:3 Organ Environ 233, at 250-51 (arguing that CSR reporting “fosters systematic management practice” to take place); Norman & MacDonald, supra note 123, at 257 (holding that CSR reporting “can play a critical role in a firm's serious strategy to improve its ethical and social performance and to integrate this goal into its corporate culture”); Larry Cata Backer, “From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations” (2007) 39 Georget J Int Law 591, at 593 (positing that a mandatory disclosure system “serves a more subtle purpose—to create a framework for private governance consistent with the overarching objectives that form the essence of the system of disclosure itself”).
“responsible care” initiative, have yet to reduce the gap.\textsuperscript{237} In a similar vein, Sulkowshi and White argue that voluntary CSR reporting may function as a misleading indicator to the marketplace that a firm is relatively environmentally efficient and benign compared to non-reporters.\textsuperscript{238} In discussing the practice of the Global Reporting Initiative (GRI), one of the most influential standard provider of voluntary CSR reporting worldwide, Sarfaty finds that the GRI is ignorant of whether the companies’ CSR reports credibly reflect their good or bad performance. She therefore argues that indicators should not be treated “as ends in and of themselves, but rather as a means toward evaluating performance and ultimately improving behaviour”.\textsuperscript{239}

In a separate yet related endeavour, a growing body of literature has begun to describe the situation of the CSR reporting-performance discrepancy as corporate greenwashing, corporate hypocrisy and corporate dissembling. For example, Vos argues that corporate greenwashing occurs when “a company’s practices don’t match up to the image they would like to have” and based on his observation, he notes that large corporations publicize CSR stance without “putting [their] rhetoric into practice”.\textsuperscript{240} To embed their argument under a real-life example, Cherry & Sneirson trace BP’s CSR reporting as it relates to the disaster of BP oil spill and note the disconnect between BP’s self-portrait and its actual behaviour as a problem of corporate greenwashing and “faux CSR”.\textsuperscript{241}


\textsuperscript{239} Sarfaty, supra note 131, at 621.

\textsuperscript{240} Vos, supra note 224, at 673-74.

\textsuperscript{241} Miriam A Cherry & Judd F Sneirson, “Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster” (2011) 85:4 Tulane Law Rev 983.
separate note, Wagner *et. al.* mention that when firms’ CSR behaviour contradict with their stated standards of CSR, they are perceived as performing corporate hypocrisy by consumers.\(^{242}\) Moreover, in his evaluation of the three pillars of CSR reporting, Hess challenges the overwhelmingly positive information provided by companies in their CSR reporting and posits that “corporations dissemble when they disclose favourable information but hide unfavourable information, fail to put their disclosures into the appropriate context, or simply provide false disclosures”.\(^{243}\)

Although organized around different themes, the literature mentioned in this section collectively points to the decoupling of “what is represented publicly and what actually transpires behaviourally” in the practical world.\(^{244}\) While it is only a small portion among the vast CSR scholarly work, the literature should be highly valued and seriously considered, because the debates engaged by these pieces provide helpful thoughts on whether the CSR movement underpinned by CSR reporting is heading on the path of meaningful social changes or encompasses merely symbolic, cosmetic business exercises.\(^{245}\) As the following texts show, the present research theme is further elaborated on and refined by the empirical research of the present study.


\(^{244}\) Mobus, *supra* note 224, at 35.


A related concern has been expressed by Tansey when he commented on the notion of industrial ecology (IE). Hypothetically, IE describes the industrial system that optimizes the utilization of useful energy. It asks industries to learn from natural systems for industrial design, so that the industrial systems can function like ecosystems and become more resource-productive. However, according to Tansey, “the majority of recent research publications under the umbrella of IE have focused on specific techniques and processes rather than on the promise of a paradigm shift.” See:
3.3 The Empirical

Based on the real-life examples and the literature presented in the preceding sections, this section provides a more vivid picture of the research thesis through the empirical study. It examines how the CSR reporting-performance inconsistency is manifested in practice by soliciting views from interview participants, who reflect more broadly on their day-to-day experiences with CSR reporting. In addition, it compares corporate CSR reports with other documentary data, noting the delay in reporting timeline and the absence of key negative information in the reports. It further explains why the present research studies the problem of inconsistency from a law and regulation perspective.

The description of the empirical data in this section strives to contextualize the subject of the CSR reporting-performance discrepancy within the present thesis and to stimulate further thoughts in terms of how to address the discrepancy. More detailed empirical findings of where the problems lie and how they can be alleviated will be displayed and discussed in the ensuing chapter.

3.3.1 An Unsatisfying Portrayal of the Reality

In general, the interviewees comment on the practice of CSR reporting as being decorative and primarily in public relations terms. For instance, when asked about his impression of the CSR reports he has encountered, Lawyer 1, who is specialized in aboriginal issues and mining, notes: “It just becomes a decorative piece as part of the PR

James Tansey, “Between Beckett’s Trousers and Ecotopia: The Future of Industrial Ecology” in Ray Cote, James Tansey & Ann Dale, eds, Linking Industry and Ecology: A Question of Design (UBC Press, 2007) 176-77. As Tansey puts, the danger is that “the rhetorical attraction of IE will provide false comfort for policy makers” and therefore may replace serious industrial transformation.
strategy”. He continues, “CSR reporting in Canada is very much on the voluntary side and it is very much uneven. You see very glossy CSR reports, which do not talk about company-wide performance and do not provide comprehensive review but only put lots of focuses on things that have been done. There are significant gaps”.247

On a separate note, Consultant 2, formerly a public relation manager in a mining company, posits: “The CSR reports done are presented more in public relations terms—they shed positive, image-building stories and they do not call upfront all of the issues. They report all the positives but gloss over the negatives. … CSR reporting is more of a PR-based exercise”.248

Besides, interviewees express additional concerns toward CSR reporting that they feel may undermine its credibility. For one thing, the practitioners note that the information provided by many companies is generic and boiler-plated. For another, the interviewees identify that a number of CSR reports cover only the CSR impacts on the companies and not the other way around. As one fund manager puts,

We would like to see what companies do is acknowledge environmental risks to the company, and also acknowledge how the company is posing environmental risks to the environment or the society. So we would like them to be concerned about both—[not only] how changes in the environmental regulation impact them but also to acknowledge their own footprint and demonstrate they are taking measures to reduce their impacts as well.249

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246 Interview transcripts on file with the author, June 3, 2014.
247 Ibid.
248 Interview transcripts on file with the author, June 3, 2014.
249 Interview transcripts on file with the author, July 17, 2013.
The documentary analysis reveals the existence of the CSR reporting-performance gap in a more nuanced way. First, by comparing the available data regarding the release time of companies’ financial reports and that of their CSR reports, the current study finds in general a serious delay in the publication of firms’ CSR reports. The CSR reports of the companies that the present study covers do not come up until five to six months after the fiscal year-end. The backlogging of information is problematic, viewed by both the interviewees and the current research, since it not only discourages financial investors from incorporating CSR consideration into their investment decisions as the data lacks real-time value, but also dissuade stakeholders from engaging in meaningful dialogue with management and contributing their knowledge timely.\(^{250}\)

Second, a major issue identified by the empirical research, primarily the documentary data, is the absence of key negative information in companies’ CSR reports. For instance, during 2011 and 2012, there were a series of social conflicts occurred in M1’s mine sites. The mounting local tensions surrounding the sites received a wide coverage in the media release and the amount of fund the company put aside for the closure of one of its mines was viewed as extremely insufficient by NGOs. As a result, the company was delisted from the Dow Jones Sustainability Index ("DGSI index") in 2012. However, neither the company’s 2011 nor 2012 CSR report speaks of such an issue. Besides, in all of its CSR reports, there is not much coverage of the challenges that the company is facing or the problems and issues that need to be addressed. When asked about the absence of negative

\(^{250}\) Three of the interviewees, who are senior fund manager, fund manager and lawyer respectively, resonate with this concern. Interview transcripts on file with the author.
information, the front-line CSR manager of M1 paused, but then she quickly responded:
“I think there are definitely issues that we were quite open about”.\textsuperscript{251}

The avoidance of reporting negative information is also manifested in R3’s CSR reports, despite that R3 is a recognized leader in CSR reporting in the industry. Its CSR reports discuss performance according to a three-tier evaluation system: target met, target almost met or on track, target not met or at initial stages. Although it seems R3 reports on both positive and negative results, a closer look of the targets suggests otherwise. Some of the unmet targets were simply removed from the CSR report in the ensuing year without further explanation. For example, the target “increase the number of women in leadership roles in the organization” was not met in 2013, but it was taken away from the company’s CSR report in 2014.

It is not to say that the inconsistency exists in each and every company at all times and this study does not position itself as a critic of the companies, some of which are actually CSR leaders in their industry. However, it is worrying that the tendency of overstating accomplishments and understating risks and concerns remains pervasive and unchanged. While the CSR reports generated by some firms are indeed informative and comprehensive and a lot can be told in terms of the improvement in reporting quality, when viewing the CSR reporting practice entirely to explore the gap between corporate reporting and their actual performance, the present research sees a picture that is more of a negative one than of a mixture of good and bad. Despite that the landscape of CSR reporting has dramatically changed in the past two decades, the effort taken has barely

\textsuperscript{251} Interview transcripts on file with the author, June 20, 2014.
remedied the hollowness and vagueness of the reporting content and the prevalence of using CSR reporting to sing one’s own praises.

### 3.3.2 The Lack of a Regulatory “License to Operate”

In their seminal work, Gunningham _et al._ point out that corporations are subject to three “licenses to operate” whose terms include economic, social and regulatory categories. The present research is particularly interested in the condition of regulatory license: while a review of the regulatory context in Canada shows that Canada has not set particular legal or regulatory requirements for CSR reporting and the Canadian regulatory regime in general only addresses CSR reporting at the very periphery, the empirical research is concerned about whether this position is equally shared by the interviewees. Moreover, it seeks to understand how the interviewees sense the CSR reporting-performance gap and whether, in the practitioners’ perceptions, the inconsistency of CSR reporting with corporate actual performance has something to do with the lack of the regulatory license.

As to the first matter, the views expressed by the practitioners strongly resonate with the discussion in Chapter 2. During the interviews, many respondents explicitly note that it is voluntary for the industry to do CSR reporting in Canada. As one respondent puts: “In

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252 The concept “the regulatory license to operate”, along with two other concepts, namely the social license and the economic license, was coined and meticulously discussed by Gunningham _et al._ See: Gunningham _et al._, supra note 12. In the literature, the notion of “license to operate” was adopted to represent the socially constructed external factors that influence firms’ performance in an interactive way. Among the three licenses, the regulatory license has established a floor for corporations to comply with.

The present research considers primarily the condition of the regulatory license as it is directly related to the current research thesis. While the social and the economic licenses are both important considerations for companies when they produce their CSR reporting, limited by the scope of the research inquiry, the present research will leave them to future studies.


254 See Section 2.3.2 for a review of the Canadian law and regulation that have a link with CSR reporting.
terms of regulation in Canada, it’s very minimal. It really is the voluntary initiatives that require [CSR] reporting”. While the interviewees do not feel they are bound by a regulatory “license to operate” in terms of CSR reporting, a handful of them refer to industry association policies as a source of compulsion for mining companies to report on CSR. This observation is in line with the contention of the literature. As Gunningham posits in a later work, “industry-specific, collective and voluntary initiatives” that aim at protecting the collective social license of the industry constitute a fourth license to operate, which he calls “collective license”. Collective license is in use when an industry sector seeks to improve the reputation of the entire industry tarnished by individual companies within the industry. While the practitioners agree that in the mining industry, the collective license plays an important role in pushing for more stringent conditions in CSR reporting, they also mention that with respect to the other two industries, there is not such an equivalence.

With respect to the second question, in fact, some industry practitioners interviewed by the present research have to various extent already sensed the problem of the CSR reporting-performance inconsistency, as Manager 3 notes: “I think there needs to be some rigor around [CSR] reporting because it is getting out of hand right now”. Manager 5,

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255 Interview transcripts on file with the author, June 17, 2014.
256 The two most cited industry-wide codes of conduct that have a great influence on Canadian mining companies’ CSR reporting are the Toward Sustainable Mining (TSM) program developed by Mining Association of Canada (MAC) and the 10 Sustainable Development Principles required by the International Council on Mining and Metals (ICMM). In both situations, the interviewees note that the industry initiative has been substantially abided by as it is a precondition for companies to gain membership in the association.
258 Ibid, at 489.
259 Interview transcripts on file with the author, July 14, 2014.
who is the front-line CSR reporting manager of M2, echoes to this sentiment and adds: “If there are legal requirements on [CSR] reporting, there is a lot more rigor and the company will allocate more budget on it.”

The response of Manager 5 deserves a further elaboration since other interviewees have expressed similar views. For instance, Senior Manager 6 posits: “I think [companies] will be taking it a lot more seriously if CSR reporting is mandated. If it’s regulated, that would open the door to more attention and more resources.” When asked about “What, in your opinion, are the key factors that drive publicly-traded companies to better align their CSR reporting with CSR performance”? Senior Manager 4 responds without hesitation: “Regulatory requirements”.

These overlapping viewpoints expressed by the practitioners strongly suggest that the regulatory condition is a major concern of corporate decision making in terms of what information companies would put in their CSR reports and how rigorous the information would be. As a result, the present research posits that a sound remedial method for the CSR reporting-performance inconsistency should work toward building and strengthening the regulatory license. This stance is well supported in the literature. When discussing the “licenses to operate”, Gunningham et. al. argue that regulatory license serves as the floor of corporate environmental performance and may reinforce social license in significant ways. They posit, “regulation does matter—and matters a

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260 Interview transcripts on file with the author, December 9, 2013.
261 Interview transcripts on file with the author, October 29, 2013.
262 Interview transcripts on file with the author, June 18, 2014.
263 This point is further illustrated in Section 4.2.2.
lot”. 265 Gunningham further argues that collective voluntary initiatives are much more likely to succeed “if they operate in the shadow of rules and sanctions” of governmental regulation. 266 For the above-mentioned consideration, the present research strives to explore the research thesis from the perspective of law and regulation.

3.4 The Research Question

As the previous texts show, the divergence of CSR images built by companies in CSR reporting and their actual performance poses a serious challenge to the pursuit of CSR. As noted by Cherry & Sneirson:

We posit that the accuracy of CSR information is important for efficient securities markets and informed consumer choice. Further, if faux CSR is allowed to flourish, it will ultimately undermine any attempts at substantive CSR, which will only be met with cynicism. 267

This issue deserves a heightened and urgent concern, especially at a time when CSR reporting keeps gaining significant growth and “much of our collective knowledge about companies and their actions is predicated on what a particular firm chooses to tell the public”. 268 It would primarily serve corporate interests rather than promote social progress if a firm claims that it is committed to CSR while undertaking changes only at a surface level. Consequently, CSR will become groundless when it “[degenerates] into costly exercises in paper pushing or excuses for avoiding real action”. 269 More seriously,

265 Gunningham, Kagan & Thornton, ibid, at 45.
266 Gunningham, 2007, supra note 257, at 497.
267 Cherry & Sneirson, supra note 241, at 986.
268 Cherry & Sneirson, ibid, at 1026.
269 Fung, Graham & Weil, supra note 7, at 106 (explaining why certain government-mandated disclosure policies are effective and why others are not).
the current public and media obsession on CSR reporting has misled policy making as well, because it directs legislators and regulators to eye predominantly on the content of the information disclosed by the organizations, *i.e.* whether it is exhaustive enough to cover all the items on the regulatory checklist, rather than on the progress the companies have actually made in terms of CSR.\(^\text{270}\)

Built upon the literature and the empirical evidence, the present study poses the research question as: **from a law and regulation perspective, how can the ubiquitous CSR reporting-performance discrepancy be alleviated?** Based on a review of practical endeavours that have been made, which primarily are in the form of private actions, the current research argues that instead of relying on episodic and case-by-case attempts, a more fundamental and systemic solution should be required to bridge the CSR reporting-performance gap. In particular, it calls for the repair of the missing link of governmental regulation in the process of CSR reporting. Besides, it posits that the focus of scholarly work needs to move away from generating greater paperwork compliance to stimulating substantive corporate performance improvements in CSR and tightening its connection with CSR reporting in terms of how CSR reporting is evaluated.

Following this line of thinking, the present research proposes the use of the reflexive law approach to fix the disagreement between CSR reporting and corporate actual

\(^{270}\) For instance, the France’s Grenelle II law includes mandatory disclosure requirements of social and environmental issues by publicly-traded companies against a set of indicators. According to the law and the implementing decree, there are 42 topics that companies must report on, divided into four themes—human resources, labour standards, community interests, environmental impact, management and protection. The only measurement of obedience is whether companies have made disclosure in all these required areas. See: Lucien J Dhooge, “Beyond Voluntarism: Social Disclosure and France’s Nouvelles Regulations Economiques” (2004) 21 Ariz J Int Comp Law 441 (examining the strengths and weaknesses of Grenelle II law from a human rights perspective).
performance on CSR dimensions. Consequently, the research purpose is to justify why imposing governmental regulation on CSR reporting and shaping the regulatory requirements into a form of reflexive law is a sound solution to remediate the decoupling of CSR reporting and corporate actual performance. To support its argument, the present research combines doctrinal and theoretical legal analysis with empirical qualitative research. It only not defends the thesis argument from a theoretical perspective, but also pulls industry experience to further refine the theory of reflexive law. On that basis, it puts forward a working model of “reflexive law plus” as it relates to CSR reporting, which, argued by the present research, is more pertinent than both traditional regulation and other contemporary forms of governmental regulation in addressing the CSR reporting-performance inconsistency.

The present research is one of the first endeavours that systemically analyze and respond to the problem of the CSR reporting-performance inconsistency. The research significance of the present study manifests in at least three aspects. First, the present research contributes to the broader regulation and governance scholarship in terms of theory building. Second, the research result will inform policy making and CSR advocacy practice in Canada and beyond. Third, the research acts as a wake-up call for the CSR research. An expanded discussion of the research significance will be made in Section 6.3.1.
Summary of Chapter 3

This Chapter starts with three examples—Barrick Gold, the Body Shop, and the ANZ bank—all of which are recognized CSR reporting leaders or award winners. These companies promote themselves as green and socially responsible, but their actual social and environmental performance fails to match their CSR commitments and reported profiles. These examples have raised hard and universal questions about the inconsistencies between the image projected by the companies and their actual CSR practices. As such, they reveal that what corporations report in terms of CSR does not necessarily translate into their practices.

This divergence mirrors the current CSR debate, as more and more scholars have become skeptical of or even cynical about the value of CSR as a means to induce real changes in corporate performance. First, the literature expresses a general concern about the empty and vague nature of current CSR practices. Second, scholarly work argues that voluntary actions are insufficient for bridging the CSR reporting-performance gap. Despite that the literature uses various labels to describe the CSR reporting-performance inconsistency, such as corporate greenwashing, corporate hypocrisy, and corporate dissemble, they collectively support the major thesis of the present research, which is the decoupling of CSR reporting with corporate CSR performance. The presentation of the scholarly opinions has potently exhibited the academic value of the present research.

The latter part of the chapter examines the empirical evidence in order to contextualize the issue of the CSR reporting-performance inconsistency within the present research.
According to the research interviews, the current practice of CSR reporting is flawed because it is largely decorative and presented primarily in public relations terms. Addition concerns include generic and boiler-plated information as well as incomplete disclosure. According to the documentary analysis conducted by the present research, the companies have made serious delays in terms of the timeline for their CSR reporting. Besides, they tend to avoid reporting key negative information in their CSR reports.

In terms of the legal and regulatory conditions for CSR reporting in Canada, the empirical research finds that the interviewees commonly share the opinion that practicing CSR reporting in Canada is voluntary and there generally lacks a regulatory “license to operate”. In the meantime, by soliciting views from the practitioners, the present research corroborates the stance of the literature in positing that a sound remedial method for the CSR reporting-performance inconsistency should work toward building and strengthening the legal and regulatory requirements for CSR reporting.

Based on the above analysis, the present study poses the research question as: from a law and regulation perspective, how can the ubiquitous CSR reporting-performance discrepancy be alleviated? The research proposes that imposing governmental regulation on CSR reporting and shaping the regulatory requirements into a form of reflexive law would be a sound solution to remediate the discrepancy.
Chapter 4: Proposed Solutions & Analyses

Introduction

To further the discussion in prior chapters, this chapter focuses on proposing a plausible solution to the research thesis. In particular, it combines theory with practice and devotes a generous portion of the discussion to the empirical findings in terms of where the problems lie and what the opportunities are for the CSR reporting-performance realignment. While providing a comprehensive analysis of the proposed reflexive law solution, it leaves a more profound elaboration of the reflexive law approach to the ensuing chapter.

This chapter is made up of four major sections. First, this chapter critically analyzes the existing attempts to address the CSR reporting-performance inconsistency. These include false advertising litigation, securities fraud litigation, and shareholder resolutions. The present research argues that they provide beneficial yet suboptimal remedies to the decoupling problem, in that the success of these solutions is episodic and on a case-by-case basis.

Second, the present chapter digs deeply beneath the existing private actions to identify the fundamental regulatory gap as it relates to CSR reporting. From both historical and practical perspectives, it shows how the regulatory field with respect to CSR reporting is dominated by private and self-regulation. Analyzing the limitation of each regulatory
form pertaining to CSR reporting, the study concludes that governmental regulation of CSR reporting should be instituted.

Third, the present chapter situates CSR reporting within the setting of governmental regulation and proposes that the reflexive law approach be used to alleviate the CSR reporting-performance inconsistency. To corroborate its argument theoretically, this chapter carefully reviews the literature concerning the reflexive law theory, drawing an analysis of what reflexive law is and how it has been applied by the literature. In addition, it extrapolates from the literature that the reflexive law approach within the context of CSR reporting encompasses two major steps: first, officially mandating CSR reporting through either legislation or regulatory rules; and second, requiring institutional conditions for CSR reporting that induce corporate self-referencing processes. Regarding the first step, the present chapter cogently discusses why the current regulatory structure of CSR reporting is flawed and why governmental regulation over CSR reporting should be called for. With respect to the second step, it notes that reflexive law as an abstract theory ought to be put in the practical context of CSR reporting so as to get its meaning precisely elaborated on.

Finally, in order to meet the need to substantiate the reflexive law approach, this chapter closely examines the empirical evidence to identify the factors underpinning the CSR reporting-performance decoupling and the opportunities for realigning the two.

This chapter contributes to both the literature and the regulatory practice of CSR reporting. For one thing, the discussion engaged in the present chapter is a continuation
and update of the literature, in particular, the CSR scholarship. The present chapter does not just simply adopt the reflexive law theory, but also develops and revives the theory in the contemporary regulatory setting of CSR reporting. It clarifies some significant issues surrounding reflexive law and makes observations on the pattern of the theory’s practical application. For another, the empirical findings documented in the present chapter fill an important research gap, since the practical circumstances around CSR reporting has not been thoroughly studied. In addition to contributing to a more comprehensive understanding of the CSR reporting phenomenon and the beliefs and assumptions underpinning it, the empirical findings shed light on the issue of regulatory design as it relates to CSR reporting.

### 4.1 Existing Private Actions

So far, people who are unsatisfied with the CSR reporting practice have used three solutions to address the CSR reporting-performance decoupling. All of these approaches are in the form of private actions. The first reaction is litigation under false advertising, which is exemplified by *Nike v. Kasky*. The second is securities fraud

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271 This section cites the US statutory provisions and regulatory arrangements as well as precedents, which may or may not have Canadian counterparts. This is because most of the private actions in terms of CSR reporting were taken shape in the US territory and later spread to Canada. In addition, the Canadian companies involved in some of the cases, e.g. Barrick Gold, were dual-listed in both the United States and Canada with the suits primarily filed in the United States. Moreover, the US and Canadian regulatory environment for CSR reporting resembles strikingly, since both countries favour the hands-off CSR regulatory policies and lean toward coordinating the disclosure of CSR issues along with the existing securities regulatory structure. That said, the Canadian variations will be noted and discussed separately in the texts as well as the footnotes.

272 In terms of the literature, there is not a single piece of scholarly work that enlists all these three solutions to address the CSR reporting-performance variation. Instead, they were proposed by the different literature under different subject matters concerning CSR reporting. See: *infra* notes 109 and 150 for the literature that has inspired the present research. It is therefore the contribution of the present thesis to coordinate the literature on different subject matters and link all the pieces together under the current theme.

litigation, as shown by *In re* Ford Motor and *In re* Barrick Gold Securities Litigations.\(^\text{274}\)

The third one, a non-litigation fix, resorts to the mechanism of shareholder resolutions that compels companies to consider shareholder voice in the corporate decision making. This section introduces these three solutions in sequence. In addition, it provides a detailed discussion of existing statutory provisions and cases underpinning each attempt.

### 4.1.1 False Advertising Litigation

One way to combat the decoupling problem is through false advertising law.\(^\text{275}\) In the United States, state laws are the principal legislations governing false and misleading advertising.\(^\text{276}\) At the federal level, the Lanham Act is probably the main source of false advertising litigation.\(^\text{277}\) In Canada, the federal *Competition Act*, which contains both civil and criminal misleading advertising provisions, is the major law applied to false or misleading claims.\(^\text{278}\) In both countries, the law prohibits “not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public”.\(^\text{279}\)

The first and foremost question asked when adopting the false advertising law is whether CSR reporting accounts for advertising. It does not seem so at first impression. However,


\(^{275}\) Cherry & Sneirson, *supra* note 241 at 1028–1030; Cherry, *supra* note 224 at 289–290.

\(^{276}\) For example, in the Kashy v. Nike case, the source of formal law is California’s false advertising law, which is incorporated in the California Business and Professions Code.


\(^{278}\) R.S.C., 1985, c. C-34, § 74.01(1).

from a broad perspective, any statements made in a CSR dialogue or report may be
deed as advertising “seeking to protect core assets such as reputation or brand image”,
less “a corporation can show that they do not benefit either directly or indirectly” from
the statements.280 In line with this thinking, the California Supreme Court defines
vertising as “representations, operations, products of fact about the business, or
services of the speaker”.281 This view is reinforced by the Canadian legislation, which
ads advertising to cover claims made relating to both services and “any business
interest”, including claims regarding corporate performance.282 Therefore, “[making]
voluntary commitments to environmental and social objectives yet [failing] to meet those
performance expectations” can be a cause of action in false advertising litigation.283

Another closely related issue is who are eligible complaints in the false advertising suits.
Generally, the plaintiffs are consumers. Additionally, business competitors may have
standing to sue.284 In terms of scienter, simply gross negligence can trigger a suit and the
law does not require the plaintiff to prove fraudulent intent.285

280 Michele Sutton, “Between a Rock and a Judicial Hard Place: Corporate Social Responsibility Reporting and
of Kasky v. Nike on European countries in terms of CSR practices and legislations).
282 In addition to the general misleading advertising provisions, the Competition Act encompasses a standalone civil
provision that prohibits performance claims that are not based on an “adequate and proper test”. See: supra note 278, §
74.01(1)(b).
283 Monsma & Buckley, supra note 173, at 192 (commenting on the potential legal responsibilities that a publicly-
traded companies may have for reporting its CSR matters).
284 Vos notes that “Section 43 (a) of the Lanham Act gives competitors a federal cause of action against rivals who
engage in false advertising”. See: Vos, supra note 224, at 691.
285 In terms of the US state law, see: Sutton, supra note 280 at 1177. The elements required in the Lanham Act for a
false or misleading claim include: “(1) a false or misleading statement of fact; (2) that is used in a commercial
advertisement or promotion; (3) that is material, in that it deceives or is likely to deceive; (4) that is used in interstate
commerce; and (5) that causes, or is likely to cause, the claimant competitive or commercial injury”. There is no
requirement for scienter. See: Reichman & Cannady, supra note 149 at 188. In terms of the Canadian law, only
criminal cases require that the claim be made “knowingly or recklessly”. For a civil claim, it must be proven that: (i) a
representation has been made, (ii) to the public, (iii) to promote a product or business interest, (iv) that is literally false
or misleading (or with a false or misleading general impression) and (v) that the claim is “material” (i.e., likely to
The most influential claim of false advertising that relates to CSR reporting comes from
the case *Kasky v. Nike* (*Nike v. Kasky* at the US Supreme Court).\(^{286}\) The case is
summarized as follows.

Marc Kasky, a California resident, brought an action on behalf of the public against Nike,
Inc. (Nike) and its directors and officers under California’s false advertising law, which is
incorporated in the California Business and Professions Code.\(^{287}\) The plaintiff alleged that
Nike had made false statements in press releases and elsewhere regarding the labour
practices in the factories where Nike sourced its products from.\(^{288}\) The trial court
dismissed the actions on the ground that Nike’s media releases constituted free speech
and thus were subject to constitutional protection. The plaintiff then appealed. The
appellate court again “concluded that Nike’s statements were noncommercial speech and

\(^{286}\) *Kasky v. Nike, Inc.*, *supra* note 281. The literature that has carefully documented this case in their discussion of CSR
reporting and related issues include: Vos, *supra* note 224; Cherry & Sneirson, *supra* note 241; Cherry, *supra* note 224;

\(^{287}\) WEST’S ANN. CAL. Bus. & Prof. Code § 17500 (West 2009). Pursuant to the California’s false advertising law, as
part of the unfair competition law (UCL), it is:

> “unlawful for any person, … corporation …, or any employee thereof with intent directly or indirectly … to
> make or disseminate … before the public in this state, … in any newspaper or other publication … or in any
> other manner or means whatever … any statement, concerning that real or personal property or those services …
> which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be
> known, to be untrue or misleading …”.

\(^{288}\) Since October 1996, a television news report as well as many local and national newspapers published articles
alleging that in the factories where Nike had its products manufactured, workers were paid less than the local minimum
wage, required to work overtime, subjected to sexual abuse and forced to work in an unsafe environment. In reaction,
Nike made a series of press releases and sent letters to newspapers, defending that its workers were protected from
physical and sexual abuse, were paid double the local minimum wage, received free meals and health care and their
working conditions complied with local laws. The complaint therefore alleged that Nike made six misrepresentations in
the course of its public relations campaign. These include: (1) “that workers who make NIKE products are . . . not
subjected to corporal punishment and/or sexual abuse;” (2) “that Nike products are made in accordance with applicable
governmental laws and regulations governing wages and hours;” (3) “that Nike products are made in accordance with
applicable laws and regulations governing health and safety conditions;” (4) “that Nike pays average line-workers
double-the-minimum wage in Southeast Asia;” (5) “that workers who produce Nike products receive free meals and
health care;” and (6) “that Nike guarantees a ‘living wage’ for all workers who make Nike products”. See: *Kasky v.
Nike, Inc.*, *supra* note 281, at 248.
therefore subject to the greatest measure of protection under the constitutional free speech provisions.”\(^{289}\) Kasky further appealed to the California Supreme Court. This time, the Court reversed the judgment of the lower courts, holding that Nike’s statements were commercial speech and so could be punished if they were false or misleading.\(^{290}\) However, the Court did not decide whether the speech was indeed false or misleading. Rather, the matter was remanded to the appellate court for further proceedings. Nike petitioned the US Supreme Court to challenge the ruling, yet the Supreme Court refused to further delve into the case.\(^{291}\) Both parties eventually reached out-of-court settlement, which forestalled any trial of the issue with respect to misleading statements in CSR reporting.

As the *Kasky v. Nike* case reveals, the first challenge of using false advertising litigation to address the CSR reporting-performance divergence lies in the legal uncertainty engendered by the precedent. The solution of false advertising litigation is judicially doubtful not only because *Kasky v. Nike* is a case ultimately undecided at the court, but also since the court ruling in *Kasky v. Nike* highlighted the constitutional debate

\(^{289}\) *Ibid*, at 249.

\(^{290}\) *Ibid*, at 247. The California Supreme Court held:

“[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages”.

Canadian law regarding free speech is different from the US one. According to Section 2 of the Canadian Charter, everyone has the fundamental freedoms of “thought, belief, opinion and expression, including freedom of the press and other media of communication”. See: Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Section 2(b). However, the right to free speech is subject to limits of Section 1 of the Charter, which allows the parliament or a provincial legislature to pass laws that limit free speech as long as the limits are reasonable and can be demonstrably justified (Section 33(1)). For a detailed comparison between the Canadian and the US systems, see: Kent Greenawalt, “Free Speech in the United States and Canada” (1992) 55:1 Law Contemp Probl 5 (discussing the variation in judicial approach between the two countries).


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surrounding free speech and commercial speech while downplayed the issue of legal liability for making untrue CSR statements. This imbalance increases the difficulty of adopting false advertising litigation to shrink the reporting-performance gap, because under the scenario of false advertising litigation, in order for the court to express opinion regarding false or misleading CSR statements, it is almost impossible to sidestep judicial discussion on the constitutional law issue of free speech, which is so controversial that the court is generally reluctant to adjudicate.

A second concern is the puffery defense. The puffery doctrine is a major element in the law of fraud. According to the literature, puffery is “a defense to a charge of misleading purchasers of goods, investments, or services, or to a charge that a promisor has made a legally cognizable promise”. Puffery has been used against false advertising charges in many occasions. It insulates companies from liability on the ground that the accused statement is mere “sales talk” and harmless bragging rather than a material misstatement in connection with products or services. The most disturbing part of the puffery defense is that the courts have been inconsistent in applying this doctrine and distinguished puffery from deceptive advertising on a case-by-case basis. Although it is the defendants who usually bear this risk of uncertainty, overall, the specter of the puffery defense makes false advertising litigation an unfavourable choice for the plaintiffs.

293 Ibid, at 107-110.
294 Ibid. A vivid example given by Hoffman is that “[t]he claim that yogurt is ‘nature’s perfect food’ apparently may be falsified and is not puffery. See: In re Dannon Milk Prods., Inc., 61 F.T.C. 840, 840 (1962). But, to enthusiasts’ chagrin, Nestlé’s boast that it sells the ‘very best chocolate’ is a meaningless puff”.
Another shortfall of adopting this approach is that consumers, the major plaintiffs in false advertising litigations, may not have direct interests or enough bargain power in many CSR-sensitive industries, such as mining, oil and gas, to initiate and continue a false advertising suit.

Therefore, the possibility of adopting false advertising litigation to address the decoupling of CSR reporting and performance is extremely limited.

4.1.2 Securities Fraud Litigation

History has filled with literature that explores the feasibility of using securities disclosure as a venue for CSR reporting.\(^{295}\) Consistent with this proposal, scholarly work argues that securities fraud litigation pursuant to Section 10(b) of the US Securities Exchange Act and Rule 10b-5 (collectively referred to as “Rule 10b-5”) may be a powerful tool to address the CSR reporting-performance inconsistencies.\(^{296}\)

\(^{295}\) Early discussion surrounding this topic focused only on corporate environmental reporting, yet more recent research has expanded the scope of corporate reporting to incorporate social and other CSR aspects. For example, see: Theodore Sonde & Harvey L Pitt, “Utilizing the Federal Securities Laws to Clear the Air - Clean the Sky - Wash the Wind” (1970) 16 Howard Law J 831 (positing that the securities regulatory body in the United States should take actions to provide specific guidelines as to when environmental disclosure will be required); John Oliver Cunningham, “Environmental Disclosure in Corporate Securities Reporting” (1979) 8 Boston Coll Environ Aff Law Rev 541(analyzing NRDC v. SEC, which is a landmark case that involved an attempt on the part of environmental advocacy groups to expand corporate securities disclosure to include reporting on corporate environmental conduct); Perry E Wallace, “Disclosure of Environmental Liabilities under the Securities Laws: The Potential of Securities-Market-Based Incentives for Pollution Control” (1993) 50 Wash Lee Law Rev 1093 (arguing that the required disclosure of corporate environmental liabilities and obligations “has created a powerful market dynamic that investors can use to promote environmental protection”); Robert H Feller, “Environmental Disclosure and the Securities Laws” (1994) 22 Boston Coll Environ Aff Law Rev 225 (proposing that the US Securities and Exchange Commission shall take an aggressive program to enforce existing environmental disclosure requirements); Williams, supra note 140; Rachel Cherington, “Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10B-5” (2004) 25 Univ Pa J Int Econ Law 1439 (suggesting that Section 10(b) and Rule 10b-5 of the US Securities Exchange Act could be used to hold transnational corporations responsible for their overseas operations); Monsma & Buckley, supra note 173; Dhir, 2008, supra note 116; Lin, supra note 61. Collectively, the literature debates on two issues: descriptively, whether or not certain CSR information falls within the mandatory disclosure realm pursuant to the current securities laws, especially in the United States; normatively, whether such disclosure shall be required by securities laws.

\(^{296}\) Cherry & Sneirson, supra note 241, at 1030-1032. Section 10(b) makes it unlawful for:
The literature comments Rule 10b-5 as “the broadest, most frequently asserted antifraud provision in the securities laws”\(^\text{297}\) of the United States and a “broad, catch-all” antifraud provision.\(^\text{298}\) It prohibits “fraudulent material misstatement or omissions in connection with the sale or purchase of a security”.\(^\text{299}\) In order to make a claim under Rule 10b-5, “a plaintiff must plead that: (1) the defendant made a materially false or misleading statement or omitted to state a material fact necessary to make a statement misleading; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which the plaintiff relied; and (5) the plaintiff’s reliance was the proximate cause of its injury”\(^\text{300}\). In practice, the US courts have relaxed the element of reliance in Rule 10b-5 litigation by

\[\text{“any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ... [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors”.}\]


Rule 10b-5 provides:

“\(\text{It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, to employ any device, scheme, or artifice to defraud, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security}.\)”

17 C.F.R. § 240.10b-5 (2004). In addition to securities fraud litigation in the secondary market, Rule 10b-5 is also widely applied to cases in terms of insider trading as well as securities fraud litigation with respect to prospectus or registration statement in the primary market. However, in the context of the present research, Rule 10b-5 is only discussed within the realm of secondary market liability, unless indicated otherwise.

Different from the US counterpart, the current Canadian securities regulatory framework is provincial-based. In Canada, the securities laws prescribe statutory liability for secondary market disclosure. For example, see: Ontario Securities Act, R.S.O.1990, s.138.3. While they share certain similarities, the statutory civil liability in Canada is not “Rule 10b-5 North” because the scope and application of the two regimes are fundamentally different. For a comparison of the two regimes, see: Davies Ward Phillips & Vineberg LLP, “The Ontario Civil Liability Regime, Not Quite 10b-5 North” (May 30, 2006), online: <http://www.dwpv.com/images/Perspective_The_Ontario_Civil_Liability_Regime__Note_Quite_10b-5_North.pdf> (last visited June 12, 2016). In theory, with respect to the decoupling issue that is the thesis of the present research, a suit under the Canadian statutory liability provisions could also be workable. However, considering that the US Rule 10b-5 action is more thoroughly mentioned in the literature themed on CSR reporting and has been more maturely tested in practice on CSR-related matters, this section only concentrates on the US approach.

\(^{297}\) Wallace, supra note 295 at FN 90.

\(^{298}\) Ibid at 1115 (quoting Charles R. O'Kelley, Jr. & Robert B. Thompson, Corporations and Other Business Associations (1992), at 839).

\(^{299}\) In re Ford Motor Co. Sec. Litig., 381 F.3d 563 (6th Cir. 2004), at 567 FN.2.

developing a theory of “fraud on the market”. According to the theory, because ordinary investors rely on the price of a security as an accurate reflection of the value of the stock, those investors have a “rebuttable presumption of reliance on the defrauded market” when the price of a company’s stock has been manipulated by false or misleading statements.\(^{301}\) The court accepted this doctrine in landmark cases such as *Basic, Inc. v. Levinson*, which has become a precedent that many courts chose to follow.\(^{302}\)

So far, two cases, one resolved and the other undecided, involve the use of Rule 10b-5 in addressing the CSR reporting-performance gap. In the first case, *In re Ford Motor Co. Securities Litigation (In re Ford)*, investors sued Ford Motor, alleging that Ford made false or misleading statements or omissions about the dangerousness of Ford Explorer vehicles equipped with ATX tires, which was in contradiction with Ford’s social commitment.\(^{303}\) Among the allegedly false or misleading statements were Ford’s


\(^{302}\) *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988). In its decision, the US Supreme Court held that “[b]ecause most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action”.

In Canada, attempts to apply the “fraud on the market” doctrine have not met with success. See: *Carom v Bre-X Minerals Ltd* (1998) 41 OR (3d) 780. In this decision, the court concluded that “there is no support in the common law for the plaintiffs’ assertion that a presumption of reliance may arise as a matter of law”. *Ibid*, at 793. Nevertheless, the court conceded that a presumption of reliance might arise as an inference of fact. Later, in *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman (“Fisherman”)*, the court agreed that whether a plaintiff has actually relied on a misrepresentation was an issue of fact and may be inferred from all the circumstances. See: *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman (2001)*, 8 CCLT (3d) 240, at 256-57. According to the literature, these cases suggested that the Canadian courts may accept “a softer version of presumed reliance based on inferences of fact that may be drawn in particular cases”. See: Michael Duffy, “Fraud on the Market: Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia” (2005) 29 Melb Univ Law Rev 621 at 643. But currently, the “fraud on the market” doctrine is no longer an issue in Canada, since the Securities Act of major provinces, such as Ontario and British Columbia, all have freed the plaintiffs from proving reliance in the secondary market civil liability suits, which creates better protection for the investors than the doctrine. See: *Securities Act, R.S.O.1990, c. S.5, s.138.3(1); Securities Act, R.S.B.C. 1996, s.140.3(1).*

\(^{303}\) *In re Ford, supra* note 299, at 563.
statements in its public disclosure “regarding its commitment to quality, safety, and corporate citizenship”. Despite the fact that the court eventually dismissed the complaint on the basis that the statements Ford Motor made were immaterial, the literature views the case remarkable since *In re* Ford “demonstrates that investors have already used a statement about CSR as a foundation for allegations of Rule 10b-5 violations to take aim at a public company”.

The second case, *In re* Barrick Gold Securities Litigation (*In re* Barrick), is closely associated with the Barrick example mentioned at the beginning of Chapter 3. The plaintiffs alleged that Barrick made misleading statements with respect to the Pascua-Lama mine project, which constitutes securities fraud under Rule 10b-5. The defendants filed a motion to dismiss the case. The court denied the defendants’ motion in part, holding that the plaintiffs had sufficiently proved material misstatements regarding Barrick’s compliance with environmental commitments, internal controls and

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304 *Ibid*, at 570. As the court noted:  
In their complaint, plaintiffs allege that Ford made many misleading statements regarding its commitment to quality, safety, and corporate citizenship, such as: 1) “[Alt Ford quality comes first”.; 2) “We aim to be the quality leader”; 3) “Ford has its best quality ever”; 4) Ford is “taking across-the-board actions to improve ... [its] quality”; 5) Ford has made “quality a top priority”; 6) "Ford is a worldwide leader in automotive safety"; 7) Ford has made "quality a top priority"; 8) Ford is "designing safety into ... [its] cars and trucks" because it wants its customers to feel safe and secure in their vehicles at all times"; 9) Ford "want[s] to make customers' lives ... safer"; 10) Ford has "dedicated ... [itself] to finding even better ways of delivering ... safer vehicles to [the] consumer"; 11) Ford "want[s] to be clear leaders in corporate citizenship"; 12) Ford's "greatest asset is the trust and confidence ... [it] has earned from ... [its] customers"; 13) Ford "is going to lead in corporate social responsibility".


305 Kerr, *supra* note 51 at 842. According to Kerr, by only discussing three statements related to safety of Ford Explorer, “the court did not analyze the statements about corporate citizenship or corporate responsibility independently of the other statements that the plaintiffs alleged to be misleading”. Therefore, Ford Motor was able to avoid liability “not because the court unequivocally found statements about CSR to be per se immaterial”.

306 In *re* Barrick Gold Sec. Litig., Fed. Sec. L. Rep. (CCH) P98, 433; 2015 U.S. Dist. LEXIS 43053, at 21. Plaintiffs alleged four main categories of actionable misstatements pursuant to Rule 10b-5: “statements regarding cost and schedule (including statements that Pascua-Lama was a “low-cost project”), statements regarding compliance with environmental regulations, statements regarding internal controls and accounting for capital costs, and statements concerning accounting for the project”.

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accounting. 307 Although In re Barrick has not yet reached the trial stage and may not do so because of the high possibility on the part of the defendants to pay settlement to end the case, the court’s stance in granting the class certification evidently shows that adopting securities fraud litigation to tackle the incompatible CSR disclosure and performance is judicially acceptable.

However, a number of factors limit the use of securities fraud litigation in addressing the problem of CSR reporting and performance inconsistencies. Like the barrier in false advertising litigation, one major obstacle is the defense of puffery. Once a court determines that a corporate statement on CSR matters constitutes puffery, “it is deemed to be immaterial as a matter of law” and therefore “the company will be shielded from liability arising from that statement”. 308 For instance, in In re Ford, the court based its ruling of dismissal on that:

Such statements are either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they were misleading. All public companies praise their products and their objectives. Courts everywhere “have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate

307 Ibid. Particularly, the court ruled, “Plaintiffs provide detailed allegations supporting a strong inference that defendants had access to information that directly contradicted their public statements that Barrick was complying with all environmental commitments. … This raises a strong inference that is at least as compelling as any opposing inference of nonfraudulent intent that Barrick either knew that its statements were false, or was recklessly indifferent to that possibility". The court rejected the claim that Barrick made misstatement with respect to the mine’s projected cost and construction schedule.

308 Jennifer O’Hare, “The Resurrection of the Dodo: The Unfortunate Re-emergence of the Puffery Defense in Private Securities Fraud Actions”, (1998) 59 Ohio St LJ 1697 at 1697 (arguing that "the courts have misused the puffery defense and have improperly insulated companies from liability for their misrepresentations").
managers and numbingly familiar to the marketplace-loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available.\textsuperscript{309}

It has been reported that more recently, the courts have increased the use of the puffery defense to dismiss private securities fraud actions as well as extended the protection of the defense to corporate defendants.\textsuperscript{310} However, in most cases, the courts merely cited puffery with little or no reference to what the standards they actually used in distinguishing puffery from misstatement. Given this vagueness, the expansion may in the future lead to growing uncertainties in CSR reporting-related securities fraud litigation.

The second restriction lies in the willingness of investors and shareholders to make securities fraud suits. What Rule 10b-5 provides is a private right of action to injured investors and shareholders who either purchase or sell securities within the period when the misrepresentation happens while relying on the fraud or misleading information. In

\textsuperscript{309} In re Ford, supra note 299, at 570-71 (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1217 (1st Cir. 1996)). It is generally accepted that the US securities regime defines materiality as “a substantial likelihood” that a reasonable investor would view the disclosure of the information as “having significantly altering the ‘total mix’ of information made available” See: TSC Industries, Inc. v. Northway, Inc., (1976) 426 U.S. 438.

Different from the US approach, the Canadian securities law adopts the market impact test and it differentiates material fact from material change. According to the securities legislation, a “material fact” is “a fact that would reasonably be expected to have a significant effect on the market price or value of the securities”, while a “material change” is defined as “a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer”. See: Securities Act, R.S.O. 1990, c. S.5, s. 1(1); Securities Act, R.S.B.C. 1996, c. 418, s. 1(1). In Cornish v. Ontario (Securities Commission), the Ontario court noted that “the reasonable investor test sets a lower threshold for materiality than does the market impact test”, holding that “the market impact test subsumes the perspective of the reasonable investor”. Cornish v. Ontario (Securities Commission), [2013] O.J. No. 1233, 2013 ONSC 1310 (Ont. Div. Ct.), at para.73 & 79. However, these two tests are reported to be converging in most cases and scholars argue that there is barely a practical benefit from adopting the market impact test in Canada for the statutory definitions of materiality. See: Johnston, Rockwell & Ford, supra note 169 at 201.

\textsuperscript{310} O’Hare, supra note 308, at 1698-99.
terms of social and environmental misstatements, although lawyers have enough incentive to persuade affected investors to get involved and form a class, given the overwhelming expenses, the timeliness of proceedings and the lack of deterrence value owing to the high tendency of settlement instead of trial, securities fraud litigation may not be the optimal choice for addressing the problem.

Thirdly, seeking redress of the CSR reporting-performance inconsistencies from securities fraud litigation may on the contrary discourage companies from releasing CSR reports, since corporations can simply refuse to disclose CSR-related information in order to avoid liability.\footnote{311} According to the US securities laws, there is generally no duty for corporations to disclose “soft information”, which characterizes the majority of CSR-related information in corporate filings.\footnote{312} Under Rule 10b-5, companies cannot be held liable for omission of “soft information”. However, if a company chooses to disclose CSR issues, it has to do so fully and truthfully, even in the absence of the duty to disclose.\footnote{313} Therefore, companies will have a greater incentive to abstain from the CSR communication if more firms are sued for securities fraud in terms of their CSR disclosure.

\footnote{311} Similarly, after announcing the settlement with Kasky, Nike stated that it would not release its 2002 CSR report as well as limit its work in CSR. See: William Baue, The Implications of the Nike and Kasky Settlement on CSR Reporting (September 23, 2003), online: Ethical Corp.\url{http://www.ethicalcorp.com/content-print.asp?ContentID=1130} (last visited June 12, 2016).

\footnote{312} Kerr, supra note 44, at 840.

\footnote{313} Ibid.
4.1.3 Shareholder Resolutions

A third method to remediate the CSR reporting-performance contradiction is rooted in the instrument of shareholder advocacy, in particular shareholder resolutions.\textsuperscript{314} CSR-conscious shareholder resolutions provide an important source for communication between proposing shareholders and management on CSR matters. More importantly, they have the potential to positively influence corporate management and policy making pertaining to CSR reporting and performance of the firms.\textsuperscript{315} In addition to being a venue for shareholder-management dialogues and a check of management decision making, shareholder resolutions also play an educative role by arousing the awareness of passive and uncritical shareholders on CSR issues. Consequently, it is theorized that shareholder proposals and resolutions may help to bridge the gap between CSR reporting and corporate actual performance.\textsuperscript{316}

In the United States, shareholder resolutions are regulated under Rule 14a-8 at the federal level.\textsuperscript{317} Rule 14a-8 “affords shareholders in public corporations the right to have their

\textsuperscript{314} Shareholder advocacy, also called shareholder activism, is defined as a means “whereby investors seek to influence companies from within through shareholder resolutions and other tactics”. See: Benjamin Richardson, “Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability” (2009) 87:4 J Bus Ethics 555, at 562 (arguing for a reformulation of fiduciary duties with respect to financial institutions to foster socially responsible investment). Instead of discussing other tactics of shareholder advocacy, such as holding dialogues with corporate management and campaigns, this section concentrates on the issue of shareholder proposals and resolutions, which is a major component of shareholder advocacy.


\textsuperscript{316} Eric Engle, “What You Don’t Know Can Hurt You: Human Rights, Shareholder Activism and SEC Reporting Requirements” (2006) 57 Syracuse Law Rev 63 (discussing shareholder activism as a governance tool to improve human rights and the limitation of it); Aaron A Dhir, “Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability” (2006) 43:2 Am Bus Law J 365 (noting that the Canadian arrangement of shareholder resolutions suffers from at least three shortfalls compared to the US pattern and suggesting that the Canadian system should learn from the US counterpart to remedy its deficiencies).

\textsuperscript{317} Securities Exchange Act of 1934 §14(a), 17 C.F.R. §240.14a-8 (2006). Predicated on the US system, Canada also sets up a similar regulatory regime for shareholder resolutions. See: Canada Business Corporations Act, R.S.C., c. C-
proposals included … in the corporation’s proxy materials at corporate expense” and to be voted on in the next annual meeting of shareholders.\(^{318}\) Pursuant to Rule 14a-8(i), the management must circulate a shareholder proposal to shareholders unless certain exclusion criteria are met.\(^{319}\) If there is a controversy regarding whether a shareholder proposal is excludable, the corporation has the obligation to consult with and justify its decision in front of the SEC.\(^{320}\)

Although the rise of socially responsible investing and institutional shareholding has dramatically increased the bargaining power of shareholders, there are a few obstacles in maneuvering the mechanism of shareholder resolutions to coordinate corporate reporting and performance in CSR aspects. Firstly, in terms of procedural hurdles, to be eligible to

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\(^{318}\) Dhir, *ibid.*, at 375-76.

\(^{319}\) According to Rule 14a-8(i), a company may exclude a shareholder proposal for any of the following reasons:

1. **Improper under state law:** If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;
2. **Violation of law:** If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;
3. **Violation of proxy rules:** If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;
4. **Personal grievance: special interest:** If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;
5. **Relevance:** If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;
6. **Absence of power/authority:** If the company would lack the power or authority to implement the proposal;
7. **Management functions:** If the proposal deals with a matter relating to the company's ordinary business operations;
8. **Relates to election:** If the proposal relates to an election for membership on the company's board of directors or analogous governing body;
9. **Conflicts with company's proposal:** If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting".

\(^{320}\) C.F.R. § 240.14a-8(g) (2006). If the SEC agrees with the management, it usually issues a “no action” letter confirming that it will not take enforcement proceedings against the company if the proposal gets excluded from the company’s proxy statement. The unconvinced shareholder can then bring the matter before the courts.
submit a shareholder proposal, a shareholder should satisfy requirements on both the market value or percentage of shareholding and the holding period. A shareholder proposal is automatically invalid if the proposing shareholder does not meet the prerequisites. While this prescription is aimed at preventing the abuse of shareholder rights, it nevertheless sets an entrance barrier for CSR-conscious shareholders.

Secondly, a shareholder resolution is “a non-binding suggestion to the board of directors as to how it ought to function”. It is non-binding in the sense that even if presented in proxy materials and won a majority of the shares voted at the annual meetings, “the board of directors is under no legal obligation to comply with a shareholders’ proposal”. The advisory nature of shareholder resolutions determines that “tinkering with corporate governance” is insufficient, because the management has the final say on whether the proposal will be eventually adopted.

Lastly, the lack of a formal mechanism for post-adoption evaluation raises a big concern to the effectiveness of corporate actions toward the shareholder resolutions. Even in situations where the management agrees to accept the advice proposed by a shareholder, it does not ensure that the actions taken by the company will be compatible with what the shareholder has proposed. Moreover, in practice, between agreeing to include a shareholder proposal in the proxy statement and refusing to circulate a proposal, a midway outcome is that the proposing shareholder withdraws the proposal after

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321 Rule 14a-8(b) requires the proposing shareholder to have continuously held shares worth $2,000 in market value or 1% of the total number of the company’s securities entitled to be voted at the annual meeting of shareholders for at least one year by the date of submitting the proposal. 17 C.F.R. § 240.14a-8(b) (2006).
322 Engle, supra note 316, at 67.
323 Ibid. In the United States, state and the SEC regulation may render a binding proposal invalid.
324 Bakan, supra note 59 at 159.
successful negotiations with the targeted company. Usually the management promised substantial adoption of the suggestion put forward by the shareholder proposal, and the shareholder agreed to withdraw the proposal. However, without a system for post-adoption monitoring, it is commonly seen that a promise made by the management fails to meet the shareholder’s expectations. For instance, as early as 2006, Les Soeurs de Sainte-Anne made a proposal to Barrick Gold, asking it to report on the environmental and financial risks associated with the Pascua-Lama mine project.325 The proposal was withdrawn after successful negotiation with the management of Barrick Gold, who agreed to hire independent environmental consultants to prepare an overview report with respect to the risk factors of the project.326 But it turned out that neither the sisters nor the CSR activists were satisfied with the report released.327 Being disappointed with the outcome, Les Soeurs de Sainte-Anne submitted a new resolution in 2008, which nevertheless failed to win the majority vote at the annual meeting.328

4.2 Identifying the Regulatory Gap

4.2.1 The Limits of Private Actions

Although the above-mentioned attempts have been beneficial in raising public awareness and sparking scholarly debates surrounding CSR reporting, the success of these private

326 Ibid. Also see: Michael Swan, “Sisters Take on Mining Giant”, The Catholic Register (February 21, 2008), online: <http://www.catholicregister.org/item/8363sisterstakeonmininggiant> (last visited June 12, 2016).
327 Ibid.
actions in triggering the CSR reporting-performance alignment is episodic and on a case-by-case basis. Besides, as the previous texts show, the use of each solution is bound by various restraints and qualifications. For instance, the use of false advertising litigation in addressing CSR reporting dissembling is judicially doubtful and challenged by a constitutional barrier that the precedent has yet to overcome. Likewise, the securities fraud litigation approach is made uncertain by the expanded judicial application of the puffery defense, which is decided through case-by-case application.329 In terms of shareholder resolutions, the voting results of shareholders as well as the management’s stance toward the proposals are both unpredictable. In addition, the remedial plan reached between the advocacy groups and companies may not proceed as expected. The sporadic wins achieved so far are not enough to lead to meaningful changes over time.

Additionally, the private actions provide only contingent rather than permanent responses and cannot fundamentally address the problem of the CSR reporting-performance inconsistency. By interpreting the discrepancy between CSR reporting and corporate actual performance into an issue of omission and misrepresentation in CSR reporting, these three solutions support a one-sided account of the decoupling problem. This account over-emphasizes what is reported from the companies’ source and under-emphasizes reporting’s linkage with corporate actual performance in CSR. As a result, these attempts would contribute more to the generation of greater paperwork than the stimulation of substantive corporate performance improvements on CSR dimensions.

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329 Hoffman, supra note 292 at 143.
Therefore, the present research posits that the private actions are helpful but not enough to repair the broken link between CSR reporting and corporate actual performance in CSR aspects. Rather, a more profound and systemic approach is required if the CSR reporting-performance gap is to be bridged.

4.2.2 A Call for Governmental Regulation

On a separate note, the present research considers a fundamental issue as it relates to the current remedial regime of the CSR reporting-performance gap that is dominated by private actions. While both the literature and the empirical work point to the necessity of having governmental regulation on CSR reporting, the present research finds that in the current regulatory field with respect to CSR reporting, corporate self-regulation and private third-party regulation, both weigh business interests at a higher level than public interests, are in charge. Based on an analysis of their weaknesses, this section concludes by arguing that the prospective solutions to the CSR reporting-performance gap should take governmental regulation of CSR reporting as its first step.

4.2.2.1 The Peril of the Current Regulatory Infrastructure

At first sight, the global regulatory architecture for the implementation of CSR reporting is featured for being plural and multilayered. It is plural in the sense that law, public policies, stock exchange rules, universally-accepted guidance and corporate codes of conduct all play a role in directing and disciplining CSR reporting. It is multilayered
because the partnership between various regulatory bodies has already become a norm in the regulation of CSR reporting.\textsuperscript{332}

That said, a close examination of the regulatory practice of CSR nevertheless brings to light a different perspective: despite the proliferation of regulatory actors and the various networks they have built, the regulatory field with respect to CSR reporting in fact reveals a supremacy of self-regulation and private regulation.\textsuperscript{333} The dominance of corporate self-regulation and private third-party regulation manifests in at least two aspects. First, from a historical perspective, it is the private and self-regulatory bodies that take the lead in setting the agendas for CSR disclosure.\textsuperscript{334} CSR reporting came into

\textsuperscript{332} For instance, the informal forms of regulation, such as regulation by stock exchanges and regulation by standard setting bodies, are frequently in partnership with governmental regulation to gain authority and legitimacy. In addition, in a few countries, private reporting standards are officially endorsed by the government. Also it is commonplace that self-regulated companies voluntarily adopt a widely-accepted reporting framework produced by a private standard setting body, such as the GRI.

\textsuperscript{333} This view is consistent with Shamir, \textit{ supra} note 105. Shamir posits that the field of CSR “strongly tilts in the direction of voluntary and self-reliant models”. In the present research, private regulation refers particularly to commonly-accepted and adopted regulatory standards, principles, indicators and protocols that are produced by private regulatory bodies, such as non-governmental and transnational organizations. The most-cited forms of private regulation in the field of CSR are the GRI reporting protocols and the UN Global Compact principles.

With respect to the interactions between private and governmental regulation, there are contradicting views as to whether private regulation may in fact forestall or even undermine governmental regulation. One group of scholars are concerned that private regulation could crowd out governmental regulation. For instance, according to Seidman, state regulation is “thinned” by stateless regulatory schemes, such as consumer boycotts and independent labour monitoring programs, because of the distrust of international advocacy groups toward local governments in protecting labour rights. See: Gay W Seidman, \textit{Beyond the Boycott: Labor Rights, Human Rights, and Transnational Activism} (Russell Sage Foundation, 2007), at 23-28. In contrast, other scholarly work argues that the displacement hypothesis is oversimplistic as the contestation of private regulation may add more nuance to the situation. See: Tim Bartley, “Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry”, (2005) 12 Res. Pol. Soc. 211.

\textsuperscript{334} For a thorough discussion of the increased use of self-disclosure policies by the regulatory agencies, see: Fung, Graham & Weil, \textit{ supra} note 7.
existence as a pragmatic response to areas where governmental regulation has been weak or inadequate. In particular, CSR reporting responded to the bottom-up call to hold multinational corporations accountable for their irresponsible actions in foreign countries in cases where local regulation for such actions was absent.

Second, from a practical view, private standard-setting bodies have become the *de facto* leaders in CSR reporting. Although it appears that there are more and more government-sponsored legislations on CSR reporting, these legislations are largely silent in terms of specifying what reporting standards or guidelines reporters should adhere to and encourage the utilization of existing reporting frameworks, principles and protocols to produce CSR reports.

The official endorsement of private regulation facilitates a regulatory mode that positions

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335 Conley & Williams, *supra* note 14, at 36 (auguring that "[t]he inadequacy of traditional regulation at the national level has provided the stimulus for the collection of actions that comprise the movement"). However, this might not be the case in some emerging markets, such as China, where the CSR movement was arguably driven by the government in the first place. See: Virginia Harper Ho, “Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China” (2013) 46 Vand J Transnatl L 375 (suggesting that CSR in China follows a state-centric path).

336 For representative views surrounding this topic, see: David J Doorey, “Who Made that?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation” (2005) 43 Osgoode Hall Law J 353; Snyder, *supra* note 204; Backer, *supra* note 236 (proposing the establishment of an international system of disclosure to address the problem with substandard working conditions of indirect employees).

Viewed by the literature, in terms of CSR reporting, the affinity that governmental regulation has with private and self-regulation is an outcome of political struggle. See: Shamir, *supra* note 105; Shamir, *supra* note 95; Maja Savevska, “Corporate Social Responsibility: A Promising Social Innovation or a Neoliberal Strategy in Disguise?” (2014) 14 Romanian J Eur Aff 80 (positing that CSR has an affinity with minimal government regulation and is a product of the neoliberal epistemology).

337 Dhooge, *supra* note 270, at 483-86 (criticizing the absence of disclosure protocol in the France's social disclosure legislation); Sarfaty, *supra* note 131, at 597-606 (noting that the GRI has been working closely with major economies to successfully popularize the use of the GRI guidelines while encouraging regulation on CSR reporting).

In addition, there is a proliferation of literature that interprets the phenomenon as “outsourcing regulation”. For example, see: Dara O’Rourke, “Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring”, (2003) 31 Pol’ y Stud. J. I (evaluating the role of nongovernmental systems such as codes of conduct and monitoring in advancing labor standards); Sidney A. Shapiro, “Outsourcing Government Regulation”, (2003) 53 Duke L.J. 389 (arguing that the transaction costs could be high in certain circumstances if the government relies on private means to achieve public goals); Galit A. Sarfaty, “Shining Light on Global Supply Chains”, (2015) 56 Harvard International Law Journal 419, at 434-37 (positing global supply chain regulation as a distinct model of outsourcing regulation and analyzing the accountability concerns surrounding this arrangement).
corporations, industry associations, private standard-setting bodies and assurance providers at the center of regulatory governance.\textsuperscript{338}

The heavy reliance—actually the sole reliance in the case of Canada—on private and corporate self-regulation for CSR reporting is problematic.\textsuperscript{339} In terms of corporate self-regulation, the process of CSR reporting is seen by scholars as a strategy that serves firms’ own interests in reputation-building and reinforces their power “in subtle but effective ways”.\textsuperscript{340} As noted by the literature, the effort corporations are making to transform CSR into a business matter is an important approach that aims to resist governmental regulation.\textsuperscript{341} This effort, which is also called “marketization”,\textsuperscript{342} not only impedes governmental regulation on CSR reporting, but also encourages CSR reporting to become symbolic and cosmetic, which is a major factor that contributes to the CSR reporting-performance inconsistency.

\textsuperscript{338} Hess, 2014, \textit{supra} note 245, at 129-35 (summarizing the major players in the CSR reporting field).

\textsuperscript{339} The heavy reliance on private and self-regulation is evident in the fact that various governments define CSR reporting as a voluntary action. For instance, the policy statements concerning CSR in Canada have been made by the Government of Canada in two CSR strategy releases. In both documents, CSR is defined as “the voluntary activities undertaken by a company, over and above legal requirements, to operate in an economically, socially and environmentally sustainable manner”. See: Department of Foreign Affairs and International Trade (DFAIT), \textit{supra} note 198. Also See: DFAIT, \textit{Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad} (November 2014), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng#6> (last visited June 12, 2016).

In its 2001 circulation, the European Commission defined CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”. Although it later endorsed a new definition that does away with the voluntary limitation, the EU report continually argues that “CSR remains primarily a voluntary policy” and therefore should be “driven primarily by businesses themselves”. See: European Parliament, \textit{Resolution on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth}, 2012/2098 (INI), para.3.1.

According to the literature, “[t]he fact that the notion of CSR eventually crystallized around ideas of voluntary compliance with private and self-regulation has been a product of an orchestrated corporate campaign, aided by business management models and an emergent industry of private regulatory instruments”. See: Shamir, 2010, \textit{supra} note 95, at 538-39.

\textsuperscript{340} For the former view, see: Livesey & Kearins, \textit{supra} note 230, at 250. For the latter view, see: John M Conley & Cynthia A Williams, 2005, \textit{supra} note 14, at 37.

\textsuperscript{341} Shamir, 2010, \textit{supra} note 95, at 544 (discussing the theoretical implications with respect to the marketization of CSR). Noted by Shamir, the proponents of the marketization approach argue that governmental regulation may stifle competition while free market facilitates the spread of CSR.

\textsuperscript{342} Shamir, \textit{ibid}. 

With respect to private regulation, the motivation and capacity of private regulatory bodies to monitor and enforce CSR reporting is questionable. This is because the private regulatory bodies involved in determining the condition of CSR reporting are primarily corporate-oriented private organizations that shape CSR reporting “in ways that are amenable to business and employer’ concerns”, rather than to societal needs.\footnote{Shamir, 2004, supra note 6, at 669 (calling the corporate-oriented private organizations as Market Non-Governmental Organizations). Shamir defines Market Non-Governmental Organizations (MaNGO) as NGOs that “are established in order to disseminate and actualize corporate-inspired versions of ‘social responsibility’ while enjoying the aura of disinterestedness often bestowed on non-profit ‘civil society’ entities” (p.680-81). According to the KPMG survey, the GRI guideline “remains the most popular voluntary reporting guideline worldwide”. See: KPMG, The KPMG Survey of Corporate Responsibility Reporting 2015, online: KPMG <https://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/kpmg-survey-of-corporate-responsibility-reporting-2015-O-201511.pdf>, at 45. Shamir explicitly takes the GRI as an example of MaNGO (p.679).} In addition, as suggested by the literature, private regulatory bodies such as the GRI form partnerships with governments and stock exchanges to seek legitimacy and regulatory authority, while these bodies also promote business interests at the expense of public interests.\footnote{Sarfaty, supra note 131, at 606-14.} For instance, Sarfaty notes:

the motivation behind the GRI is not whether the reports are credible to NGOs or whether they reflect a company’s good or bad performance, but that more and more companies participate which perpetuates the existence of the GRI and raises its status as the leading standard for corporate sustainability reporting.\footnote{Ibid, at 581.}

The empirical research of the present study exacerbates this worry. One interviewee, who is a senior manager of a mining company, vividly describes the problem in the field with respect to UN Global Compact, another influential private regulatory body in Canada and throughout the world:
I think there’s a real danger in the proliferation [of private standards]. For example, UN Global Compact does not look at the substance of what you report. They outsource and provide business opportunities for consultants. I think it is a bit of industry. The danger is when you create an industry like that, when times get tough like they are now in the mining industry, there is less and less goodwill predisposed to support CSR reporting. ... So when you hit that and you have people who are not knowledgeable [nor] immediately aware of what goes on in a particular sector and what matters to it, there will be a disconnect that can move to a backlash.

As a result, the predominance of private and self-regulation attempts makes it unreliable and inadequate to address the CSR reporting-performance inconsistency and stimulate meaningful CSR changes. To tackle the problem, governmental regulation should be called for and strengthened, in order to form a more balanced regulatory combination of CSR reporting.346

In sum, while the discussion in this section covers various aspects of CSR reporting, they all target at one common thesis: the call for governmental regulation of CSR reporting.  

As the literature notes, when the private and public interests in being committed to CSR do not substantially align, “the state must take on more interventionist roles” in the regulation of CSR reporting.347 Within the context of the present research, this refers to CSR reporting gradually declining into an information dump and a marketing tool, rather

346 The literature has already made similar observations regarding the necessity of prescribing governmental actions to regulate CSR matters. For example, in his research about market-driven CSR, Vogel posits that “[t]he most effective strategy for reconciling private business goals and public social purposes remains what it has always been, namely effective government regulation”. See: Vogel, supra note 106. On a separate note, McInerney argues that “voluntary CSR measures should supplement not supplant state regulation”. See: McInerney, supra note 231, at 172.

than functioning as a regulatory instrument that facilitates benchmarking, dialogue and
corporate performance improvement.

4.2.2.2 Additional Thoughts on the Design of Governmental Regulation

Additionally, viewed by the present research, attention should be paid to two fundamental
issues underpinning the vibrant debate with respect to governmental regulation of CSR
reporting. One issue concerns the definition of mandatory reporting and the role of the
stock exchanges in imposing CSR regulatory rules. To draw from Sarfaty, the notion of
mandatory and voluntary may be viewed as a continuum rather than a rigid distinction.348
Thus, in a broad sense, the mandatory component does not exclusively come from
governmental regulation, which only sits at one end of the regulatory spectrum. Rather,
mandatory regulation may refer to a combination of governmental regulation and stock
exchange regulation. This would explain why some policy document and scholarly work
discuss stock exchange regulation under the heading of mandatory CSR reporting.349

This categorization is not in itself problematic. What is problematic, however, is the
intention to rely entirely on stock exchange regulation to counterbalance the drawbacks
of the current CSR reporting landscape. Although stock exchange regulation can be
beneficial in certain aspects, stock exchanges are subject to significant incentive and
enforcement problems.350 In particular, stock exchanges need to maintain a positive

348 Sarfaty, supra note 131, at 592.
349 United Nations Conference on Trade and Development (UNCTAD), Best Practice Guidance for Policymakers and
Stock Exchanges on Sustainability Reporting Initiatives (2013), online: UNCTAD,
the representative academic literature.
350 Kahan, supra note 112; Kerry Shannon Burke, “Regulating Corporate Governance through the Market: Comparing
the Approaches of the United States, Canada and the United Kingdom” (2001) 27 J Corp L 341, at 351-55.
public image to attract and retain companies, which refrains them from implementing CSR reporting rules that are more stringent than legally required. Besides, stock exchanges are limited in their regulatory power to impose fines or sanctions for violations of their rules. Suspension from trading or delisting is used in very rare occasions. In the present CSR reporting context, the most urgent issue, as identified by the present research, is to realign corporate reporting with companies’ actual performance. It takes governmental authority to conquer this problem, not only because governmental regulation can better ensure that necessary corporate internal resources would be allocated to address this issue, but also in that compared to stock exchange regulation, “governmental regulators are likely to have a competence advantage when it comes to enforcing regulations”.

Therefore, although the present research explicitly adopts the term governmental regulation in its discussion, for the sake of language variety, it sometimes uses mandatory reporting or reporting mandate to express the same meaning as governmental regulation. To avoid misunderstanding, the present study nevertheless notes that the terms mandatory reporting and reporting mandate are used in a narrow sense in the current thesis, as they exclude the sole reliance on stock exchange rules for regulating CSR reporting.

351 Kahan, ibid, at 1517. 
352 Burke, supra note 350, at 353. 
353 Kahan, supra note 112, at 1516. Kahan defines enforcing regulations to encompass three aspects, “the power to pass binding rules, the sanctioning of violations, and the policing for violations”. According to Kahan, while the power of exchanges in passing rules may vary, governmental regulation excels in the latter two aspects compared to stock exchange regulation. See: ibid, 1516-18. 
354 To make sure the scope of the research was understood by the interviewees, the present research explained its notion of mandatory CSR reporting at the research interviews.
The second aspect underneath the call for governmental regulation of CSR reporting relates to the form and scope of the proposed CSR reporting mandates. In particular, among the proposals for governmental regulation, a significant group of scholars argues in favour of the incorporation of CSR reporting requirements into the existing securities regulatory regime as a solution to the underregulation of CSR reporting.\textsuperscript{355} This view has gained support especially in Canada from both regulators and the public, exemplified by the securities regulators’ promulgation of regulatory guidance for the disclosure of environmental information as well as the increasing presence of environmental and social information in corporate financial filings.\textsuperscript{356} Such a solution seems economical and politically feasible, as it requires little governmental effort beyond the existing enforcement function.\textsuperscript{357} On second thought, however, the method of building CSR reporting programs within the existing institutional structures of securities reporting bears questioning. Viewed by the present research, this approach could only be adopted ad hoc and provisionally. In the long run, it is problematic to use securities regulation as the

\textsuperscript{355} See \textit{supra} note 233 for the representative literature that supports this view. Although the literature has not come up with a thorough discussion on what the alternatives are for mandating CSR reporting, a possible option is to promulgate a stand-alone requirement in the form of regulation for CSR disclosure, as exemplified by the practice in France and several other European countries. See: Dhooge, \textit{supra} note 270 for an overview of the France decree. Also see \textit{supra} note 105 for a general introduction of the European circumstance.

\textsuperscript{356} See: Canadian Securities Administrators (CSA) Staff Notice 51-333, \textit{Environmental Reporting Guidance} (October 27, 2010). Different from the United States, securities regulation in Canada is provincial-based. CSA is a non-regulatory body that issues National Policies to coordinate policies across the country. However, it lacks enforcement powers and each jurisdiction remains free to take its own approach. A more binding document in Canada comes from Ontario Securities Commission (OSC), see: OSC Staff Notice 51-716, \textit{Environmental Reporting} (February 29, 2008) (outlining the result of a targeted review of compliance with the disclosure requirements pursuant to National Instrument 51-102 \textit{Continuous Disclosure Obligations} and concluding that material environmental information is currently underprovided).

\textsuperscript{357} Although the Canadian securities regulator has used official interpretative guidance to back up the disclosure of material environmental information by publicly-listed companies in their continuous disclosure documents, the guidance acknowledges that it does not mean to change the regulatory landscape of corporate reporting. Neither did the regulatory agency seek to expand the reporting obligation beyond what was required by securities law nor intend to take additional enforcement effort in this regard. See: \textit{ibid}, CSA Staff Notice 51-333 (noting that “this notice clarifies existing disclosure requirements relating to environmental matters and does not create any new legal requirements or modify existing ones”).
single official regulatory venue for CSR reporting. First, only the disclosure of some CSR information can be justified as necessary for the protection of investors, one of the most often cited objectives of securities regulation.\footnote{In Canada, investor protection was set by the 1965 Kimber Report as one of the twin goals for securities regulation (the other is efficient capital markets). See: Report of the Attorney General’s Committee on Securities Legislation in Ontario (Toronto: Queen’s Printer, 1965), Part I [Kimber Report]. This principle was also suggested by International Organization of Securities Commissions (IOSCO) as a key objective of securities regulation. See: IOSCO, Objectives and Principles of Securities Regulation (May 2003), online: <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>, at para. 4.1.} As a result, mandating the disclosure of CSR information based on the same benchmarks of financial reporting would yield to CSR disclosure that is fragmented and not comprehensive enough.\footnote{See supra note 309 for a discussion of the material test for mandatory financial reporting in securities regulation.} Second, the rationales of CSR reporting regulation and securities disclosure regulation are fundamentally different, in that the aim of securities disclosure regulation is not to eliminate all the risks that investors are exposed to, but rather to ensure investors are aware of these risks,\footnote{Johnston, Rockwell & Ford, supra note 169 at 17.} while CSR reporting regulation is aimed to identify and correct the risks associated with corporate irresponsibility. Particularly, one significant difference between the CSR reporting system and the securities disclosure mechanism is that in terms of CSR reporting, “information was viewed as a way to change behaviour, not simply as a public right” of having access to information.\footnote{Graham, supra note 200, at 15 (comparing the differences between “new disclosure systems” from the “right-to-know requirements”).} This is not to claim that securities disclosure cannot encourage companies to rethink policies and make internal changes by arousing public attention to mismanagement.\footnote{However, a review of the historical background of mandatory securities reporting in the United States cogently reveals that “[t]he SEC perceives its role as protecting the investors rather than acting as an instrument of corporate change”. See: Feller, supra note 295, at 248.} Nevertheless, because the two systems are subject to different regulatory philosophies, securities regulation is not
the appropriate mechanism for regulating CSR reporting officially and the regulatory architecture for CSR disclosure ought to be built independent of securities regulation.

4.3 The Reflexive Law Proposal

Putting CSR reporting within the setting of governmental regulation, the present research advocates for the use of reflexive law to mitigate the CSR reporting-performance gap. Particularly, it proposes mandating CSR reporting and shaping the CSR reporting requirements into a form of reflexive law. This argument is enlightened by the theory of reflexive law, which puts forward an alternative approach to regulation. Different from traditional forms of regulation, reflexive law regulates by establishing a sequence of self-referential processes and arrangements within the regulated social institutions. Relying on the regulated organizations’ self-referential capacity, reflexive law leads them to proactively reflect on and react to the problems identified.

4.3.1 What Reflexive Law Is

The theory of reflexive law was initially brought into being by Teubner, a German legal scholar and sociologist, to refer to a new evolutionary stage of law in addition to the formal and substantive types of law.363 In terms of the evolution of law, the first type of law emerged was formal law, which focuses on giving private rights to individuals and “establishing basic rules by which private parties orient their affairs and resolve

363 Eric W Orts, “Reflexive Environmental Law” (1994) 89 Northwest Univ Law Rev 1227, at 1254-57. Also see: Gunther Teubner, “Substantive and Reflexive Elements in Modern Law” (1983) 17:2 Law Soc Rev 239 at 251-55. Since Orts was among the first to contextualize the three types of law within the North American regulatory system, the present thesis finds it more persuasive and coherent to adopt Orts’ interpretation of the three regulatory patterns than following their original paths toward the notion of legal rationality. See Section 4.3.4 for a more detailed discussion of Orts’ work.
When the social interactions became more complex, formal law was not enough to meet societal needs and thus substantive law was developed. Substantive law is “goal-oriented intervention” that regulates social processes in a more particularistic way than formal law and it does so “through statutes and delegation of legal authority to specialized agencies”. The increased expansion of substantive law in the modern society raised both cognitive operational difficulties as well as normative challenges. Meanwhile, law was gradually decentered by other institutions in the social system that makes it increasingly difficult for law to subjugate those spheres. These two conditions set the stage for the emergence of reflexive law.

Reflexive law is a self-critical legal theory. Defined as law that “provides the structural premises for reflexive processes in other social subsystems”, reflexive law “recognizes limits on law imposed by increasing social complexity” and proposes a more modest role of law. Therein, it advocates for establishing self-referential processes within social institutions outside the legal system and enhancing the social institutions’ self-referential capacity to fulfill the task of public regulation. Instead of direct intervention, reflexive

364 Orts, ibid at 1255. According to Orts, the common law of property is a form of formal law, because it “recognizes certain legal ‘rights’ of individual owners” and allows individuals to bring any unsolved disputes to the courts. The common law of nuisance is also viewed as a kind of formal law.

365 Orts, ibid, at 1256-57. Orts posits that “[s]ubstantive law focuses on social regulation through public administration”. In this sense he finds that substantive law correlates to command-and-control regulation, while formal law is analogous to market-based regulation.

366 Orts, ibid, at 1258-59. Orts recognizes two normative problems associated with relying extensively on substantive law: one is the difficulty to oversee and coordinate a heavily detailed mass of statutes and the other is challenges toward democratic legitimacy because administrative delegation is a typical arrangement of substantive law.

367 Sociologists term this process as social differentiation. See: Teubner, supra note 363, at 263 (citing Luhmann’s social theory).

368 Teubner, ibid at 275. According to Teubner, the role of the reflexive legal order is “to decide about decisions, regulate regulations, and establish structural premises for future decisions in terms of organization, procedure, and competencies”.

369 Orts, ibid, at 1262.

370 Orts, supra note 363 at 1265–66.
law shares the regulatory burden with other social entities and “restricts legal performance to more indirect, more abstract forms of social control.”\(^{371}\) It does so by setting up certain procedures and stimulating the self-referential capacity of the social institutions subject to regulation.

Particularly, with respect to CSR, the reflexive law approach argues for a reflexive control of corporate behaviour. It is in favour of regulatory methods such as “disclosure, audit, justification, consultation, and organization of internal control processes” to address the CSR tensions and to promote CSR-conscious corporate behaviour.\(^{372}\)

Despite its European origin, the theory of reflexive law has been meticulously developed by common law scholars to address issues related to CSR.\(^{373}\) These explorations are of precious normative value as they suggest plausible paths that reflexive law could take. A detailed discussion in terms of how the reflexive law theory has been applied to address practical CSR issues will be made in Section 4.3.4.

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\(^{371}\) Teubner, supra note 363 at 274.

\(^{372}\) Gunther Teubner & Bremen Firenze, “Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility” in Klaus J Hopt & Gunther Teubner, eds, Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility (Walter de Gruyter, 1985), at 167 (arguing that the substantive standards of fiduciary duties need to be replaced by reflexive regulatory methods).

4.3.2 Reflexive Law and the New Governance Scholarship

In recent years, a growing body of theories that has dominated the regulatory literature is the new governance paradigm. New governance is defined as “regulation that is informed and underpinned by a bottom-up, decentered, horizontal experimental process by private actors”.374 The new governance scholarship favours process-based, flexible, participatory and experimental regulation as an alternative to conventional models of regulation.375 To precisely position reflexive law in the regulatory landscape, it is indispensable to briefly examine the relationship between reflexive law and the new governance scholarship.

While some scholars attribute reflexive law as an integral part of the new governance paradigm,376 others take a more cautious stance. For example, Karkkainen argues that “[m]any, and probably most, New Governance scholars have simply found it unnecessary to embrace Teubner’s controversial and far-reaching theories”.377 In the middle are intellectuals who agree that the two are not necessarily symbiotic but accept that they are strongly connected.378

376 For example, see: Hess, ibid; Orly Lobel, “Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, The” (2004) 89 Minn Law Rev 342 (arguing that there are “strikingly similar patterns of explanation” between the theory of democratic experimentalism and the theory of reflexive law); Grainne de Burca, “New Governance and Experimentalism: An Introduction” (2010) 2010 Wis Law Rev 227 (noting that the reflexive law theory provides a theoretical accounts of the rise of new governance in both the EU and the US).
The present thesis views new governance as an expanded continuation of reflexive law. On the one hand, a number of widely-acknowledged new governance literature explicitly draw from the theory of reflexive law and the two schools of thought overlap with each other to a great extent. On the other hand, however, the theory of reflexive law proposes an alternative regulatory method in the context of law rather than governance, which arguably is a broader concept than law.\(^{379}\)

Consequently, owing to the above-mentioned considerations, the present research relies on the new governance literature to establish its arguments, but meanwhile, it draws an explicit divide between law and non-law. As will be examined in the ensuing section, reflexive law provides a viable solution to alleviate the CSR reporting-performance inconsistencies not only because this approach is reflexive, but also because it is law. In jurisdictions where voluntary CSR reporting is the norm, like the United States and Canada, quite a number of corporations nevertheless report on CSR perspectives and have certain processes in place for reporting. However, the frequently observed CSR reporting-performance gap, which has been evidently exhibited in the previous Chapter, forcefully demonstrates that the absence of law has dramatically hindered CSR reporting to fulfill its intended purpose in improving corporate performance on CSR dimensions.\(^{380}\)

\(^{379}\) One wing of the new governance scholarship is research that explores the potential of private regulation in the absence of law. For instance, see: Conley & Williams, \textit{supra} note 219.

\(^{380}\) This is not to assert that in European countries, where CSR reporting is made mandatory, the CSR reporting-performance gap does not exist or is negligible. Rather, the reflexive law has both the reflexive component and the law component. Depending on the institutional design, unless both conditions are met, there is still a possibility for the inconsistency to occur. This raises questions such as whether the mandatory CSR reporting requirements that are being practiced in the EU amount to reflexive law. However, owing to the limited scope of this study, these inquiries will be left to future research to deal with.
4.3.3 A Critical Analysis of the Reflexive Law Theory

This section reflects on not only Teubner’s theory, but also the literature in the common law world that has elaborated on and applied the theory to address concrete social problems. In particular, it highlights and responds to two issues that are directly related to the thesis argument and have been heavily questioned by the literature.

4.3.3.1 Is the Law Component Indispensable?

In his seminal piece that has aroused lasting debates regarding the role of law in regulating CSR matters, Stone makes a critique of the legal institution, suggesting that “trust in traditional legal machinery as a means of keeping corporations in bounds is misplaced”. In reaction, Teubner argues that reflexive law might be a solution, because “‘reflexive’ control of corporate behaviour”, is “not where the law ends, but where the law begins”. Although the jurisprudence debate is beyond the scope of the present thesis, it consolidates what the present thesis posits, i.e., reflexive law encompasses two components: the reflexive component and the law component.

However, the law component has long been underemphasized in the literature. Since most of the literature discusses reflexive law within a legal or regulatory context, the research emphasis tends to be placed on the reflexive component with the law component

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381 See supra note 373 for the representative literature that applies reflexive law to different regulatory settings.
382 The present thesis takes the stance that reflexive law, as a division of law, incorporates legislations and other official, written forms of regulatory methods, such as rules and regulations.
383 Christopher D Stone, Where the Law Ends: The Social Control of Corporate Behaviour (Harper & Row, 1975), at 110 (presenting problems traditional legal machinery has in regulating corporate irresponsible performance and proposing putting focus on the processes of corporate decision making as a solution).
384 Teubner & Firenze, supra note 372 at 166.
taken for granted and hardly mentioned. In addition, a growing number of scholars have broadened the research dimension of reflexive law from law to governance without evidently justifying what the differences between the two scopes are in applying the theory and why their contention is scalable. What adds to the complication is that even Teubner himself was hesitant clarifying the law-governance relationship in his theory. Advocating for a catalytic role of the law, Teubner has not yet expressed whether this function can be performed by institutions other than law. As a result, an unanswered question remains whether the law component in reflexive law is indispensable or can be substituted by informal, private regulatory instruments.

Viewed by the present thesis, reflexive law should not be replaced by self-regulation or other non-governmental forms of regulation, such as regulation undertaken beyond the state or shared with non-state actors. Reflexive law provides a viable solution to mitigate the CSR reporting-performance inconsistencies not only because this approach is reflexive, but also because it is backed by authoritative power, which plays a critical role in facilitating and, in the case of non-obedience, enforcing the corporate self-regulation

385 For example, although arguing for a transition to a mandatory system at a later stage, Orts proposes setting up an environmental management and auditing system on a voluntary basis as a form of reflexive law. See: Orts, supra note 363. Moreover, some scholars view reflexive law as a form of self-regulation. See: supra note 221. Also see: Hirsch, supra note 373.


Reversely, scholarship of legal pluralism argues for the broadening of the concept of “law” to incorporate non-state regulatory ordering. For views against the legal pluralist response to regulatory pluralism, see Christine Parker, “The pluralization of regulation” (2008) 9:2 Theor Inq Law 349, at 353-55 (identifying three main problems associated with an expanded definition of law).

387 Teubner & Firenze, supra note 372, at 159-60.
processes. The official law nature is essential for reflexive law to function properly, in that it ensures that valuable resources within organizations are allocated for internal self-reflection processes that otherwise will not necessarily be established or well-maintained.\(^{388}\) In the context of corporations, the structural precondition for corporate self-reference is indispensable, since “many problems owe not to failures of the corporation to have the information on hand (somewhere), but to failures to process it upward to the people who are in a position to do something about it.”\(^{389}\) Law can help create “the strands of social networks” that other social institutions fall short of on their own.\(^{390}\) This explains why the literature argues that in the case of reflexive law, “law might still play a universal normative role” in provoking coordination between subsystems.\(^{391}\)

### 4.3.3.2 The Relationship between Reflexive Law and Public Goals

In describing what reflexive law is, the literature typically contrasts reflexive law to substantive law,\(^{392}\) arguing that reflexive law does not command any predetermined outcome but rather guides the regulated entities in thinking critically and behaving responsively.\(^{393}\) As Teubner notes, “[i]nstead of taking over regulatory responsibility for

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\(^{388}\) This echoes to Teubner & Firenze’s argument that “institutions and procedures should be designed to promote internal reflexion processes …. This reflexion cannot be voluntary, but needs to be stimulated by powerful external forces”. Teubner & Firenze, \textit{ibid}, at 165. Also see Section 4.1 for a thorough analysis of why we need a more structured legal regime, compared to the current one, to regulate CSR reporting.

\(^{389}\) Stone, \textit{supra} note 383, at 204.

\(^{390}\) Parker, 2008, \textit{supra} note 386, at 358.

\(^{391}\) Parker, \textit{ibid}.

\(^{392}\) Also called regulatory law by Teubner. It is the conventional form of law. Teubner defines regulatory law as law that “[defines] standards of business conduct and production results in all details and [enforces] those standards via negative or positive sanctions”. Teubner & Firenze, \textit{supra} note 372, at 159. Also see Orts’ definition at \textit{supra} note 363.

\(^{393}\) For instance, Hess argues that “[s]ocial report legislation may be termed a ‘reflexive law’ because the law will not command any particular outcome”. Hess, 1999, \textit{supra} note 86, at 63.
the outcome of social processes, reflexive law restricts itself to the installation, correction, and redefinition of democratic self-regulatory mechanisms”. It is therefore generally believed that reflexive law is process-driven while substantive law is goal-driven. However, despite that reflexive law is about setting a process, argued by Parker, “it must be a process that is ‘going somewhere’”. So here comes the doubt: does setting public goals and promoting certain social values contradict with the spirit of reflexive law? Viewed more broadly, is reflexive law and substantive law mutually exclusive?

This question is discussed not only because it is fundamentally important for a precise understanding of the concept of reflexive law, but also since it informs the analysis of the ensuing chapter and directly influences the research conclusion in terms of whether the CSR policy goals should be clearly identified and defined in order to repair the CSR reporting-performance gap. This inquiry also echoes to the concerns that the literature has raised over reflexive law being reduced to a purely reflexive, process-oriented law that does not set any substantive value. For instance, situating reflexive law within the setting of regulatory pluralism, Parker posits,
“We need to be cautious about advocating an ideal of law that takes no responsibility for promulgating substantive values and is only concerned with processes connecting with other processes—law should be about processes for articulating substantive outcomes”. 396

The worry is not groundless. In most scholarly discussions, reflexive law has been positioned as an evolutionary stage of law that is more nuanced and context-sensitive than substantive law. 397 Rather than complementing existing types of law, it seeks to replace them. It is under such a circumstance that the scholarly work argues that the deconstruction of substantive rights may result in “a system impervious to direction and leadership, incapable of setting priorities”. 398

While sharing the above sentiment, the present research sides with the view that reflexive law does not mean to do without substantive law. 399 Putting reflexive law within a regulatory pluralism setting resonates with the conception of Smart Regulation, which favours the use of multiple rather than single policy instruments to achieve public objectives. 400 Taking one step further, the present thesis argues that setting normative goals that the regulated entities could reflect upon and react to does not necessarily

396 Parker, 2008, supra note 386, at 360. Parker herself is not against reflexive law. What she argues against is the misinterpretation of reflexive law into a process without adequate goals. See: Parker, 2007, supra note 60, Section IV.

397 For example, see: Teubner, supra note 363; Hess, 1999, supra note 86 (FN145 in particular). However, c.f. Orts, supra note 363, at FN111 (arguing for a more fluid theory of law that allows for "the coexistence of different forms of law in modern society").


399 Orts, supra note 363, at 1262 (arguing that “[a] reflexive legal theory does not recommend that legislators do without substantive legal norms"). Elsewhere, Gunningham notes that “many, less interventionist strategies are far less likely to succeed if they are not underpinned by direct regulation”. Neil Gunningham, “Environment Law, Regulation and Governance: Shifting Architectures” (2009) 21:2 J Environ Law 179, at 208 (reviewing the history of environmental law, regulation and governance and calling for Smart Regulation). Owing to the limited scope of the present research, this section only acknowledges the substantive-reflexive law partnership without expanding the discussion on it.

conflict with the essence of reflexive law. On the contrary, for any kind of regulatory structure to work effectively, the prerequisite is to have the policy goals properly identified and the rights and responsibilities clearly established. Thus, the main difference between reflexive law and substantive law, according to the present research, is not that the latter is goal-focused and the formal is procedure-centered, but lies in that the public goals defined in the reflexive law circumstance are more principle-based and non-prescriptive compared to the substantive law objectives. This arrangement makes sure that both the regulated and the public are allowed more certainty and clarity as to what the law expects the regulatees to accomplish, while not jeopardizing the indirect and abstract form of social control.

4.3.4 The Reflexive Law Approach for CSR Reporting: A Need to Substantiate the Theory

To date, scholars have analytically explored the application of reflexive law to various CSR regulatory settings. In particular, it is Eric Orts and David Hess, two most frequently cited North American scholars in reflexive law, that cause the idea of reflexive law to really take off in North America. Their development of reflexive law was identically based on the recognition that reflexive law, a theory that exists on a broad and abstract level, relies on the context to illustrate its meaning. Therefore, to consider the

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401 See supra note 373 for a list of the representative literature that applies reflexive law to different regulatory settings. In particular, some literature rebrands reflexive law as disclosure regulation or regulation by disclosure. For example, see: Doorey, supra note 336; Braunig, supra note 373. The present thesis disagrees with the literature that reduces reflexive law to disclosure regulation. Although public disclosure is an important reflexive law strategy, reflexive law leverages both corporate decision-making and communication processes and therefore may require institutional design beyond the public disclosure mandate. For instance, under the reflexive law approach, the dialogue process is an integral part of CSR reporting, yet in terms of disclosure regulation it is a welcomed next step. Therefore, this section only lists the literature that adopts reflexive law more comprehensively.

402 See Orts, supra note 363; Hess, 1999, supra note 86.
plausibility of reflexive law as a solution to the CSR reporting-performance gap, the present research naturally places a great emphasis on the approaches that Orts and Hess take to substantiate the theory.

In his work, *Reflexive Environmental Law*, Orts deploys the reflexive law theory to address environmental law issues. Orts pinpoints two contemporary challenges for environmental regulation—conventional regulation “outpaced” by the complexity of emerging problems and the high cost of regulation, forcing a more modest role for law.403 Arguing that environmental law in the United States has already embodied a reflexive character, Orts makes a proposal for “a reflexive environmental management and auditing system (EMAS) in the U.S.”.404 “Reflexive environmental law”, phrased by Orts, “aspire to engender a practice of environmentally responsible management”.405 Particularly, he envisages the setup of American EMAS program as a reflexive-law-inspired scheme, under which participating companies set up internal EMAS tailored to specific business sectors and file an annual environmental report that is verified by independent environmental auditors.406

Another scholarly work that is closely connected to the present thesis comes from Hess.407 To govern corporate irresponsible behaviour, Hess makes a strong argument for “a reflexive law approach to social reporting” that “focuses on institutionalizing

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403 Orts, *supra* note 363, at 1231.
404 Orts, *ibid*, at 1313.
405 Orts, *ibid*, at 1232.
responsible decision making within an organization". Hess bases his argument on social contract theory and proposes that the regulatory goal of social reporting is to promote corporate social responsiveness. Under that framework, Hess favours the reflexive law approach because it helps to solve the dilemma of regulating in a “value-pluralistic society” where there lacks a consensus on what it means to be socially responsible. Positing that corporations need to be given “the freedom to be able to respond to their unique situations”, Hess proposes a reflexive law model of social reporting made up of five basic elements, including: legislating mandatory corporate annual social reporting to the public; requiring firms to set up reporting procedures and policies (e.g. mission statement, procedures for data collection, and personnel designation); requiring companies to prepare separate sections for different stakeholder group; mandating accredited verification of the social reports; legislating penalties and private enforcement for false or misleading information.

The present thesis is a continuation and update of Orts and Hess’ arguments within the current social and regulatory context, in the sense that the present research agrees with the literature in terms of proposing officially required CSR reporting, including the mandate of establishing firm-level CSR reporting procedures and policies, to encourage corporate self-referencing processes. Nevertheless, the present thesis differs from Orts

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408 Hess, *ibid*, at 43. Hess posits that a social report incorporates social accounting, social auditing and social reporting. See *ibid*, at 64.
409 Hess defines corporate social responsiveness as the “capacity of a corporation to respond to social pressures” (citing Frederick). A socially responsive corporate is a corporation that has procedures in place to anticipate and react to social demands. Hess, *ibid*, at 54.
410 Hess, *ibid*, at 59.
411 Hess, *ibid*, at 61.
412 Hess, *ibid*, at 64-72.
and Hess’ literature and makes its unique contribution to CSR scholarship in at least two aspects.

For one thing, instead of governing corporate irresponsible behaviour in general, the present thesis argues for a reflexive law approach to CSR reporting in a more concrete situation, i.e. to address the commonly-observed discrepancy between CSR reporting and corporate actual performance. In the early days of CSR reporting, the mission of CSR-conscious scholars was to arouse public awareness and encourage more and more companies to open up and start the journey of CSR reporting. The CSR reporting-performance gap was not an issue at that point, because there had not been adequate examples to be studied. For instance, the two very rare examples of CSR reporting that Hess gave were from the Body Shop and Ben & Jerry’s. But in the present context, where CSR reporting has been practiced steadily for a consecutive period of time yet industrialization and rapid growth still take their toll, raising awareness alone is no longer enough. As documented in section 2.1.2, the circumstance surrounding CSR reporting has dramatically changed over the past ten years, which demands a more comprehensive examination of CSR and CSR reporting. The present thesis therefore fills the research gap in this aspect.

For another, different from Orts, who does not explicitly discuss the purpose of his EMAS model, and Hess, who argues that the reflexive law approach to social reporting is

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413 In line with this observation, the research theses of early CSR scholars tend to concentrate on justifying the legitimacy of CSR reporting from either a perspective of common law fiduciary duty or from an aspect of statutory law securities disclosure obligation. For example, see: Williams, supra note 140 (discussing both aspects).

414 Hess, 1999, supra note 86, at 72-80. Also see Section 3.1 of the present thesis for counter-argument against the Body Shop’s CSR-friendly profile
aiming for social responsiveness rather than CSR, the present thesis suggests that the reflexive law approach should serve a bolder purpose than what the literature advocates. Moreover, depending on what the policy makers are looking for, the reflexive law approach may be designed to have more teeth than what the literature posits. In general, the present thesis does not take some arguments of the literature as being wrong, but it is obvious that in today’s world, where CSR tensions are more pressing and where CSR reporting has been practiced unsatisfactorily for a while, heavily relying on private and corporate self-regulation to tackle CSR challenges may not bring about the outcomes that the society desires. Rather, it may even delay social progress and be counter-productive. In response, as the following chapter will illustrate, the present thesis explores and seeks to justify a more concrete model of reflexive law.

4.4 The Empirical Findings

It can be extrapolated from the above-discussed literature that the reflexive law approach within the context of CSR reporting encompasses two major components: first, officially mandating CSR reporting through either legislation or regulatory rules; and second,

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415 Hess, ibid, at 51-63. However, it is strongly believed that compared to CSR, the concept of social responsiveness sets a less clear goal and allows more room for companies to manipulate and play around. For example, adding an assurance statement affirming that “a company is posturing toward becoming more responsible” is related to corporate social responsiveness rather than CSR. Chiu, supra note 52 at 390–91.

416 While noting that a voluntary EMAS scheme would pull in more companies to join, Orts nevertheless posits that “EMAS procedures and disclosure requirements should be made mandatory, at least for large-sized companies” (p.1318). See: Orts, supra note 363, at 1316-18. However, it is not clear how he approaches the disclosure mandate under a voluntary “Environmental Leadership Program”.

Viewed by the present research, some of Hess’ arguments with respect to reflexive law were strongly influenced by the laissez-faire mentality and are too light-handed nowadays to address CSR concerns. For instance, Hess argues that “[r]eflexive law is primarily procedural law, and therefore may be considered self-regulation”, which the present thesis finds otherwise. Hess, ibid, at 51. In addition, Hess takes a very cautious stance toward social reporting legislation and proposes experimentalism. As he notes: “social report legislation should not be mandated immediately but instead be implemented in stages. … The first stage would involve non-mandatory legislation that would encourage companies to experiment with social reporting and work with accounting institutions to gain the practical experience necessary to develop the needed standards”. Hess, ibid, at 65.
requiring institutional conditions for CSR reporting that induce corporate self-referencing processes.\textsuperscript{417} While the first component is generally self-explanatory, the scholarly work interprets the details of the second component using various instruments. As Orts and Hess’ analyses show, the institutional strategies that can be taken to stimulate corporate self-reference include imposing internal management and auditing system, requiring routinized data collecting procedures and policies, adding weight to stakeholder involvement, mandating external verification and allowing private enforcement.\textsuperscript{418} Viewed by the present research, the reflexive law approach is dynamic in the sense that the discussion of any of these strategies is not meaningful unless the context is provided. Therefore, an accurate and comprehensive description of the reflexive law approach for CSR reporting is inseparable from a close empirical examination of the current CSR reporting atmosphere.

While Section 3.3 provides a general picture of the CSR reporting practice in Canada, this section digs more deeply to identify the factors underpinning the CSR reporting-performance decoupling and the opportunities for realigning the two. It does so by soliciting views from the interviewees, comparing documentary data and ethnographic observing.

\textbf{4.4.1 Where the Problems Lie}

Overall, the present empirical research identifies five commonly shared factors underlying the CSR reporting-performance inconsistency. Firstly, there are noticeable

\textsuperscript{417} See Section 5.1 for a more explicit discussion of the corporate self-reference function.

\textsuperscript{418} See: Hess, supra note 86, at 64-72; Orts, supra note 363, at 1316-24.
knowledge gaps within companies at the level of senior management as well as among lower-level corporate employees. Secondly, corporations fail to adequately learn from their CSR reporting processes. Thirdly, companies tend to overstate their efforts to engage with stakeholders and keep their stakeholder engagement process opaque. Fourthly, the external verification of firms’ CSR reporting is optional and falls short of being rigorous and comprehensive. Lastly, CSR reporting lacks a performance-driven purpose.

As later confirmed by the non-corporate CSR practitioners, although the companies covered by the empirical research are limited in number, the problems identified here are more of a widespread phenomenon than of a niche activity. By reporting and analyzing these tentative findings, this subsection expects to “[pull] industry experience into regulatory decision making”, in order to inform a contextual-based reflexive law approach for CSR reporting.419

4.4.1.1 The Knowledge Gaps

The present study reveals noticeable knowledge gaps within the companies that report on CSR. The knowledge gaps exist not only at the level of senior management but also among lower-level corporate employees who feed information to the CSR reporting department or staff. Besides, this problem runs through both the data collection and the reporting generation processes.

At the senior management level, during the process of CSR reporting, since corporate senior managers make decisions and execute actions at such a distance, they have very rare knowledge of how CSR issues are actually operating in the field. A widely adopted data generation model among the firms that the present research explores is through a partnership between the internal reporting team/staff and the external third-party helpers,\textsuperscript{420} with key items in the reports briefed to the corporate governance committee. Throughout the process, there is no direct involvement of the senior management. In particular, among the firms that the empirical research covers, individuals inside the corporations who lead or fulfill CSR reporting responsibilities are more often at a lower rank.\textsuperscript{421} The management who “oversee” CSR reporting merely review and approve the content of CSR reports without looking deeper into the stories behind. As Consultant 3 notes:

\begin{quote}
There is the disconnect between the boardroom and the executive team and what is happening at the site. From what I have seen, there is limited corporate oversight of what is actually happening on the ground. … When people bring [issues] up in the boardroom, everybody says “wow”.\textsuperscript{422}
\end{quote}

\textsuperscript{420} Sometimes, the task of producing CSR reports is partly outsourced to third-party writers and consulting firms. For instance, both Manager 6 and Senior Manager 6 acknowledge that their companies hire writers to work on the CSR reports.

\textsuperscript{421} The empirical research notices that the people who collect information and do the CSR reports are corporate managers, who report to corporate lower-level directors for approval of the reporting content. This gets confirmed by all of the six front-line CSR reporting managers during the research interviews.

\textsuperscript{422} Interview transcripts on file with the author, October 8, 2013.
She sides with the concern that the CSR discussion has seldom been elevated to the C-suite of the companies, adding: “the senior managers and the board are so much at a distance”. 423

The distance of senior managers from CSR knowledge is also manifested in their readership of the CSR reports. As consultant 3 observes,

In all honesty, a lot of executives do not even read the CSR report. It is generated by somebody, sometimes a consultant and sometimes within the organization. It is very difficult for that person to get good data because you have to talk to different people in the organization. 424

This view was further corroborated by the industry interviewees. For instance, when asked about whether he is aware of the information in the company’s CSR reports, Senior Manager 1 replies: “the executives are aware of the information, maybe as a result of day-to-day business as opposed to the report”. 425

In addition, the empirical research finds that the knowledge gap is also pervasive among corporate employees, especially among the lower-level corporate employees who feed information to the CSR reporting department or staff. In terms of CSR data collection, the standard practice is to get specific people working on it and to insulate the rest of the people in the firm. For instance, Senior Manager 4 mentions: “What we do is we have a CSR department. People in the department review and update information in the report

423 Ibid.
424 Ibid.
425 Interview transcripts on file with the author, October 16, 2013.
According to Manager 5 and Consultant 3, such a CSR data collection process is very “siloed” and “compartmentalized”, in the sense that there lacks interaction across the divisional structure. In fact, although people in different divisions and departments were asked to contribute certain data to the CSR department, they generally had no idea about what the data would be used for, as they were not provided necessary context nor were they informed of the whole picture of CSR reporting. As a result, they simply supply what they were asked for. For instance, recalling the data collection experience, Manager 6 states:

About this time of the year I reach out to between 70 and 100 data providers. I ask them for specific pieces of information so they would provide that back to me and we would massage it and work with the writing team and editing team. We would then go back to the content providers to make sure we have properly portrayed the information and get their signoff.

When further inquired about “when you asked other divisions to provide data for you, did people in those divisions know the data would be used for CSR reporting purpose”, Manager 6 responds, “Not necessarily”. She adds: “we are not there yet”.

Another line of the knowledge gap on the part of the employees lies in that that there usually is no direct link between employees’ day-to-day work with the overarching corporate CSR performance goals. As Manager 5 puts, “how to embed our strategy into performance objectives—how to really reach the average person and how to make it

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426 Interview transcripts on file with the author, June 18, 2014.
427 Interview transcripts on file with the author, December 9, 2013 and October 8, 2013 respectively.
428 Interview transcripts on file with the author, October 18, 2013.
429 Ibid.
relevant to everyone is a big challenge.” 430 “We have done various initiatives around engagement but it is definitely a struggle” 431

4.4.1.2 A Missing/ Inadequate Learning Process

Another key factor underlying the CSR reporting-performance inconsistency is the corporations’ failure to learn adequately from their processes of CSR reporting. 432 While the literature has suggested that the CSR reporting process should be circular, in which the past reporting experience informs corporate strategies and decision making that could shape a new round of CSR reporting, 433 the empirical research of the present study shows a mostly negative result in terms of the practical resonance to this view. In particular, during the research interviews, when asked about what the influences of CSR reporting are on firms’ environmental and social practices, the majority of the interviewees express the view that rather than having CSR reporting influence corporate performance, they just report on what they have done. For instance, Manager 1 notes: “I think a report is just an outcome of what an organization does”. 434 She adds: “I think we have our systems, programs and strategies very much developed in our way and reporting is secondary. We put what we do into the reporting. The reporting doesn’t influence what we do”. 435

430 Interview transcripts on file with the author, December 9, 2013.
431 Ibid.
432 See Section 2.2.1 for a discussion of the connection between CSR reporting and corporate learning.
433 Michael Mitchell, Allan Curtis & Penny Davidson, supra note 148, at 1057.
434 Interview transcripts on file with the author, November 18, 2013.
435 Ibid. This standpoint is very popular among corporate practitioners. To avoid redundancy, the present research lists a couple more similar views in the footnote. For instance, Manager 3 puts: “I think reporting is just a tool, an avenue for us to communicate what we were doing. It does not prevent us or encourage us to do more. It has nothing to do with the actual performance” (Interview transcripts on file with the author, July 14, 2014). In addition, Manager 6 observes: “the actual report does not really have an influence on our management practice. CSR reporting is just the way we do business—it is how we go about things that have been doing so all the time” (Interview transcripts on file with the author, October 18, 2013). A similar view has also been expressed by Senior Manager 2.
As the above-mentioned observations show, the practitioners’ strong doubts toward the value of CSR reporting in driving corporate performance changes suggest that corporate learning may be either missing or inadequate within those companies. By making further rounds of analyses surrounding this issue, the present research notes that the lack of learning within the companies that the empirical research covers is evident in two other aspects.

First, setting goals without monitoring. Setting goals and benchmarking performance against the goals form an important part of corporate learning in the process of CSR reporting. In practice, what is problematic is not that companies fail to set goals, as many of them do, but that companies which set performance goals in their CSR reporting do not track their progress toward these targets nor publicly acknowledge whether the goals have been achieved at a later date. By reading their reports, it is difficult for readers to know how far away the companies are from meeting those goals. As Consultant 3 comments: “even if [companies] have goals in place, they are not effectively communicated and supported, and people are not monitoring against them”. Moreover, the goals established are inconsistent as the companies are quick to change their goals in the next CSR reporting cycle without acknowledging the reasons for the changes. As a result, the performance goals, rather than acting as a learning tool that companies use to

436 This suspicion is extrapolated from Huber, who contends that “[a]n entity learns if, through its processing of information, the range of its potential behaviours is changed”. See: Huber, supra note 150, at 89.
437 Unless otherwise noted, the problems identified here are common for the companies that the empirical research addresses in particular. However, since many of these companies are award winning and recognized corporate leaders in CSR, the present research believes that these problems may have a wider application.
438 Interview transcripts on file with the author, October 8, 2013.
439 The empirical research suggests that companies change performance goals to avoid reporting negative information. See Section 3.3.1 for the instance of R3.
benchmark themselves and stimulate improvements, have reduced into a lip service and a sign of denying the opportunities to learn.

Second, collecting data without managing. Companies’ failure to learn is also manifested in their stances toward the CSR data collected. As Consultant 3 notes: “how the company uses the data it generates is going to be the real deciding factor on whether anything positive happens”. Nevertheless, she adds, “Now [corporate] people know this is what they need to know, but they do not take the next step”. In line with her observation, the empirical research finds that instead of stimulating further rounds of discussion and scrutinization, CSR reporting has become an end point and a reinforcement of past corporate behaviours. In practice, CSR reports rarely become the source documents that inform future corporate strategies and decision making. According to the research interviews, the information collected during the previous CSR reporting cycles has rarely been used by the companies to refine corporate environmental and social policies, upgrade management systems, engage stakeholders, set up corporate substantive goals, etc. Among the corporate respondents, only one interviewee, Senior Manager 6, acknowledges that the CSR report is “the go-to document” in the company’s CSR decision making. On a separate note, Manager 4 states: “my hope is that companies

440 Interview transcripts on file with the author, October 8, 2013.
441 Ibid.
442 The question “Whether your company uses CSR reporting to inform corporate decision making?” was asked during the empirical interviews. While several non-corporate interviewees note that the companies should take better use of their CSR data, only two of the corporate interviewees (Manager 5 and Senior Manager 6) contends that CSR reporting is a consideration for corporate management. On the contrary, the majority of the corporate interviewees side with the point that their CSR reporting is merely an outcome of their CSR performance and therefore has no effect on corporate decision making. See supra note 362 and the accompanying texts for more description of the latter view.
443 Interview transcripts on file with the author, October 29, 2013.
start using [CSR reporting] more for performance management rather than just throwing
the information out and never looking at it again”.444

4.4.1.3 Overstated & Opaque Stakeholder Engagement

Built upon content analysis of CSR reports from the eight companies that the empirical
research particularly deals with, the present research notices that 50% of the companies
have used the buzz phrase “stakeholder engagement” in their CSR reports (R3, B3, M1
and M2). However, a closer look at the content of stakeholder engagement that these
companies describe in their CSR reports reveals that the claims made by these companies
are very much overstated: it seems that companies have taken an overly broad view
toward stakeholder engagement, a view that equates informing stakeholders to
engagement them. For instance, the companies interpret stakeholder engagement to
include things such as announcing the CSR reports (B3), sending newsletters to
stakeholders (M1), and joining the GRI reporting frameworks for CSR reporting (M2).
The research interview further corroborates this contention. When asked about what
forms stakeholder engagement in terms of CSR reporting takes in the company, Manager
3 responds: “We do the report. We announce the report. We post our report on the
corporate website.”445

Another empirical observation as it relates to stakeholder engagement is its opaqueness.
While some companies mention in their CSR reports that they have organized
stakeholder engagement events, such as stakeholder-advisory panels and stakeholder

444 Interview transcripts on file with the author, June 20, 2014.
445 Interview transcripts on file with the author, July 14, 2014.
interviews, to solicit views concerning their CSR reporting, they do not report any detail of such engagement, i.e. how the participants were selected, what issues and concerns were raised, how the company plans to respond to those issues, etc. During the research interviews, when asked to provide further information regarding their stakeholder engagement, the corporate interviewees either acknowledge that they hire consulting firms to do the work for them (in the case of R3 and B3) or note that the stakeholder engagement logs are kept confidential (in the case of M1 and M2).

4.4.1.4 “Rituals of Verification”

Another issue that is responsible for the CSR reporting-performance gap, as identified by the empirical research, concerns the external verification for CSR reporting. The empirical research notes that the current external verification regime as it relates to CSR reporting is flawed not only because the third-party verification is optional and, in many cases, absent, but also because in the cases in which external verification has been performed, it falls short of being rigorous and comprehensive.

A seemingly straightforward reason behind the CSR reporting-performance gap is the lack of external verification for CSR reports, as many interviewees express views supporting this contention. For instance, one consultant notes during the research

446 This phrase is borrowed from Power’s critical comment on the rise of audit practice. In his book, _The Audit Society_, Power argues that the standard audit process, which favours procedural routines and evidence gathering instead of real improvements in operational efficiency, exhibits “formalized rituals of accounting and verification”. See: Michael Power, _The Audit Society: Rituals of Verification_ (Oxford University Press, Oxford, 1999), at 96, 137-38.

While Power’s observation concentrates on financial audit, which is a well-recognized form of assurance for corporate financial reporting, the problem he identifies is equally applicable to the assurance service of CSR reporting. Viewed by the present research, CSR reporting assurance should arguably strive to stimulate learning and behavioural improvement. However, it is currently caught up in “rituals of verification” that merely produce certificates of comfort and a cosmetic illusion of reporting credibility.
interview: “The rigor is in the assurance process. If you do not have anybody assuring [you CSR report] and your report does not have actual legal liability, you can say whatever you want to say and keep saying that”. Furthermore, Manager 4 emphasizes: “external assurance is a really important part of the [CSR] report because it gives credibility to the report”.

While the lack of external verification is indeed a matter of concern, the present research finds that it only explains part of the story. Both the documentary data and the research interviews suggest that in companies in which the third-party verification for CSR reporting is provided, the assurance only deals with a limited sample of data. As Manager 4 confirms:

[Assurers] are not looking through every single data point for every single indicator because it is a limited assurance. What they are taking is a slice of the data and they are looking at where it comes from, saying “given that this slice is correct, we feel comfortable with the rest of it”.

Further, Consultant 1 points out that the standard practice for large, publicly-traded companies is to have limited assurance for CSR reporting, which attests that the evidence the assuror have collected does not make it believe that the company reports in an untruthful manner. Among the eight companies that the empirical research examines,

447 Interview transcripts on file with the author, June 17, 2014.
448 Interview transcripts on file with the author, June 20, 2014.
449 Ibid.
four provide assurance reports for their CSR reporting, while the reports for three companies explicitly note that their assurance is limited assurance.

According to the empirical research, the key concern for limited assurance is its insufficiency in rigor and depth. As to the first issue, the interviewees tend to compare the verification of CSR reporting with that of financial reporting and draw the conclusion that the former is less rigorous and standardized. For instance, Consultant 1 and 3 both posit that it is necessary for CSR reporting to be of the same rigor as financial reporting, through either internal audit or external verification. With respect to the second problem, the empirical research finds that in practice, the verification of CSR reporting is narrowly confined to data check and paper work, without probing into the corporate planning and control mechanisms underpinning the CSR data. As a result, as Senior Manager 5 puts, with external verification, companies “are just ticking another box”.

4.4.1.5 The Lack of a Performance-Related CSR Reporting Purpose

The present research notes that the lack of a comprehensive, performance-driven purpose for CSR reporting is a fundamental factor beneath the CSR reporting-performance discrepancy. It is fundamental not only because the CSR reporting purpose determines the direction that CSR reporting is heading in the circumstance of a particular firm, but also in that it has a direct link with the other factors aforementioned. For example, how a company defines the purpose of CSR reporting directly influences how much attention

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450 Interview transcripts on file with the author, June 16, 2014.
and resources it is going to put for CSR reporting, whether it is willing to engage senior management and stakeholders to monitor CSR reporting, and how the CSR reporting personnel is disposed, etc.

In the field work, the CSR practitioners have showed different standpoints as to the purpose of CSR reporting.\footnote{451} In particular, communication and risk management are the two most frequently cited goals of CSR reporting during the research interviews. For one thing, a number of practitioners take CSR reporting as a communication and public relations instrument. For instance, Manager 1 posits: “CSR report is absolutely a communication tool”.\footnote{452} Senior Manager 1 and Senior Manager 2 both resonate with this view. Senior Manager 1 further demonstrates the purpose of CSR reporting as “[letting] people know from a reporting standpoint about what we are doing across different areas”.\footnote{453} For another, some other interviewees see CSR reporting primarily through the perspective of risk management. For example, Senior Manager 6 states:

In our report we got quite a few scorecards which we talk about. You know, here are the material topics. Here are the goals we target on. Did we meet them? If not, why not? So these kinds of tools become a risk management exercise—through the development of the report every year, we put the organization through that and at least create some disciplines so people are looking at accordingly.\footnote{454}

\footnote{451} Although the views expressed by individuals are not equal to the views of the organizations, the former provide important clues to the inquiry of how the purpose of CSR reporting is comprehended by the business sectors in general.\footnote{452} Interview transcripts on file with the author, November 18, 2013.\footnote{453} Interview transcripts on file with the author, October 16, 2013.\footnote{454} Interview transcripts on file with the author, October 29, 2013.
Similarly, when commenting on the role of CSR reporting in the mining industry, Senior Manager 5 notes:

Because of the nature of the business, the fact that all the capital goes to the upfront before you earn any money, there is a huge amount of risk management—you’d better have the most material issues identified and managed. CSR reporting is a way of managing that.\textsuperscript{455}

Although it seems that the standpoints expressed by the practitioners regarding the purpose of CSR reporting are diverse, the underlying rationale behind these expressions is identical: they view CSR reporting primarily as a means to receive social and environmental credibility, not as a way to make improvements to companies’ own activities in environmental and social aspects. It is surprising to see that among the 26 interviewees, only one practitioner explicitly acknowledges that CSR reporting has a consequence for corporate performance.\textsuperscript{456}

The lack of a comprehensive, performance-driven purpose for CSR reporting has a close link with companies’ personnel arrangements toward CSR reporting. In practice, the task of CSR reporting is usually set at the divisional or departmental level rather than at the enterprise level of the firms. In other words, CSR reporting is seen as a division-wide or a department-wide issue, not a company-wide one. Compatible with this observation is that right now, it is most often the public relations/affairs department that is responsible for

\textsuperscript{455} Interview transcripts on file with the author, June 16, 2014.

\textsuperscript{456} The exception is the view expressed by Manager 3, who suggests: “[CSR reporting] disciplines us to make improvement. It is a way to communicate our mandate and mission. It is for people to hold us accountable” (interview transcripts on file with the author, July 14, 2014).
CSR reporting. As Consultant 1 corroborates, “CSR reporting [has been] hijacked by PR and communication departments”.

### 4.4.2 Opportunities for Realignment

As the earlier chapter shows, in terms of the CSR reporting-performance inconsistency, what is implicit is that companies fail to learn from the process of CSR reporting. The realignment of corporate reporting and performance requires corporate behavioural changes that is a result of corporate learning. Therefore, this section explores the opportunities of realigning CSR reporting with corporate performance primarily from the perspective of organizational learning.

According to the organizational learning literature, the adoption of learning ultimately depends on “the specific culture, leadership styles, and structural features” of the companies. Following this roadmap, the present section explores empirically the potentials of alleviating the CSR reporting-performance gap. It does so by considering how these three aspects of stimulations have been discussed and manifested in the CSR reporting field and how the empirical findings shed light on the issue of regulatory design as it relates to the CSR reporting mandate.

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457 Among the firms that the empirical research focuses on, R1, R2, R3, B1, M1 and M2 all have the CSR reporting team sit under the umbrella of the Public Relations/ Affairs department, whereas B2 and B3 have a Corporate Responsibility department that is responsible for CSR reporting.

458 Interview transcripts on file with the author, June 17, 2014.

459 See Section 2.2.1 for a discussion of the links between CSR reporting and organizational learning.

460 Dierkes et. al., supra note 156 at 756.

461 The discussion in particular helps to refine the reflexive law approach. See Section 5.2 for a description of the “reflexive law plus” model, which builds on the theoretical work of reflexive law and in the meantime is greatly inspired by the result of the empirical observations.
4.4.2.1 The Structural Building Blocks

The structural mechanisms in the context of organizational learning are defined as “the institutionalized structural and procedural arrangements allowing organizations to systematically collect, analyze, store, disseminate and use information that is relevant to the performance of the organization”. With respect to CSR reporting, the structural features refer largely to the corporate policies and procedures as well as the internal management system surrounding CSR reporting. In the empirical research, some frequently cited examples of the structural elements include: defining the scope of CSR reporting, determining targets and priorities, establishing a baseline of stakeholder involvement, developing key performance indicators and parameters, making company-specific CSR strategies, and setting up organizational units for CSR reporting. However, observed by the empirical research, not all the companies in practice adopt CSR reporting protocols or management system in an institutionalized manner, as some of the cited components were practiced merely on an ad hoc basis without interfering with the companies’ day-to-day operation in CSR aspects.

In terms of integrating the structural components into the regulatory design to conquer the CSR reporting-performance gap, the empirical research identifies two issues as being significant. For one thing, the empirical research notes that the structural building blocks for CSR reporting should not be a one-thing-fits-all. A salient example is the TSM

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463 For instance, when asked whether there was a formal process for the company to solicit feedback from stakeholders for its CSR reporting, Manager 6 expressed that the company did it “more of ad hoc”.
program for mining companies.\textsuperscript{464} Requiring the buildup of operation and management system surrounding CSR within the facilities of each participating firm, the TSM program received a big success at the beginning. However, a “reporting fatigue” emerges as time goes by.\textsuperscript{465} According to the interviewees, although the TSM “drill[s] down and require[s] specific performance toolkits” (Senior Manager 5), “provides huge opportunities for smaller companies who do not have their [CSR] management systems” (Manager 5), and is “helpful for companies who might not have any structure or basis to start their sustainability programs” (Consultant 2), it is felt as being redundant for large companies. As Consultant 2 posits: “For large companies, doing TSM is very redundant, because generally they have already had the framework implemented yet need to transform the data they have already had into a TSM format so as to get approval from MAC”.\textsuperscript{466} Manager 5 further confirms: “[The TSM] is not happily received at our sites—no one has problems with what they are trying to promote, but there is some duplication of reporting between their checklist and our own management standard”.\textsuperscript{467} The implication of this dilemma is that the structural mechanisms should leave room for companies to develop management tools unique to their operations. In other words, the

\textsuperscript{464} See \textit{supra} note 167-68 and the accompanying texts for an introduction of the TSM. The TSM has assessment protocols covering six areas of CSR management (aboriginal and community outreach, energy and GHG emissions management, tailings management, biodiversity conservation management, safety and health, and crisis management planning). Each protocol contains a set of performance indicators. Companies are asked to evaluate their own performance against the indicators and publicly report their levels of conformity (AAA to C) to those indicators.

\textsuperscript{465} See: MAC, \textit{Post-Verification Review Report}, 20\textsuperscript{th} Meeting of the Community of Interest Advisory Panel (October, 2013), online: \texttt{<http://mining.ca/sites/default/files/documents/PostVerificationReview2013.pdf>}, at 16. Teck Resources (Teck) refused to report on two newly-added protocols of the TSM in 2012. Teck publicly challenged the TSM for being rigid, “‘one size fits all’, regardless of facility or organizational context”. In the post-verification review (PRV) stage, this issue was heavily debated along with the value of the TSM in general (p.15-17).

\textsuperscript{466} Interview transcripts on file with the author, May 22, 2014.

\textsuperscript{467} Interview transcripts on file with the author, December 9, 2013.
CSR reporting process ought to be individualized and tailored to each company’s unique circumstance.

For another, the empirical research resonates with the literature on the point that the structural components for CSR reporting are necessary but insufficient on their own to alleviate the CSR reporting-performance gap. According to the literature, the structural features are indispensable building blocks for CSR reporting, because they “attribute to organizations a capacity to learn”.468 However, the complexity of the structural mechanisms is that “the existence of organizational structures in which the learning process can be carried out” is “a necessary, but not a sufficient, condition for systematically promoting organizational learning”.469 A salient example, as aforementioned, is the insufficient learning process within the companies that the empirical research concentrates on.470 Despite that many of these companies have in place internal management structures surrounding CSR and set criteria in terms of CSR reporting, the empirical research notes that these firms still suffer severely from problems in corporate learning, such as setting goals without monitoring and collecting data without managing and taking use.471 Besides, the practitioners of these companies show a strong doubt toward the value of CSR reporting in stimulating performance changes, as they express that reporting is just an outcome of what the company has done.472

468 Ibid, at 170.
470 See Section 4.4.1.2 for a thorough discussion of the lack of learning process within the companies based on the empirical research.
471 Ibid.
472 Ibid.
Therefore, while building an individual-tailored structural framework for CSR reporting is the necessary step to take, the shape of corporate learning, and as a result, the CSR reporting-performance alignment, requires additional cultural and institutional stimulus. This understanding turns the discussion to two other dimensions of corporate learning, corporate culture and leadership.

4.4.2.2 The Leveraging Point: Corporate Culture

Corporate culture, representing “the basic assumptions, values, and expectations” that influence how corporate members think and behave, is “the informal control system within the organization”.\(^{473}\) During the research interviews, although no question asked explicitly mentions corporate culture, the practitioners use different metaphors to describe their understandings of corporate culture, which shows the importance of corporate culture in the interviewees’ comprehension of the CSR reporting-performance inconsistency. For instance, Consultant 3 addresses corporate culture as the “personality within the company” that matters greatly to corporate decisions on what to disclose and what not to in their CSR reporting.\(^{474}\) In a similar spirit, Lawyer 1 posits: “CSR has already become part of the vocabulary of companies. But the evolution is to translate that vocabulary into corporate thinking”.\(^{475}\) He proceeds: “It is not merely a matter of

\(^{473}\) Cristie Ford & David Hess, “Corporate Monitorships and New Governance Regulation: In Theory, in Practice, and in Context” (2011) 33:4 Law Policy 509, at 511-12 (categorizing the control systems within the organizations into formal systems, which include company policies, structures, and operational processes, and informal, which refers to corporate ethical culture).

\(^{474}\) Interview transcripts on file with the author, October 8, 2013.

\(^{475}\) Interview transcripts on file with the author, June 3, 2014.
reporting, but a matter of corporate thinking. It is about having CSR incorporated into the C-suite decision making” \( ^{476} \).

In comparison, the corporate-practitioners discuss corporate culture in a more concrete and subtle way. When recalling his experience in promoting the integration of CSR factors in management decision making, Senior Manager 5 notes:

The challenge I had as a VP for sustainability was how do you embed sustainability in the culture of the company when you’re a small, non-profit generating department within the organization. You have to govern by influence, not by command and control. We were able to build sustainability into people’s personal objectives and as a component of bonus. But really we want to inspire people’s minds and hearts, so that they won’t be driven by incentives but by a sense of responsibility. That’s the biggest challenge. … There has to be a common sense why we do this, and to maintain that level of attention. … How do you keep people’s eye on things that may be seen as a nice-to-do but not a necessary-to-do today? You get them to factor sustainability in their decision making. Everyone talks about sustainability a lot but I wonder whether people take on board with what it means, what sustainability means to an organization. \( ^{477} \)

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\( ^{476} \) Ibid.  
\( ^{477} \) Interview transcripts on file with the author, June 16, 2014. Senior Manager 5’s view represents the concern and frustration of many CSR practitioners: on the one hand, they seek to build a long-lasting culture of responsibility within the companies and inspire more CSR-conscious corporate performance; on the other hand, they are tied by the business logic to present short-term, quantifiable results and illustrate that doing CSR makes good business case, or at least does not hurt the bottom line. Another illustration of the struggle for corporate CSR practitioners comes from Manager 3, who says:

The senior managers and the board members want to know what the return on investment is. We have been spending all this time and resources to complete [CSR reporting] and then it does not have any impact on the bottom line at all. It might [have an impact] in an indirect way, but directly there is not anything that I can point to “because we did this report we end up getting business in this area”. I cannot identify what that is. Until that link is made, it is difficult to justify all the effort and time that have been placed on CSR reporting. (Interview transcripts on file with the author, July 14, 2014.)
Corporate culture is a double sword. While a learning-based culture can be a strong leveraging point for the CSR reporting-performance realignment, a rigid, fix-minded culture may lead companies to remain the way they are. Worse still, a grandiose culture that favours box ticking and instrumental values over problem solving would be counterproductive. This cultural dynamic is fully exhibited in the empirical research.

Firstly, the CSR reporting-performance realignment requires a learning-based culture, as companies with a learning-based culture are good at “modifying behaviour to reflect new knowledge and insights”. Among the companies that the empirical research focuses on, B3 has shown the most salient feature of a learning culture. The company is a recognized leader in CSR and it is innovative in many CSR aspects. For instance, it is among the first companies in North America that has hired a chief environmental officer, set up a whistleblower hotline and openly discussed feedback of stakeholders in its CSR reports. While these efforts are remarkable, what impresses the present research most is a learning-based account of B3’s success in CSR reporting. When describing her experience with CSR reporting in B3, Senior Manager 6 puts:

As early as 2007 we received feedback that we had to tell more transparent stories, we had to include performance that was not particularly philanthropic and we had to stop the report being just one good story after another. So we worked quite hard to deal with these problems and bring an element of performance in our reporting.479

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479 Interview transcripts on file with the author, October 29, 2013.
Such a learning-based account also embodies in Senior Manager 6’s elaboration of B3’s governance structure surrounding CSR reporting:

The [CSR] report is reviewed by the highest level of the board committee—it is the corporate governance committee who has the accountability for this report. I am not just talking about the report but our corporate responsible strategy and performance. So it is not a check of a document, it actually is an oversight over all the aspects that form our performance. …When I first joined we did not have any of this governance, so the report was just a document, a project that we did and got it up at the door. I realized that people were looking at our company’s ESG performance as a whole, yet there was no real internal body within the bank that was doing this thing. So that was why we create this governance—at least there is one group of people in the bank that are taking these scorecards, tracking up performance and making sure that we are not falling behind.480

Secondly, for companies that excel the average firms in CSR performance yet fall behind in CSR reporting, a rigid, fix-minded culture that discourages learning could be the explanation. R2 provides a good example of this type. Being the subject of many CSR case studies, R2 does greatly in integrating environmental considerations into corporate core business strategy. Besides, it is a pioneer that links CSR objectives to the remuneration of executives, buyers and managers.481 However, the company’s CSR reporting is very rudimentary.

480 Ibid.
481 This information was gained from the Ernst & Young’s study and was later confirmed by Manager 2 at the research interview. To keep the name of the company confidential, the present research will not be able to disclose the name of the Ernst & Young’s study.
Found by the empirical research, there are three major problems with R2’s CSR reporting: 1) there is no information provided concerning R2’s CSR reporting procedures and internal management; 2) R2 has an extremely long reporting cycle (e.g. it reported in February 2014 on the data of the 2012 calendar year, February 2013 on the data of the 2011 calendar year, etc.); and 3) the reporting of R2 is environmental-oriented and does not include social aspects. Ironically, although all of the three issues were already identified and repeatedly prompted by the external reviewers of R2’s CSR reporting, to date the company remains the way it is.\textsuperscript{482}

During the research interviews, the rigid, lack of learning culture of R2 was more clearly reflected in Senior Manager 2’s remarks. For instance, when asked about the role of CSR reporting within the company, Senior Manager 2 says:

> Because we are such a big company, it does take an incredibly huge productivity initiative to impact our expenses over the longer term. Nothing in the sustainability initiative is going to affect our share price. ... For us, sustainability reporting is really about showing investors and other stakeholders that we are active in this area and we take it as part of our business. I think it is about communicating what we are doing to the outside world.\textsuperscript{483}

To justify the company’s shortage of providing information in CSR reporting, she argues: “[CSR] reporting cannot exhibit a full picture of what people are actually doing—they

\textsuperscript{482} B2 has made all the independent review reports publicly available. However, it is not clear how the company treated the comments and recommendations made by the external reviewers beyond promising that it would consider the suggestions, as most things remain unchanged.

\textsuperscript{483} Interview transcripts on file with the author, November 13, 2013. See Section 4.4.1.2, in particular supra note 435 and the accompanying texts for a discussion of similar views and their implications.
may not be doing as much as they are reporting. The other thing is that I do think there is a lot of work going on that is not all visible to the public”. 484

Lastly, realigning CSR reporting with corporate performance calls for a re-examination of the box-ticking culture. As the present research observes, in recent years, there has been a rise of the mindset within firms that favours standardization and comparability than learning and problem solving, mostly because the CSR reporting people in the companies are pressured to report the outcome of practicing CSR in numerical and quantifiable terms. In fact, according to the interview transcripts, the word “compare” appears 49 times in the interviewees’ responses. 485 Although the pursuit for quantification and comparability is understandable, as Manager 3 illustrates, “If you have one metric and everybody is reporting on it, then people can compete on their own companies’ abilities to generate better performance and that is how companies differentiate each other”, the strong tendency in the corporate value system of focusing on things that can be measured and say the job is being done is detrimental. 486 As the literature notes, “disclosure can serve important goals, but there needs to be an increased emphasis on addressing the underlying problems that drive irresponsible corporate behaviour”. 487

484 Ibid.
485 The word count includes “comparable” and “comparability”. One representative view among the practitioners regarding comparability was expressed by Consultant 4, who put: “There is a big question in terms of comparability—if you are not able to compare information company to company, then how useful is CSR reporting?” (Interview transcripts on file with the author, November 7, 2013.)
486 Interview transcripts on file with the author, July 14, 2014. As Sarfaty argues, the favour of box ticking can lead to “a preference for precise but not necessarily relevant data”. See: Sarfaty, supra note 133 at 606–07. A similar problem exists in the field of corporate internal control and monitorship. When commenting on the internal control programs, Cunningham notes that the “systemic and professional forces put pressure on having controls and having them audited, rather than having controls that are likely to be effective”. See: Lawrence A Cunningham, “The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills” (2003) 29 J Corp L 267, at 270.
487 Snyder, supra note 204 at 613.
In sum, viewed by the present research, to move forward, not only a learning culture should be cultivated, but also the emphasis of CSR reporting should be shifted toward problem finding and correction. As to this matter, Manager 4’s remarks seems pertinent:

[C]ompanies should really use [CSR reporting] as learning tool. The best practice is after the report is done, you actually take time to reflect, ‘What have we learnt? What are we going to change forward? What if we do differently this year?’, and you started having those conversations. … That is where CSR reporting can play a role and that is the real value of CSR reporting. 488

4.4.2.3 Leadership as a Change Agent

The role of leadership in fostering environmentally and socially responsible corporate performance has been greatly emphasized in the literature. 489 For one thing, corporate senior management, especially the Chief Executive Officer (CEO), are the change agents who translate the general concept of CSR into language that fits particularly for the company or the department units. For another, they are the guards of firms who have the final say of whether a structural building plan can be approved or prohibited and who consciously and unconsciously decide the popular culture within a certain firm.

488 Interview transcripts on file with the author, June 20, 2014
489 For example, Stone noted as early as 1975 that “many problems owe not to failures of the corporation to have the information on hand (somewhere), but to failures to process it upward to the people who are in a position to do something about it”. See: Stone, supra note 383 at 204. In a more recent work, Conley & Williams also mentioned briefly “the dependency of CSR on ‘senior management buy-in’”. See: Conley & Williams, supra note 14 at 17–18. Moreover, Hess stresses in his discussion of hardware and software fixes to corporate fraudulent behaviour that “[t]he primary means of influencing the firm’s software is through top management’s commitment to an integrity-based program”. See: David Hess, “A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines” (2007) 105:8 Mich Law Rev 1781 at 1806.
The empirical research corroborates such a proposition. When citing the reasons for B3’s success in CSR endeavours, Senior Manager 6 points:

[W]e want to be considered to be a leader, to be innovative and to create space. Our CEO talks about this quite often: it is a huge responsibility to have a company of this size that employs so many people and it has to be managed responsibly. That is not just financial management, but all aspects of, you know, what gives people a fulfilling job and a value that creates and stands the chain. He speaks a lot about leaving an organization in better shape than when inherited.490

Senior Manager 6 further notes the connection of leadership endorsement with the allocation of resources:

Having a central budget that we can invest in those longer-term payoff programs was a really insightful management way. The way the budgets work in the bank is either every quarter or every annual so it is very hard to make investments that have a 5-7 year payback. Our Chief Environment Officer was given a healthy budget so it allowed the investment into environmental programs that has a long-term payback.491

However, in practice, not every company is as lucky as B3, for which there is a central budget allowed by the senior management to invest in CSR projects. In the empirical research, although many CSR practitioners agree that CSR reporting was initiated by

490 Interview transcripts on file with the author, October 29, 2013. A similar view was expressed by Manager 1: “It absolutely helps when ‘the top of the mind’ are kept focused”. She emphasized, “You need to have executive-level support—a few of the high-level people within the organization to make it important and to keep it on track. As you move forward with a CSR program, the best thing you can do is have a couple of true leaders to continually bring it back to the forefront so things can be continually improved”. (Interview transcripts on file with the author, November 18, 2013.)
491 Interview transcripts on file with the author, October 29, 2013.
senior-level endorsement in their firms, such endorsement, according to the interviewees, is mostly nominal. Not only barely extra personnel or funding have been dedicated to CSR reporting, but also the senior-level monitoring and oversight of CSR reporting is extremely lacking.\textsuperscript{492} For instance, Consultant 3 notes:

At the moment, whatever report you end up with, whatever data you generate, the key thing that has been missing in CSR reporting in organizations is the feedback loop—is the integration of the data back into executive decision-making processes and having that supported by resources.\textsuperscript{493}

Commenting on the current status of senior management sponsorship in CSR reporting, Senior Manager 5 posits: “[CSR reporting] needs to have senior-level support and it needs to be real”. He repeated the last five words twice.

Senior Manager 5’s remarks resonate with the conclusion that the present study draws from the empirical research. While it requires the support of corporate leadership to bridge the CSR reporting-performance gap, a mere call for senior management involvement in CSR reporting may not be sufficient. In order for the senior leaders to have a real impact, they need to be associated with an obligation to perform due diligence toward CSR reporting.\textsuperscript{494}

\textsuperscript{492} See Section 4.4.1.1 for a more thorough discussion of the senior managers’ knowledge gap as to CSR matters.
\textsuperscript{493} Consultant 3 makes a further observation that in her experience, CSR reports were rarely scrutinized by senior management nor got fed back into executive decision making—“They didn’t take good use of their own reports”. (Interview transcripts on file with the author, October 8, 2013.)
\textsuperscript{494} See Section 5.2.2 for further discussion of this idea.
Summary of Chapter 4

To date, three solutions in the form of private actions have been tried out to address the CSR reporting-performance inconsistency. These include false advertising litigation, securities fraud litigation, and shareholder resolutions. Although these attempts have been beneficial in terms of raising public awareness and sparking scholarly debates about CSR reporting, the success of these private actions in triggering the CSR reporting-performance alignment has been episodic. In addition, from the viewpoint of the present research, these three solutions provide contingent rather than permanent responses to the problem. This is because they promote the generation of greater paperwork related to CSR reporting rather than stimulating substantive improvements to corporate CSR performance.

In closely examining the regulatory field as it relates to CSR reporting, the present research identifies a historical and practical supremacy of private and self-regulation. The heavy reliance—and sole reliance in the case of Canada—on private and corporate self-regulation with respect to CSR reporting is problematic because both regulatory forms put self-interest ahead of public interest and are limited in their regulatory capacity. The present research informs the call for governmental regulation of CSR reporting by providing additional insights into two fundamental issues. First, it opposes the sole reliance on stock exchange rules for regulating CSR reporting. Second, it posits that in the long run, securities regulation should not be the single official regulatory venue for CSR reporting. Detailed arguments for each claim are supported.
The present research situates CSR reporting within the setting of governmental regulation and proposes that the reflexive law approach be used to alleviate the CSR reporting-performance inconsistency. Extrapolating from the literature, it suggests the reflexive law approach to CSR reporting encompasses two major components: 1) officially mandating CSR reporting through either legislation or regulatory rules and 2) requiring institutional conditions for CSR reporting that induce corporate self-referencing processes. Therein, it argues that a comprehensive evaluation of the reflexive law approach requires an association between the theory and empirical field work.

To gain a better understanding of the current CSR reporting field and to prepare for the elaboration of the reflexive law approach in the ensuing chapter, the present chapter closely examines the empirical evidence in order to identify the factors underpinning the CSR reporting-performance decoupling and opportunities for realigning the two. With respect to the decoupling, it notes that five commonly shared factors underlie the CSR reporting-performance inconsistency. Firstly, there are noticeable knowledge gaps within companies at the level of senior management as well as among lower-level corporate employees. Secondly, corporations fail to adequately learn from their CSR reporting processes. Thirdly, companies tend to overstate their efforts to engage with stakeholders and keep their stakeholder engagement process opaque. Fourthly, the external verification of firms’ CSR reporting is optional and falls short of being rigorous and comprehensive. Lastly, CSR reporting lacks a performance-driven purpose.

With respect to the opportunities for the CSR reporting-performance realignment, the present research considers three aspects of potentials, namely structural features,
corporate culture and leadership. Viewing from the perspective of regulatory design, the empirical study finds that: 1) building an individually-tailored structural framework for CSR reporting is a necessary step, but structural features are insufficient to fill the CSR reporting-performance gap on their own; 2) the emphasis of CSR reporting should be shifted toward problem-finding and problem-solving, in order to cultivate a learning culture within the companies and allow them resist a rigid, fix-minded culture and a grandiose, box-ticking culture; 3) the support of corporate leadership needs to be real instead of nominal.
Chapter 5: A Working Model of “Reflexive Law Plus”

Introduction

Based on a critical analysis of the reflexive law literature, the present study develops a reflexive law model of CSR reporting, which is named “reflexive law plus”. While being faithful to the fundamentals of the reflexive law theory, the “reflexive law plus” model emphasizes the importance of self-reference as it relates to the regulated entities and seeks to fortify the self-referential mechanism by combining the procedural mandates with the learning-driven requirements that have been identified by the empirical research.

This chapter centres on justifying the use of “reflexive law plus” to alleviate the CSR reporting-performance gap. It first presents the call for the “reflexive law plus” model in terms of its feasibility and necessity. The chapter then outlines the content of “reflexive law plus” as it relates to CSR reporting by identifying the procedural components as well as the learning-driven components of “reflexive law plus”. Third, based on a comparison with the traditional and contemporary regulatory tools respectively, the present research shows that “reflexive law plus” is more capable than traditional regulation to reduce the resistance of the preexisting corporate culture and corporate climate, and is more context-appropriate than management-based regulation and meta-regulation to address the CSR reporting-performance decoupling.
This chapter makes a tentative effort to describe and defend a more concrete model of reflexive law with respect to CSR reporting. It contributes to the regulatory theories as well as the CSR scholarship. Although the ideas that this chapter proposes in terms of the CSR reporting regulatory design is relatively preliminary, they point to issues and questions that should be investigated in future research.

5.1 Why Reflexive Law Needs a “Plus”?

This section justifies the design of the “reflexive law plus” model from two perspectives. First, it presents the theoretical underpinning of the “reflexive law plus” model, showing that reflexive law goes beyond procedural law and there is space for adding institutional instruments to it. Second, this section examines the concept of corporate self-reference, arguing that self-reference is the major tool that reflexive law adopts to foster the CSR reporting-performance realignment and the major focus of the “reflexive law plus”.

5.1.1 The Feasibility: Reflexive Law Beyond Procedural Law

While the literature has frequently described reflexive law as the imposition of procedure-concerned requirements, reflexive law does not simply retreat to proceduralism or proceduralization. Because reflexive law aims to stimulate the

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495 Orts, supra note 363, at 1254 (arguing that procedural is “[t]he primary regulatory method employed by reflexive environmental law”); Hess, 1999, supra note 86, at 51 (noting that “[r]eflexive law is primarily procedural law”). However, as understood by this research, reflexive law does not prescribe standard procedures for the regulated to follow. Rather, it prescribes the use of certain mechanisms, by which the regulated establish procedures that tailor to their own circumstances.

regulatees’ self-referential capacity by using carefully crafted procedures, it is critical that the procedures are substantially abided by to the point that self-reference would become a reality. However, in a practical world, the flow from abiding by certain procedures to engaging in self-reference is by no means smooth. Therefore, additional institutional arrangements should be embraced to better catalyze and consolidate the self-referential capacity on the part of the regulated. In fact, the literature has already made similar contentions about this. For example, Orts calls these institutional components “reflexive law strategies”.497 In a similar vein, when examining what constitutes social reporting requirements, Hess did not limit his discussion to the procedures of social reporting. Rather, he extended his analysis to more nuanced ingredients that underpin the procedural norms. For instance, he argues:

the corporation must designate specific personnel to be responsible for the various stages of the social report process. This requires that all employees be educated about the social report process and their role in the process. In addition to educating the employees, all members of the organization must be kept up to date on the progress of the social report, including regular reports to top management and the board.498

In a later work, Hess made a more explicit claim that in order to realize the performance change goal of CSR reporting, the procedure-based disclosure should work together with other factors, including dialogue with stakeholders and the corporation’s ethical

497 See: Orts, supra note 363, at 1267 (noting two reflexive law strategies as "[structuring] the decision-making processes of ‘autonomous, self-guiding’ subsystems" and "[channeling] communications within the organizational structure of social institutions").
development.\textsuperscript{499} Besides, in light of the present research, although Teubner advocates for a shift in focus from substantive norms to procedural norms, he has actually never precluded the use of auxiliary institutions (either in the form of substantive law or otherwise) to operationalize the expected corporate self-reference nor has he argued for pure proceduralism.\textsuperscript{500}

In fact, viewing reflexive law merely as procedural law would lose the theory’s thick meaning and runs the risk of upholding the procedural devices too rigidly or even ritualistically. To further illustrate this point, Hess’ work is instructive. In examining whether the fact that firms are compelled to adopt and disclose codes of ethics and compliance programs improves their employees’ ethical behaviour, Hess made the observation that it is not enough to “simply look at the mere presence or absence of a code of ethics or compliance program, without attempting to understand how the codes are used by employees within the organization”.\textsuperscript{501} He went on to demonstrate that in order for a disclosure rule regarding a code of ethics to have a real impact on organizational ethics, it requires the compulsion of supplementary mechanisms, such as direct leadership devotion, to ensure that the management and the board “are not ‘out of touch’ with the ethical environment of the organization”.\textsuperscript{502}

\textsuperscript{499} See: Hess, 2008, supra note 243.
\textsuperscript{500} Teubner notes that the policy of proceduralization underpinning the structural premises for reflexive processes is a “possibility in vogue today”. He also describes reflexive law as “a new proceduralism”. See: Teubner, supra note 363, at 266, 274.
\textsuperscript{501} Hess, supra note 489 at 1790.
\textsuperscript{502} Ibid, at 1808. In particular, Hess observes that in many firms, there were only structural changes to abide by the legal requirements regarding the compliance program, such as the assignment of specific officers to be in charge. However, these arrangements were made “in a manner that did little to change top management’s involvement”.

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Similarly, commenting on the SEC rule regarding board diversity, Fairfax contends that, despite its limitations, the rule would increase the likelihood of a translation from “an increased adoption of board diversity policies” to “an increased amount of actual board diversity.” She bases her conclusion on the fact that the rule “does not merely require disclosure on the existence of a diversity policy, but also requires disclosure about how the policy is being implemented, and how a corporation assesses the policy’s effectiveness.” To fulfill such a requirement, companies actually need to have additional institutions in place, such as setting up coaching programs for the nomination committee in candidate searches, to underpin their diversity-related disclosure and operationalize their diversity policies.

These above-mentioned observations form the theoretical foundation of the “reflexive law plus” model, as they cogently show that adding institutional components to the imposition of procedure-concerned requirements is theoretically feasible.

5.1.2 The Necessity: The Corporate Self-Referential Function Revisited

“Reflexive law”, as Orts puts, “focuses on influencing the ‘self-referential’ capacity of the social institutions subject to regulation”. This section takes a close examination of

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503 17 C.F.R. § 229.407(c)(2)(vi) (2010). According to the rule, companies are required to:
   Describe the nominating committee's process for identifying and evaluating nominees for director, including … whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.

504 Fairfax, supra note 95, at 873.

505 Ibid, at 874.

506 However, Fairfax notes that the SEC rule is limited in two aspects. For one thing, it does not define the meaning of diversity; for another, it does not require companies to have a diversity policy, freeing those that do not have one from disclosure. Therefore, the rule may discourage corporations from adopting a diversity policy, as they otherwise would have to defend its effectiveness and back it by formalized institutions. See: Ibid, at 874-76.

507 Orts, supra note 363, at 1231-32.
the meaning of self-reference and its significance within the context of reflexive law, in order to differentiate reflexive law from disclosure-based regulation and justify why reflexive law needs a “plus” to cure the current problem of the CSR reporting-performance inconsistency.

Firstly, in terms of the meaning of self-reference, despite its frequent use of the words “self-reference” and “self-referential”, the reflexive law literature has not provided a solid definition of self-reference. Besides, the words “self-reference” and “self-reflection” are sometimes used interchangeably in the literature.508 In the view of the present research, it is not necessary to draw a distinction between the meanings of these words, as they are both used to describe the endogenous process that the regulated entities take to scrutinize and examine their past performance, so as to correct mistakes and improve future performance. Self-reference, when used within the context of reflexive law, is synonymous to self-examination with a trouble-shooting mind. Moreover, the subject of self-reference is “the social institutions subject to regulation”: having a strong self-referential capacity means that the regulated entities are able to proactively perform self-examination and self-correction of their performance on a frequent basis.509

Secondly, self-reference is not only a unique characteristic of reflexive law, but also the major tool that reflexive law adopts to induce social institutions’ behavioural changes.

The significance of self-reference is fully embodied in the differentiation between

509 Orts, supra note 363 at 1231-32.
reflexive law and disclosure regulation. Disclosure regulation refers to the regulatory instruments that typically require firms or other entities to collect and disclose certain information. In the literature, there is a pervasive misunderstanding that simply regards disclosure regulation as reflexive law. While reflexive law shares similar regulatory methods with disclosure regulation, the two are by no means the same. What sets reflexive law apart from general disclosure regulation is the emphasis that the former puts on self-reference. Inducing the social entities’ self-reference is a key effort made in reflexive law, yet in terms of disclosure regulation it is a welcome next step but not an aim to work toward. This distinction has an important implication for the regulatory design of CSR reporting. In particular, governmental regulation of CSR reporting will not naturally become reflexive law, since the regulatory mechanism of CSR reporting may not primarily seek to stimulate corporate self-reference nor, as a consequence, corporate performance changes.

Thirdly, according to the present research, the necessity of upgrading reflexive law lies in the urgency to substantiate the theory of reflexive law and fortify the feature of self-

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Similar misunderstanding also exists in the critique of reflexive law. For instance, Dhir contends that disclosure-induced performance changes are anecdotal and speculative. See: Dhir, 2009, supra note 19, at 61-64 (positing that the reflexive law approaches are "ambitious claims" and speculative because their application to concrete situations is only supported by anecdotal evidence). However, viewed by the present research, Dhir’s criticism seems misplaced, as the points Dhir made are not necessarily arguments against the reflexive law approach, but rather arguments against the mere use of information disclosure as a behaviour-driven instrument. Simply arguing against disclosure law does not amount to an argument against reflexive law.
reference within reflexive law. For one thing, as noted in the preceding chapter, reflexive law is a theory that exists on a broad and abstract level. While scholars have elaborated on and justified their meanings and methods of reflexive law in concrete settings according to their understanding of the theory and the regulatory atmosphere, they have done so mostly on an analytical ground rather than on an empirical ground. There is an urgent need to fill this research gap. For another, although the regulated entities’ self-reference necessitated by reflexive law is the key to address the CSR reporting-performance inconsistency, self-reference is an unpredictable outcome rather than a natural and definitive consequence of reflexive law. In other words, reflexive law is a vehicle for the self-referential mechanism, but it cannot ensure that self-reference is definitively accomplished by the regulated bodies. In this regard, the present research proposes the regulatory design that incorporates additional institutional arrangements to better catalyze and consolidate the self-referential capacity of the regulated bodies.

To more accurately capture the reflexive law model that the study contributes, the present research adds a label to it, calling it “reflexive law plus”. By definition, “reflexive law plus” is a reflexive law strategy that is upgraded in its regulatory design, with the purpose of reinforcing and stabilizing the mechanism of self-reference. As the following section will show, based on the theoretical and empirical evidence, the present research advocates for officially mandated corporate annual reporting on CSR matters and identifies six regulatory design components of “reflexive law plus” in order to address the problem of the CSR reporting-performance inconsistency. The components include three

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512 See Section 4.3.4 for a comprehensive discussion of how the literature has substantiated reflexive law.
procedural elements that mandate the disclosure of companies’ CSR reporting policies and procedures, corporate internal CSR reporting management and external verification of these aspects. Besides these, it encompasses three learning-driven elements that require top management to perform due diligence, stakeholder consultations to be documented and made publicly available and the legal mandate to incorporate an overall statement of the actionable direction of CSR reporting.

While the elaboration of “reflexive law plus” is based on the reflexive law literature and remains as faithful to the literature as possible, the regulatory structure that “reflexive law plus” presents is more of a reformulation of the reflexive law theory than a restatement of it in the circumstance of CSR reporting. First, the “reflexive law plus” model for which the present research advocates keeps the essence of reflexive law intact, respecting reflexive law as a “process-oriented structuring of institutions and of organizing of participation”513 that favours indirect and abstract forms of social control. Second, “reflexive law plus” is more concrete than reflexive law in the context of CSR reporting regulation, in the sense that: 1) the institutional components that comprise “reflexive law plus” are learning-based and informed by empirically gained knowledge; and 2) the corporate self-referential mechanism that “reflexive law plus” builds is more stable and sustaining than reflexive law.

In sum, the reflexive law approach for which the “reflexive law plus” model advocates is reflexive law that is more self-conscious and resilient, in that “reflexive law plus” is built upon a critical analysis of the reflexive law literature and is based on a comprehensive

513 Teubner, supra note 363 at 251.
understanding of the field for regulation.\textsuperscript{514} Below is a tentative comparison of disclosure-base regulation, reflexive law and “reflexive law plus” as they relate to CSR reporting.

Table 2 A Provisional Comparison of Disclosure-Based Regulation, Reflexive Law & "Reflexive Law Plus"

<table>
<thead>
<tr>
<th>Key Attributes\textsuperscript{515}</th>
<th>Disclosure-Based Regulation</th>
<th>Reflexive Law</th>
<th>Reflexive Law Plus</th>
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<tr>
<td>Mandate disclosure of factual-based CSR information</td>
<td>• Mandate disclosure of factual-based CSR information</td>
<td>• Mandate disclosure of factual-based CSR information</td>
<td>• Mandate disclosure of factual-based CSR information</td>
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<tr>
<td>Specify a standardized and comparable framework for the disclosure of information</td>
<td>• Mandate reporting procedures and policies</td>
<td>• Stakeholder-orientation</td>
<td>• Mandate the setup of reporting procedures and policies</td>
</tr>
<tr>
<td>Statement of the regulatory goal</td>
<td>• Mandate verification of the CSR reports</td>
<td>• Mandate the setup of internal management systems concerning CSR reporting</td>
<td>• Mandate external verification of the</td>
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\textsuperscript{514} The reflexive law theory was first developed at a time when the regulatory theories, especially the new governance theory, were yet to flourish. Therefore, many scholars attribute reflexive law as one processor of the contemporary regulatory theories. For instance, see: Parker, supra note 104, at 297; Lobel, supra note 376 at 346.

\textsuperscript{515} This table does not list all the attributes, since some attributes, such as prescribing who must report as well as penalties and private enforcement for mis-disclosure and non-disclosure are commonly shared by all these three forms of regulation.
<table>
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<tr>
<th>Disclosure-Based Regulation</th>
<th>Reflexive Law</th>
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<td>• Require top management to perform due diligence toward reporting</td>
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<td></td>
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<td>• Documented stakeholder consultations</td>
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<td>• Statement of the regulatory goal</td>
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</table>

**Goals**

- Correct information asymmetries
- Promote informed consent or deliberation

- Social responsiveness
- Elevate CSR consciousness and induce performance changes

- Social responsibility
- Address the CSR reporting-performance inconsistency

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### 5.2 The Components of “Reflexive Law Plus” pertaining to CSR Reporting

The “reflexive law plus” regime with respect to CSR reporting goes beyond legally mandating companies’ disclosure of CSR influence and exposure. It is contextualized in the present research to also incorporate three procedural elements and three learning-driven components. A “reflexive law plus” model of CSR reporting as such is conducive to systematically elevating CSR consciousness and improving CSR performance.

To provide a clear roadmap of the narrative flow, the table below lists how the components of “reflexive law plus” correspond with the analytical inquiries and the empirical findings made in the preceding Chapters.

<table>
<thead>
<tr>
<th>Disclosure-Based Regulation</th>
<th>Reflexive Law</th>
<th>Reflexive Law Plus</th>
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<tbody>
<tr>
<td>Mechanisms</td>
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<tr>
<td>• Increase knowledge and facilitate informed choices</td>
<td>• Influence the self-referential capacity of the regulated entities</td>
<td>• Influence and reinforce the self-referential capacity of the regulated entities</td>
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</table>

**Table 3 The Analytical and Empirical Basis of “Reflexive Law Plus”**
<table>
<thead>
<tr>
<th>Design of “Reflexive Law Plus”</th>
<th>The Analytical and Empirical Basis</th>
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</thead>
<tbody>
<tr>
<td><strong>Procedural</strong></td>
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</table>
| Legally mandated CSR reporting | • The lack of a regulatory “license to operate”  
| | • The regulatory gap with respect to CSR reporting |
| | • The Knowledge gaps within corporations  
| | • The structural mechanism as a stimulus  
| | • Promoting peer learning |
| The internal management systems | | |
| | • The structural mechanism as a stimulus  
| | • Promoting peer learning |
| CSR reporting policies and procedures | | |
| | • Ritualistic external verification  
| | • The structural mechanism as a stimulus |
| External verification | | |
| | • The Knowledge gaps within corporations  
| | • A missing learning process  
| | • Leveraging corporate culture  
| | • Leadership as a change agent |
| **Learning-Driven** | | |
| Top management’s informational duties | | |
| | • A missing learning process  
| | • Opaque stakeholder engagement |
| Documented stakeholder consultations | | |
### Design of “Reflexive Law Plus”

<table>
<thead>
<tr>
<th>The Analytical and Empirical Basis</th>
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<tr>
<td>• Leveraging corporate culture</td>
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<tr>
<td>A statement of the regulatory goal</td>
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<td>• A missing learning process</td>
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<tr>
<td>• The lack of a performance-related CSR reporting purpose</td>
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<tr>
<td>• Leveraging corporate culture</td>
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</table>

### 5.2.1 Procedural Requirements

Based on the literature and the empirical findings, the present research tentatively outlines the structural components of “reflexive law plus” as encompassing legally mandated public reporting of CSR issues, as well as the following three:

- The firm’s CSR reporting policies and procedures
- The internal management systems concerning CSR reporting

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518 These elements are collectively drawn from Orts, *supra* note 363 and Hess, 1999, *supra* note 86. According to Orts, they are incorporated in the European Eco-Management and Audit Scheme (EMAS), which resembles an “experiment in reflexive environmental law” (p. 1287). However, in his proposal for a U.S. counterpart of EMAS, Orts only adopted the verification element, as he felt the European EMAS is “overly detailed and complex” (p. 1316). The present thesis finds these elements nevertheless indispensable to generate learning and self-reference. In the meantime, the present research takes off from Orts’ proposal three other components (voluntary, company-based, company- and industry-specify systems), as they either are against the holdings of the research (voluntary) or are already implicit in the present context (company-based, specify systems).


520 Orts, *ibid*, at 1299-1300 (“Environmental Management System”).
• External Verification of the above elements\textsuperscript{521}

The following is a breakdown of these ingredients, concentrating on how they each would contribute to corporate self-reference and capacity building with respect to CSR reporting.

5.2.1.1 Legally Mandated Public CSR Reporting

The present research sides with the view that CSR reporting ought to be legally mandated.\textsuperscript{522} As the discussion in the previous chapter illustrates, the current regulatory architecture regarding CSR reporting is flawed in that private and corporate self-regulation of CSR reporting are in supremacy.\textsuperscript{523} Since the private and public interests in being committed to CSR do not substantially align, it is problematic to rely primarily on private and corporate self-regulation to tackle the issues of the CSR reporting-performance inconsistency. Therefore, it is necessary to put governmental regulation back into the loop.

This element also encompasses three implicit issues. First, who the proposed audience of CSR reports should be. The present research recommends a stakeholder orientation.\textsuperscript{524} It does so not because it argues against the shareholder-centric mode when it comes to CSR, but primarily since it views CSR reporting as a tool to engender corporate

\textsuperscript{521} Orts, \textit{ibid}, at 1306-09 ("Verification"), 1322-23; Hess, 1999, \textit{supra} note 86, at 70-71 ("Verification").
\textsuperscript{522} Hess, \textit{ibid}, at 66-67 ("Mandatory").
\textsuperscript{523} See: Conley & Williams, \textit{supra} note 219, at 570 (arguing that the private and self-regulatory phenomenon could "[dissuade] governments from even the effort at regulation"). Also see \textit{supra} note 333-38 and the accompanying texts for more discussion on this topic.
\textsuperscript{524} This issue is related to the shareholder-stakeholder debate that was previously mentioned and has been heavily discussed in the literature. See Section 2.1.1.2, for more information.
responsible performance and the role of stakeholders in this process is indispensable.\textsuperscript{525} Despite that, this study contends that the released CSR reports should also be accessible to shareholders, as they form an important category of stakeholders. In the meantime, however, the present research encourages a holistic view toward stakeholders and finds it necessary to leave to companies themselves to decide which stakeholder groups they would address.\textsuperscript{526} Since some CSR concerns are shared by more than one stakeholder groups, assigning certain issues to one particular stakeholder group would discourage other groups from pressing for attention to those issues. Moreover, segmenting the content that companies report on would make stakeholder groups focus only on the section that concerns them directly, rather than looking at the full picture of CSR and evaluating corporate performance comprehensively. While there may be skepticism about whether companies will include all relevant stakeholders in their vision of CSR reporting, the present research posits that it is fallacious to imagine that CSR reporting can address every need of everyone. Besides, the breadth of stakeholder inclusion is not a pressing issue in the present CSR reporting practice. In both the literature and the practice, the key concern is not that companies neglect a certain stakeholder group in its CSR reporting, but rather the lack of depth and the opacity of their stakeholder engagement process.\textsuperscript{527} This study will come back to this latter aspect in a short while.\textsuperscript{528}

\textsuperscript{525} See \emph{supra} note 140-43 for an examination of the behavioural change dimension concerning CSR reporting.

\textsuperscript{526} This differs from the literature that suggests “dividing the reports into sections based on stakeholder groups”. See: Hess, 1999, \emph{supra} note 86, at 69-70.

\textsuperscript{527} See: Conley & Williams, \emph{supra} note 14, at 12-13; Hess, 2008, \emph{supra} note 243, at 463-64. Also see Section 4.4.1.3 for the empirical research.

\textsuperscript{528} See Section 4.4.1.3 for the empirical evidence that supports this view. Also see Section 5.2.2.2 for the proposed countermeasures inspired by reflexive law.
Second, a related issue is the media through which CSR reports should be transmitted and circulated. The present research advocates for a web-based disclosure instead of a paper-based one.\(^5\) As the company’s website should be the main venue that accommodates such web-based CSR reports, the growth of online directories of CSR reports also makes it easier to locate and compare CSR reports from different enterprises.\(^6\)

Third, the frequency and timeline of CSR reports. While supporting for an annual model of CSR reports in line with companies’ fiscal year-end, the present research finds it necessary to prescribe a deadline for the release of CSR reports. This is because in practice, the CSR reports of many companies do not come up until four to six months after the fiscal year-end.\(^7\) Owing to concerns with the long time lapse,\(^8\) the present research proposes that the annual CSR reports should be released within three months of the fiscal year-end. Companies who fail to do so should be required to explain the reasons of their delay publicly.

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\(^5\) A web-based CSR report is advantageous as it enjoys a wider readership and can be updated more readily and economically. Besides, a web-based report may use hyperlinks and the key words search tool to facilitate easy reading. More importantly, it can take better use of social media and online feedback forms to make the communication interactive.

\(^6\) Presently, two major data providers of assorted CSR reports are the GRI and CorporateRegister.com. See: online: the GRI, [http://database.globalreporting.org/search](http://database.globalreporting.org/search); CorporateRegister.com [http://www.corporateregister.com](http://www.corporateregister.com) (last visited June 12, 2016).

\(^7\) This issue does not appear salient in the first place, as many companies only date the year, not the month nor date on their CSR reports. However, by comparing the available data regarding the release time of companies’ financial reports and that of their CSR reports, this study found in general a serious delay in the publication of firms’ CSR reports. This point was also corroborated in the empirical research.

\(^8\) The long time lapse is problematic, since it not only discourages financial investors from incorporating CSR consideration into their investment decisions as the data lacks real-time value, but also dissuade stakeholders from engaging in meaningful dialogue with management and contributing their knowledge timely.
5.2.1.2 The Internal Management Systems Concerning CSR Reporting

An internal management system denotes the disciplines, internal and external processes, and specific programs that the firm sustains to operationalize its policies and procedures. While the policies and procedures provide an overall direction for firms’ CSR reporting, they do not sufficiently respond to concerns with regard to the implementation of it. It is the internal management systems that connect the details of day-to-day corporate practices on CSR dimensions with the CSR reporting principles and policies.

The knowledge gap and a missing learning process identified by the empirical research both reflect a problem with corporate internal management of CSR reporting: CSR reporting has been managed in a very perfunctory manner. To counter this problem, the internal management of CSR reporting should be strengthened. One effective way of doing so is by asking companies to communicate in their CSR reports key information on

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533 This theme, along with the discussion on top management’s informational duties in the ensuing section of the present thesis, bears a resemblance to the internal controls requirement in section 404 of the US Sarbanes-Oxley Act ("SOX 404"). Although the present research hasn’t intentionally borrowed from SOX 404, it could be useful to mention and compare these two sets of regulatory design in order for the readers to get a better understanding of the kind of management system that the present study particularly concerns and advocates.

Pursuant to SOX 404, management of publicly-traded companies should establish and maintain "an adequate internal control structure and procedures for financial reporting" and make an annual assessment of its effectiveness. It adds another layer of stringency by asking the auditors to attest to the management’s assessment. See: The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §404, 15 USC 7262. The opponents of SOX 404 complain about the high implementation cost and the potential negative impact on the competitiveness of U.S. securities markets, while the proponents argue that SOX 404 helps to strengthen corporate internal controls and create a culture of compliance, the benefits of which are more of a long-term. For a comprehensive comment on SOX 404, see: Robert Prentice, “Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404” (2007) 29 Cardozo Law Rev 703 (positing that the critics of SOX 404 may be overstated and cautioning against the efforts of discrediting SOX).

While both the internal control system required by SOX 404 and the regulatory model proposed by the present thesis seem to share the value of promoting endogenous learning and changes as a fundamental way of ensuring compliance, they differ greatly in their focuses. The internal control system under SOX 404 is risk-based and its major focus is on identifying and reducing financial risks. In comparison, the internal management system pertaining to CSR reporting is primarily focused on facilitating corporate internal communication of CSR issues, making sure that the senior managers and the board either are fully aware of or directly participate in the management of CSR business and the employees do not just work in isolation in collecting fragmented pieces of CSR data. It responds to the perceived knowledge gap in CSR reporting that was described in Section 4.4.1.1.
their internal management systems, in order to subject corporate internal management of CSR reporting under the public scrutiny.

5.2.1.3 The Firm’s CSR Reporting Policies & Procedures

As noted in the preceding chapter, firms’ CSR reporting policies and procedures form the structural framework of corporate learning.\textsuperscript{534} In addition to the disclosure of CSR issues, companies should make a statement of their CSR reporting policies and procedures. Meanwhile, if any substantial changes have been made to them since the last reporting cycle, firms are expected to document and explain these changes. This policy statement provides an overview of companies’ CSR reporting structures. According to Hess, this declaration should include, \textit{inter alia}, a mission statement, procedures for collecting CSR data and seeking stakeholder inputs, the personnel structure of the CSR reporting process and corresponding educational programs.\textsuperscript{535}

According to the present research, the above two statements—the internal management system and the policy overview—also serve several purposes related to corporate self-reference. First, they promote peer learning and the diffusion of best practices; second, they force management to establish a more routinized reporting system and a more robust internal management system concerning CSR within the companies and arouse the boards’ attention to CSR issues; third, they provide external stakeholders with necessary

\textsuperscript{534} See Section 4.4.2.1 for a more thorough discussion of this topic in an empirical setting.

\textsuperscript{535} Hess, 1999, \textit{supra} note 86, at 67-68.
details to evaluate the soundness of companies’ CSR reporting structure and suggest changes accordingly.

5.2.1.4 External Verification of the above elements

While financial assurance is typically used to enhance information quality and the credibility of the data, the review and verification of CSR information should go beyond that. Consistent with the rationale of reflexive law, external verification in terms of CSR reporting should aim at engendering learning and continuous improvement.\(^{536}\) External verification requires extensive engagement with the companies and the stakeholder groups. Therefore, not only companies’ CSR data, such as their CSR performance and risk exposure, ought to be verified, but also the adequacy of their planning and control mechanisms underpinning the actions and risks should be attested.

Moreover, the present research proposes that it is necessary for the external verification of CSR reporting to be rigorous. In particular, the depth of the external verification in terms of CSR reporting should approximate reasonable assurance, as opposed to limited assurance that has been currently the common practice in the CSR reporting field.\(^{537}\) According to the literature, reasonable assurance denotes that “CSR disclosures are fairly stated”, whereas limited assurance “states that there is nothing that may cause [the verifier] to believe that the CSR reporting is unfair”.\(^{538}\) Reasonable assurance is a higher


\(^{537}\) See the GRI, The External Assurance of Sustainability Reporting, online: GRI <https://www.globalreporting.org/resourcelibrary/GRI-Assurance.pdf>, at 11-12. Also see Section 5.1.1 for the empirical research that corroborates the pervasion of limited assurance for CSR reporting.

\(^{538}\) Chiu, supra note 52 at 388.
stage of commitment than limited assurance, as it requires deeper-level engagement with the companies and it yields more credible disclosure. It is better aligned with the reflexive law approach, since the goal of external verification as a reflexive law component is not merely to perform a data check, but rather to identify weaknesses within corporate management and help companies to improve these areas and reduce further risks.

Although under the current CSR reporting regime, independent third-party assurance performed by major accountancy organizations has already been established as a standard practice among large, publicly-traded companies, viewed by this study, the reflexive-law-style verification will not necessarily be prepared by accountancy bodies. Depending on the companies’ circumstances, other sources of credibility, such as consultancy verification, would suffice too. This is because: first, the assurance of CSR reports framed by accountancy assurance models “are inadequate for the broader, qualitative dimensions of social, ethical and environmental performance”; and second, since the kind of verification in the reflexive law context calls for advice for appropriate corrective actions as well as credibility toward the truthfulness of the information, the consultancy bodies may be in a better position to perform such tasks.

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539 KPMG, supra note 343, at 5.

Whether they are accountancy or consultancy verifiers, the external assurance providers in terms of CSR reporting are expected to have the expertise and competency in both CSR matters and the assurance practices. Limited by its research focus, this study does not prepare to elaborate on the qualification of the external verifiers. Nevertheless, considering the necessity of being demonstrably competent, the thesis provisionally holds that in terms of consultancy verification, the key individuals of the verification team should be certified management consultants.

These above-mentioned components of “reflexive law plus” are procedure-oriented, since they focus primarily on the process of CSR reporting and how the operation of this process incurs self-directed learning and capacity building to address CSR uncertainties. They should act as the “backbone” of companies’ CSR reporting requirements, as they encourage firms to critically reflect on their own reporting cycles, define individual-tailored steps and management systems for CSR reporting, and keep their practices in check.

### 5.2.2 Learning-Driven Elements

While the literature has frequently described reflexive law as the imposition of procedure-concerned requirements, "reflexive law plus" adds another layer to it. As the name shows, the learning-driven elements noted here are proposed to induce corporate self-referencing and learning. In particular, based on the literature and the empirical observations, the present research identifies three components as being significant in systematically triggering corporate self-reference: 1) top management’s informational duties, 2) documented stakeholder consultations, and 3) an overall statement of the normative public policy goal concerning CSR reporting.

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542 Orts, supra note 363, at 1254 (arguing that procedural is “[t]he primary regulatory method employed by reflexive environmental law”); Hess, 1999, supra note 86, at 51 (noting that “[r]eflexive law is primarily procedural law”). However, as understood by the present research, reflexive law does not prescribe standard procedures for the regulated to follow. Rather, it prescribes the use of certain mechanisms, by which the regulated establish procedures that tailor to their own circumstances.
5.2.2.1 Top Management’s Informational Duties

To make CSR reporting into a corporate self-referential process, it is imperative for top management to be actively involved in CSR reporting affairs. The board of directors and senior managers act as the formal authority of corporate decision making and they are in a unique position to bring about organizational reform. They hold “important, or even primary, responsibility for the integration of responsible corporate processes into organizations’ everyday activities”.

However, one key regulatory challenge for CSR reporting with respect to establishing the self-referential mechanisms is that companies may simply “adopt the necessary structures and processes in form, but in a manner that did little to change top management’s involvement”. In practice, it is not atypical to see that the task of CSR reporting is assigned to certain low- to mid-level officers or be fully outsourced to third parties. As one interviewee, who used to be a senior manager in RCC, comments:

As I spent more time in the retail, I found the level of the CSR people is falling down in the companies. At the beginning it used to be VPs or associate VPs. By the end it is mostly people who are directors and managers. When you have VPs who have direct access to the CEO, that is meaningful and that is how companies get changed. In comparison, it is very hard for managers to push hard on CSR [on their own].

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543 Gary R Weaver, Linda Klebe Treviño & Philip L Cochran, “Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures, and Corporate Ethics Practices” (1999) 42:5 Acad Manage J 539, at 550 (finding that the leadership commitment is required for a firm to develop an integrated ethics program, as opposed to one that can easily be decoupled from everyday decisions and actions).
544 Hess, 2007 (“SOX”), supra note 489 at 1807.
545 See Section 4.4.1.1 for a description of the knowledge gap existed within corporations.
546 Interview transcripts on file with the author, July 7, 2014.
To tackle this deficiency and to operationalize the procedural norms of CSR reporting, the board of directors and senior managers should be required to perform due diligence with respect to CSR reporting. As Senior Manager 5 mentioned in the interview when he looked back on the development of CSR reporting in his firm: “The thinking of due diligence, which drove organizational orientation toward management systems that identify and address [CSR] risks, really set the floor for what became [CSR] reporting”.

In particular, senior managers and directors ought to be required to conduct due diligence toward the adequacy of their companies’ CSR management system and the accuracy of the reported CSR data. In terms of due diligence, management should be responsible for

- The assertions, statements and claims made in the CSR report
- The integrity of the information in the CSR report
- The oversight of CSR policies, procedures and internal management systems that are designed to support the reporting process
- Maintaining adequate records of stakeholder engagement and responses to stakeholder inquiries

With regard to this matter, the voluntary CSR reporting protocol developed by the GRI provides an excellent example. According to the GRI, “the reporting organization’s senior decision-makers should take ownership of the process for defining report content, and should approve any associated strategic decisions”. Adding a due diligence

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547 The GRI, *Sustainability Reporting Guidelines* (G3 & G3.1), Technical Protocol, online: <https://www.globalreporting.org/resourcelibrary/G3-Guidelines-Incl-Technical-Protocol.pdf>, at 4. In the empirical research, two of the interviewees mentioned that this point was strongly emphasized in the GRI training courses and was implemented in their firms. They expressed positive views toward this prescription. For instance, Manager 3 says: “The targets you have seen in the report, they have owners. So it is not me that owns these targets, but it is the
provision to the CSR reporting mandate ensures that top management has “incentives to
digest that information”, “to develop expertise on the topic” and “to devote specific time
to these issues”.

5.2.2.2 Documented Stakeholder Consultations

One implicit aspect of the CSR reporting process is regular and organized stakeholder
consultations. Ideally, stakeholder consultations mean that companies “[bring] together
all relevant stakeholders for an open-ended discussion on the corporation’s progress
toward sustainable development and [seek] consensus on goals and compliance
actions”.

A stakeholder consultation provides an outlet for stakeholders to challenge
corporate CSR decisions and ensures their views and expectations can be readily obtained
by the firms. This constant confrontation enriches corporate culture and helps to cultivate
a learning mindset within the companies. Right now, more and more companies are
aware of the importance of engaging stakeholders and a growing number of them adopt
stakeholder consultations in various forms with regard to CSR reporting.

What is problematic, however, is that the current mechanism of stakeholder consultations
intrinsic to CSR reporting falls short of going deep enough and generating meaningful
results. Since companies are in full control of the consultation process, corporate

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individuals within the company that look after these areas. They are responsible to make sure that these targets get
done”.

Nevertheless, in its most recent formal publication, the G4, the GRI changed its language from “should take
ownership” to “are expected to be actively involved”, which extraordinarily weakens the effect of its protocol.


deliberations may be compromised. As noted in the empirical research, one acute problem is that the two-way communication is yet to be reached. In particular, companies are reluctant to follow up and unwilling to publicly respond to the proposals and inquiries they received from stakeholders. More often than not, stakeholder engagement ended up becoming “nothing more than listening”. This weakens the potential of the “participatory, dialogic process” to be profoundly destabilizing and to activate endogenous self-examination and change.

Therefore, the present research recommends that companies should be required to have their stakeholder consultations documented and made publicly available. The archive should include itemized stakeholder comments as well as how the company has responded to them. This formal record not only informs the stakeholders, but also subjects the companies to public scrutiny of the progress and the remaining gaps.

5.2.2.3 A Statement of the Normative Public Policy Goal

Putting law in the context of CSR reporting, Parker argues,

Laws requiring CSR reporting may well be a useful, facilitative adjunct to more substantive regimes that do have clear policy values and do give ‘stakeholders’ rights, but on their own they can achieve no meta-regulation of the corporate conscience.

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550 See: Conley & Williams, supra note 14, at 12-13; Hess, ibid, at 456-57. In particular, Conley & Williams note that companies in stakeholder dialogue processes are in control “over who participates, how things get said, and consequently, if indirectly, what gets said” (p.13).
551 Hess, supra note 243, at 464.
552 Ford & Hess, supra note 473, at 536 (reflecting on the lack of a learning-based mechanism in the corporate monitorship programs).
553 Parker, 2007, supra note 60, at 233.
Although the present research discusses CSR reporting within the context of reflexive law, it shares an overlapping concern with Parker, *i.e.* for any kind of new governance regulatory structure to work effectively, the prerequisite is to have the policy goals properly identified and the rights and responsibilities clearly established. With respect to the governance of CSR reporting, the lack of a clear purpose, an issue raised by the literature and confirmed by the empirical research of the present thesis, underlies the problem of the CSR reporting-performance inconsistency and has severely reduced the intrinsic value of the reporting regime. Reflexive law will not save but may perpetuate the problem if it cannot specify any social policy goals or responsibility values in mandating CSR reporting processes.

Therefore, to balance the need of specifying the regulatory purpose and the concern of reducing to rigid rules, the present research advocates for the reflexive-law-style CSR reporting mandate to incorporate a whereas statement, which notes that the purpose of CSR reporting is to promote more CSR-conscious and socially responsible corporate performance. This arrangement makes clear the direction of corporate reporting and self-reference, encouraging companies to be committed to elevating their CSR performance, yet it does not interfere directly with how companies manage their CSR reporting process in concrete circumstances nor jeopardize the spirit of reflexive law.

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554 The literature is aware of the importance of stating regulatory goals as well. For instance, see: Charles F Sabel & Jonathan Zeitlin, “Experimentalism in the EU: Common ground and persistent differences” (2012) 6:3 Regul Gov 410 at 411 (calling for the "broad framework goals" to address the inherent uncertainty of experimentalist forms of organization); Parker, *supra* note 60 at 231 (arguing that in terms of meta-regulation, "the substantive goals at which internal processes are aimed must be adequately specified and enforced external to the company").

555 See *supra* note 141–43 and the accompanying texts (noting the purpose of CSR reporting should go beyond corporate transparency); *supra* note 358-61 and the accompanying texts (analyzing the different rationales of securities disclosure regulation and CSR reporting regulation). Also see Section 4.4.1.5 for the empirical findings.

556 See Section 4.3.3.2 for a reflection on the relationship between reflexive law and public policy goals.
In sum, the following is an outline of the “reflexive law plus” requirement as it relates to CSR reporting:

1) Whereas CSR reporting has a purpose of promoting more conscious and socially responsible corporate performance, publicly-traded companies shall release an annual CSR report within three months of the fiscal year-end, disclosing, among other things:

   a) the company’s CSR performance, risks and exposures during the reporting period;

   b) the company’s CSR reporting policy and procedure; and

   c) the corporate internal management system of CSR reporting.

2) Publicly-traded companies shall hire an independent assurance services provider to verify the data disclosed in the CSR report, evaluating whether the company’s CSR reporting policy and procedure as well as the corporate internal management system of CSR reporting are fairly stated and substantially followed.

3) Publicly-traded companies shall consult regularly with stakeholders on corporate CSR management and reporting, keeping a record of the issues identified and making it publicly available.

4) Senior managers and directors of the aforementioned companies shall conduct due diligence toward:

   • the assertions, statements and claims made in the CSR report;
• the integrity of the information in the CSR report;

• the oversight of CSR policies, procedures and internal management systems that are designed to support the reporting process; and

• maintaining adequate records of stakeholder engagement and responses to stakeholder inquiries.

5.3 The Pertinence of the “Reflexive Law Plus” Model

This section explores the regulatory toolbox and compares the “reflexive law plus” strategy with traditional as well as contemporary regulatory technologies. In particular, the first portion of this section focuses on illustrating the likely success of “reflexive law plus” in addressing the soft side of business regulation, a key perspective that is lacking in traditional regulatory regimes. The second part of this section evaluates the pertinence of “reflexive law plus” for CSR reporting regulation by placing “reflexive law plus” within the new governance regulatory infrastructure and comparing it to two contemporary regulatory forms, namely management-based regulation and meta-regulation, both of which have been discussed academically for business regulation in CSR matters. It then argues that with respect to the present CSR reporting-performance gap, the “reflexive law plus” approach is a more context-appropriate solution, as both management-based regulation and meta-regulation require a higher level of regulatory expertise and a more rigorous enforcement regime.
5.3.1 Comparing “Reflexive Law Plus” with Traditional Regulation 557

While legally mandating CSR reporting is a key first step to alleviate the CSR reporting-performance inconsistency, imposing governmental regulation on CSR reporting in itself does not ensure compliance. More fundamentally, there requires changes to the internal, “soft” side of business communities, namely the corporate ethical culture, as well as the normative organizational climate. The underlying social value of CSR reporting ought to be thereby embedded within corporate internal structures and a normative climate is necessary to accompany the change in law. This is where the “reflexive law plus” approach can make a difference.

5.3.1.1 Addressing the Soft Side of Business Regulation: Why Traditional Regulation Fails

In their study of corporate corruption, Hess & Ford use the metaphor “software” to describe the sum of corporate culture and corporate climate.558 They define corporate culture as “the informal and formal systems of behavioural controls within the organization” and corporate climate as “employees’ perceptions of organizational practices that have ethical content”.559 With respect to combating corruption, they argue

557 Although there lacks a clear definition for traditional regulation, traditional regulation is usually associated with top-down, rule-based regulatory regimes. See: Lobel, supra note 376 at 343. The present study is in line with such a recognition.


559 Ibid.
that a firm’s software determines how the “hardware” (the formal structure, policies and processes) would work in practice.\textsuperscript{560}

First and foremost, why care about corporate culture and corporate climate in the context of CSR reporting regulation? As previously discussed, the peril of the current regulatory structure with respect to CSR reporting rests in that the predominance of private and corporate self-regulation makes it unreliable and inadequate to address the CSR reporting-performance inconsistency and stimulate meaningful CSR changes.\textsuperscript{561} The factors underpinning this phenomenon are twofold: the corporate endeavour of marketization, and the shared belief that CSR is a voluntary action.\textsuperscript{562} Correspondingly, in addition to putting governmental regulation back to the loop, a reformulation of the regulatory architecture should also attend to these underlying issues.

The way in which corporations frame the notion of CSR, either as a moral and social belief or as a market-based device, is deeply influenced by their firm’s culture.\textsuperscript{563} Corporate culture determines how the concept of CSR gets translated into corporate values and actions in specific conditions and thus is a key factor that should be considered in the regulatory design of CSR reporting. In addition, corporate culture

\textsuperscript{560} Ibid, at 322-23.
\textsuperscript{561} See supra note 346 and the accompanying texts for the literature that corroborates this view.
\textsuperscript{562} See supra note 336-342 and the accompanying texts for an expanded discussion of the two aspects.
\textsuperscript{563} Jennifer A Howard-Grenville, “Inside the ‘Black Box’: How Organizational Culture and Subcultures Inform Interpretations and Actions on Environmental Issues” (2006) 19:1 Organ Environ 46, at 46 (positing that “[o]rganizational culture influences how an organization’s members define, or ‘set’, problems and the strategies they draw on to solve such problems”); Manfred Pohl, “Corporate Culture and CSR—How They Interrelate and Consequences for Successful Implementation”, in Judith Hennigfeld, Manfred Pohl & Nick Tolhurst, eds., The ICCA Handbook of Corporate Social Responsibility (John Wiley & Sons, 2006) at 46–70 (defining corporate culture as “the basis for all business activities and processes in a company”).
\textsuperscript{558-59 and the accompanying texts for a definition of corporate culture adopted in the present research.}
matters on another important dimension: it implies an internal willingness on the part of individual firms to respond to external social inquiries of CSR. Since “it is ultimately the decision of the corporation as to what it is willing to agree to”, corporations are not passive recipients of CSR reporting rules but rather are active respondents, whose decisions and value structures also shape the meaning of CSR reporting norms. As a result, to succeed, the intended official regulatory instrument of CSR reporting ought to understand and engage with this dynamic.

In the meantime, the popular belief that reduces CSR regulation to purely voluntary actions creates a tension between the regulatory effort in formalizing CSR reporting rules and the normative climate surrounding CSR reporting. The organizational climate, both within the firms and within the regulatory agencies, is arguably shaped by the prevailing norms of the organizations that establish rules and regularities about how people ought to behave. In particular, the regulation-averse climate leads to “an atmosphere of disregard for both legitimate procedures and potentially harmful consequences”.

Vílchez & González thoroughly discuss this factor when they reflect on the attempt of Spanish law in bringing about CSR reporting norms, which they deem a failure.

Observing that the CSR reporting field was filled with powerful, contrasting views that

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564 Timothy M Devinney, “Is the Socially Responsible Corporation a Myth? The Good, the Bad, and the Ugly of Corporate Social Responsibility” (2009) 23:2 Acad Manag Perspect 44 at 48. Also see: Gunningham, Kagan & Thornton, supra note 12, at 35 (arguing that it is ultimately the corporations that “interpret, confront and counter” the external factors that seek to align corporate performance to broader social values).


deny the legitimacy of the regulatory effort, they argue that in Spain, “CSR reporting lacked the normative climate required for a reporting regulation to succeed”\textsuperscript{568} As the literature exemplifies, the pro-self-regulation disposition toward CSR reporting poses a great challenge to the regulatory effort of imposing official regulation on CSR reporting.

Viewed together, both corporate culture and corporate climate are issues associated with the “soft” side of business regulation.\textsuperscript{569} They both fall into companies’ cognitive perspective, which exhibits a lot of inter-firm variations and is “deeply affected by situational factors”.\textsuperscript{570} More importantly, it takes an endogenous shift to address problems with corporate culture and corporate climate. While conventional forms of governmental regulation may do well at prescribing certain standards or specific outcomes, they are ill-equipped to deal with this “soft” aspect. First, the conventional regulatory regime “induces firms to adopt strategies that reduce the short-term risk of legal exposure”, not those that “address the underlying problem” of the companies.\textsuperscript{571} In other words, it discourages proactive problem solving and beyond-compliance corporate performance. Second, because corporate culture and corporate climate are influencing

\textsuperscript{568} Ibid, at 10.

\textsuperscript{569} See: Jeffrey Pfeffer, Toru Hatano & Timo Santalainen, “Producing Sustainable Competitive Advantage through the Effective Management of People” (2005) 19:4 Acad Manag Exec 95, at 96; Hess, 2007 (“SOX”), supra note 489, at 1806 (describing corporate architecture as being comprised of both "hardware" and "software"); Hess & Ford, supra note 558, at 322-23.

While the present research recognizes that social theorists may also use the notion of norms to explain the nature of these issues, it nevertheless has not pursued that path. Viewed by this study, instead of being norms themselves, the factors of corporate culture and organizational climate more closely resemble the “belief-systems” that interwoven with norms. See: Eisenberg, supra note 565, at 1262-63 (arguing that some social norms originate or are altered because actors form a new belief-system).

\textsuperscript{570} Ford & Hess, supra note 473, at 512.

\textsuperscript{571} Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach” (2001) 101:3 Columbia Law Rev 458 at 476 (exploring the shortfalls of traditional regulation in regulating subtle, second generation forms of workplace discrimination). Although employment discrimination is fundamentally a human rights issue, it has a CSR component since workplace discrimination has a direct impact on the health and safety of employees.
factors underlying all aspects of corporate decision making and performance,\textsuperscript{572} successful treatment of problems with the corporate cognitive perspective requires a systemic approach, yet traditional regulation falls short of providing tools or instruments for a systemic solution to these issues.\textsuperscript{573} Third, the subtlety and complexity of the “soft” component with respect to companies require regulation to be responsive to local level knowledge, rather than devise a “one-size-fits-all” approach. However, traditional regulation is refrained by its rigidity from being sufficiently sensitive to the day-to-day corporate practice that is always evolving and it does not encourage learning on that aspect.

These above-mentioned reasons suggest that traditional regulation cannot help in the endeavour of coordinating the CSR reporting mandate with the “soft” side of business regulation—namely corporate culture and corporate climate—which makes it a less attractive option for dealing with the CSR reporting-performance gap.

5.3.1.2 \textbf{The Likely Success of “Reflexive Law Plus”}\textsuperscript{574}

What sets reflexive law plus apart from conventional regulation and makes it a plausible candidate for regulating CSR reporting is that the reflexive law solution accepts the limits of law, \textit{i.e.} law can only influence, but not directly change a firm’s soft side.\textsuperscript{575} Therefore, instead of direct regulation, reflexive law aims to incentivize companies to transform

\begin{itemize}
\item \textsuperscript{572} Howard-Grenville, \textit{supra} note 563.
\item \textsuperscript{573} Sturm, \textit{supra} note 571.
\item \textsuperscript{574} Since “reflexive law plus” is built up reflexive law, it is impossible to discuss “reflexive law plus” without referring to reflexive law. So unless otherwise noted, the discussion of reflexive law in this chapter applies equally to both the general reflexive law regime and “reflexive law plus”.
\item \textsuperscript{575} Hess, 2007 (SOX), \textit{supra} note 489 at 1811; Ford & Hess, \textit{supra} note 473, at 534.
\end{itemize}
their own business culture and climate. As stated by the literature, the reflexive law approach “endeavours to promote an institutional culture that is mindful, conscious, and self-scrutinizing in terms of the social consequences of the institution’s practices”.

According to the present research, in terms of CSR reporting, the “reflexive law plus” approach is in a better position than traditional regulation to reduce the resistance of the preexisting corporate culture and corporate climate and has a better opportunity to reshape them. This is because the “reflexive law plus” approach to CSR reporting is less hierarchical, more systemic, and focuses on local-level learning and capacity-building. First, the regulatory model of “reflexive law plus” is less hierarchical than traditional forms of regulation. Instead of promulgating universal rules and standards in terms of how CSR issues need to be managed internally and what CSR information companies must provide, “reflexive law plus” engages private actors to develop their own CSR policies and management systems and to follow their own procedures to perform CSR reporting. Second, “reflexive law plus” is systemic. Compared to episodic wins, the reflexive law approach strives for “a system that can consistently produce positive results over time”. Since the reflexive law path sets the regulatory dimension to the structural issues and organizational patterns underlying companies’ CSR risks and weaknesses, it provides a holistic and durable solution to the CSR challenges that corporations face. Third, “reflexive law plus” stimulates learning and capacity building at the local level. It establishes a regulatory framework that can be readily adapted to individual

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576 Dhir, 2009, supra note 19 at 59.
577 Ford & Hess, supra note 473, at 518 (using the sentence within the context of corporate monitorship).
circumstances and elaborated on. The contextual knowledge it generates helps firms to better cope with their specific CSR problems and respond to particular external inquiries.

Corporate culture and corporate climate are important dynamics of firms’ internal processes. As Sturm puts, effective workplace problem solving looks to address the “particular culture, power dynamics and patterns of daily interaction” concerning the regulated firms. This rationale applies equally to the area of CSR. Being a cooperative, systemic and context-based solution, “reflexive law plus” recognizes and respects the uniqueness of firms’ culture and climate. It encourages companies to self-examine and reduce the internal challenges in relation to their unique culture and climate. More importantly, by increasing individual entities’ CSR consciousness and strengthening their capacity of dealing with CSR obstacles, it builds the momentum for companies to form a more sustainable cultural structure. In sum, with these characteristics, the “reflexive law plus” approach has a solid basis to successfully address issues concerning the “soft” side of business regulation.

5.3.2 Comparing “Reflexive Law Plus” with Other Contemporary Forms of Governmental Regulation

To prove the theoretical soundness of the “reflexive law plus” approach in regulating CSR reporting—and especially the CSR reporting-performance inconsistency—it is necessary to compare the “reflexive law plus” strategy not only with traditional...

578 Sturm, supra note 571 at 519.
579 Among the contemporary regulatory literature, there are major regulatory theories, such as responsive regulation and principle-based regulation, that have had a huge influence on the new governance scholarship. While being inspired by these seminal theories, the present research does not cover them, since so far, they have neither been used to treat CSR issues nor seem directly relevant to the research thesis of this study.
regulation, but also with other contemporary forms of regulatory technologies that can be used for governmental regulation. This comparison is meaningful, as new governance regulatory forms also accommodate regulatory approaches that resemble reflexive law in dealing with the “soft” side of business regulation.\footnote{\textit{For example, see: Parker, 2002, \textit{supra} note 104, at 203-12.}} In particular, reflexive law has an affinity with two contemporary regulatory forms, management-based regulation and meta-regulation, since they all have been discussed scholarly in the context of CSR management, being grouped together under the umbrella of “process-oriented” regulation.\footnote{Sharon Gilad, “It Runs in the Family: Meta-Regulation and Its Siblings” (2010) 4:4 Regul Gov 485. Also see: Neil Gunningham & Darren Sinclair, “Organizational Trust and the Limits of Management-Based Regulation” (2009) 43:4 Law Soc Rev 865 (positing meta-regulation as an evolving form of management-based regulation). But see: Cristie Ford, “Macro- and Micro-Level Effects on Responsive Financial Regulation” (2011) 44 UBC Law Rev 589, at 596-97 (arguing that meta-regulation is a more advanced regulatory form as it places systematic learning at the centre of the regulatory structure).} In addition, these three regulatory forms all tend to emphasize the importance of regulatory design and the need to be adaptive to individual circumstances. However, despite their similarities, in terms of CSR reporting regulation, the present thesis argues that “reflexive law plus” is more context-appropriate, as it is less dependent on regulatory expertise and rigorous enforcement steps.

Management-based regulation refers to the regulatory structure in which each regulated entity develops its own internal management rules and initiatives consistent with the general regulatory criteria and objectives.\footnote{\textit{Coglianese & Lazer, supra} note 510, at 693-94.} It “[intervenes] at the planning stage”—requiring the regulator to “conduct varying degrees of oversight to ensure that firms are engaging in effective planning and implementation that satisfies the stated criteria”.\footnote{\textit{Ibid}, at 694, 725.}

While “reflexive law plus” shares certain regulatory strategies with management-based
regulation, such as emphasizing the establishment of an internal management system and specifying the elements that should be incorporated in the firm’s management practice, the regulatory rationales of the two regulatory forms are fundamentally different. Management-based regulation is a system used to generate ideas regarding what constitutes good management and embodies a preventative regulatory ideology. In contrast, the reflexive law approach is a self-critical scheme on two levels, the level of the regulated entities and the level of law itself. It is a response to the question of how law, given its limits, may nonetheless effectively advance social change.

Meta-regulation defines the state’s role in regulation as “the regulation of self-regulation”. Under meta-regulation, companies are expected to: first, identify risks and develop internal management systems and strategies to self-regulate; and second, continuously self-evaluate the outcomes of their self-regulatory systems and take corrective measures to avoid non-compliance with the regulatory objectives. The regulators meta-regulate the corporate self-regulatory process: i.e., they monitor and assess the adequacy and efficacy of the companies’ self-regulation, determine whether the substantive goals of regulation are met, facilitate public debates surrounding the companies’ self-evaluation and hold companies accountable for failing to meet the regulatory objectives by using enforcement measures and imposing legal liability. Both meta-regulation and “reflexive law plus” are aimed at stimulating “modes of self-

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585 Parker, 2002, supra note 104 at 245.
586 See: ibid, at 239. These two steps are understood as “double loop learning”.
587 See: ibid, at 245-47. Regulators’ meta-regulation adds a “triple loop” to the learning process.
organization within the firm in such a way as to encourage internal self-critical reflection about its performance”, yet they are different in the tools they use to achieve this aim. Meta-regulation primarily relies on scrutinizing and meta-regulating corporate processes and management systems developed by individual companies to realize its regulatory aim, while “reflexive law plus” fulfills its regulatory goal by prescribing general procedural elements and making learning-driven institutional conditions for companies to abide by.

However, comparing these three regulatory models based on their theoretical meanings is at best a vague one since “[t]o focus on regulatory theory at the expense of looking at the context in which regulatory action is embedded is to look at a very thin slice of the picture”. In terms of CSR reporting, one practical challenge remains that the regulatory expertise and enforcement capacity on the part of regulators are insufficient to achieve the sophisticated rank that is required for management-based regulation and meta-regulation to function smoothly.

For one thing, current governmental and non-governmental regulators are ill-equipped to spot the pervasive CSR reporting-performance gaps, and the enforcement mechanism for identifying mis-disclosure and non-disclosure is weak and inadequate. In terms of regulatory expertise, the emphasis of CSR reporting regulation is now mistakenly placed

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588 Gunningham & Sinclair, supra note 581, at 866.
590 The importance of regulatory expertise and enforcement capacity concerning management-based regulation and meta-regulation respectively has been closely examined in the literature. See: Parker, 2002, supra note 104, at 251, 276 (emphasizing the role of regulatory expertise in meta-regulation); Coglianese & Lazer, supra note 510, at 726 (noting the significance of a “governmental enforcement presence” in management-based regulation); Gilad, supra note 581, at 485 (positing that meta-regulation relies on high regulatory expertise); Ford, supra note 581, at 600 (arguing that both management-based regulation and meta-regulation “require substantial regulatory capacity to operate effectively”).
on the technical check of disclosed data rather than on what actually happened in the field, nor is it on correcting root problems that drive irresponsible corporate behaviour.\textsuperscript{591} With respect to enforcement, currently the enforcement mechanism relies largely on private actions to identify and punish misbehaviour, the success of which is discrete and accidental.\textsuperscript{592} For another, perhaps more fundamentally, it is neither possible nor practical for regulators to collect all the CSR data and make an analysis on the impacts and patterns of corporate self-regulation. Likewise, the limited human and financial resource owned by regulators does not allow them to closely monitor companies’ CSR activities, especially unannounced activities, in order to assess the presence of reporting violations.

In comparison, being self-critical and self-referential, the “reflexive law plus” solution is less reliant on the above-mentioned external constraints. This is because reflexive law proposes a rather modest role of law, not a role of monitoring and detecting noncompliance, but a role of laying the groundwork for self-reference among the regulated entities. This is not to say that “reflexive law plus” is neither in need of regulatory expertise nor enforcement capacity, but such supports are not as indispensable in terms of reflexive law as they are for management-based regulation and meta-regulation.

Owing to the above-mentioned considerations, the present research posits that “reflexive law plus” fits better than management-based regulation and meta-regulation in dealing with the current regulatory context with respect to CSR reporting.

\textsuperscript{591} See Section 4.4.2.2 for a discussion of the grandiose culture that favours box ticking over problem solving.
\textsuperscript{592} See Section 4.1 for existing solutions to the CSR reporting-performance inconsistency.
Table 3 A Tentative Comparison of the Regulatory Tools

<table>
<thead>
<tr>
<th>Regulatory Capacity</th>
<th>Traditional Regulation</th>
<th>Contemporary Regulatory Forms</th>
<th>Reflexive Law</th>
<th>“Reflexive Law Plus”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strong focus on learning and self-reference</td>
<td>×</td>
<td>✓ only for meta-regulation</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Being able to address the “soft” side of business regulation</td>
<td>×</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Having a low reliance on regulatory expertise</td>
<td>×</td>
<td>×</td>
<td>✓</td>
<td>✓</td>
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Summary of Chapter 5

This chapter develops a concrete model of “reflexive law plus” based on the reflexive law literature and the empirical examination of the current CSR reporting field. The feasibility of “reflexive law plus” is fueled by the literature’s recognition that reflexive
law goes beyond procedural law and has space for the addition of institutional instruments. The necessity of upgrading reflexive law lies in the urgency to substantiate the theory and fortify the feature of self-reference, which is the major tool that reflexive law relies on to induce the behavioural changes among corporate entities.

“Reflexive law plus” is defined in the present research as a reflexive law strategy that is upgraded in its regulatory design, with the purpose of reinforcing and stabilizing the mechanism of self-reference. Based on the theoretical and empirical evidence, the present research advocates for officially mandated corporate annual reporting on CSR matters and identifies six regulatory design components of “reflexive law plus” in order to address the problem of the CSR reporting-performance inconsistency. These components include three procedural elements that concern companies’ CSR reporting structure and external verification of it, as well as three learning-based conditions that drive corporate learning and strengthen corporate self-reference. The following outlines the provisional “reflexive law plus” requirement as it relates to CSR reporting:

1) Whereas CSR reporting has a purpose of promoting more conscious and socially responsible corporate performance, publicly-traded companies shall release an annual CSR report within three months of the fiscal year-end, disclosing, among other things:

   d) the company’s CSR performance, risks and exposures during the reporting period;
   e) the company’s CSR reporting policy and procedure; and
   f) the corporate internal management system of CSR reporting.
2) Publicly-traded companies shall hire an independent assurance services provider to verify the data disclosed in the CSR report, evaluating whether the company’s CSR reporting policy and procedure as well as the corporate internal management system of CSR reporting are fairly stated and substantially followed.

3) Publicly-traded companies shall consult regularly with stakeholders on corporate CSR management and reporting, keeping a record of the issues identified and making it publicly available.

4) Senior managers and directors of the aforementioned companies shall conduct due diligence toward:

- the assertions, statements and claims made in the CSR report;
- the integrity of the information in the CSR report;
- the oversight of CSR policies, procedures and internal management systems that are designed to support the reporting process; and
- maintaining adequate records of stakeholder engagement and responses to stakeholder inquiries.

To show the pertinence of the “reflexive law plus” model in addressing the CSR reporting-performance inconsistency, the present chapter compares “reflexive law plus” with traditional top-down regulation and other contemporary regulatory forms respectively. First, the present study argues that “reflexive law plus” is more capable than traditional regulation to reduce the resistance of the preexisting corporate culture and corporate climate and has a better opportunity to reshape them. This is because in comparison to traditional regulation, the “reflexive law plus” approach to CSR reporting
is less hierarchical, more systemic, and focuses on local-level learning and capacity-building. Second, the present research notes that the “reflexive law plus” approach is a more context-appropriate solution than management-based regulation and meta-regulation—two representative forms of contemporary regulation—because it is less reliant on regulatory expertise and enforcement capacity.
Chapter 6: Conclusion

The United Nations Environment Program (UNEP)—the voice for the environment in the United Nations system—recently launched the UNEP report *Raising the Bar*. At the report launch, Arab Hoballah, Chief of UNEP’s Sustainable Cities and Lifestyles Branch, said:

> Corporate sustainability reporting needs to be rapidly elevated from focusing on incremental, isolated improvements… It should instead serve to catalyze business operations along value chains to achieve the kind of transformative change necessary to accomplish the Sustainable Development Goals and objectives by 2030. This is precisely what is needed to encourage countries and companies to act effectively at their respective levels.

Although the focus of this report is on environmental, not necessarily the entire spectrum of CSR reporting, these remarks coincide with the holdings of the present research: instead of serving public relations purposes, CSR reporting should aim to catalyze CSR-conscious and socially responsible corporate performance.

In this concluding chapter, the present research reviews the research thesis and elaborates on the research argument. It proposes an overarching conclusion based on the meeting


point of the three lines of arguments generated from the research analysis. In addition, this chapter examines the policy and theoretical implications of the present research, evaluating the research contributions and limitations. It closes by outlining issues to be addressed in future research.

6.1 Overarching Analysis & Conclusion

The present research follows three lines of arguments. The first line, which is the explicit line, accords with the research question and asks how the CSR reporting-performance inconsistency can be alleviated. In addition to the explicit line, there equally exist two implicit lines of arguments. Both contribute to a deeper understanding of the research thesis and a more nuanced elaboration on the research argument.

6.1.1 The Explicit Line of Argument: How the CSR Reporting-Performance Inconsistency Can Be Alleviated

The present study starts the inquiry on the first line of argument by defining the concepts, the research context and the research thesis. First, the present research defines the concepts of CSR and CSR reporting respectively. It studies CSR from both a legal and a practical perspective. On that basis, it makes a series of distinctions in order to profoundly illustrate the meaning of CSR reporting. Second, the present research describes the CSR reporting context upon which the research inquiry is based. The study notes Canada’s uniqueness in terms of CSR reporting at the practical, legal and

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595 See Section 2.1 for the definitions and the elaboration.
596 See Section 2.3 for the discussion.
policy levels. Third, the present study elucidates the research thesis by exemplifying, theorizing and field working. It uses three practical cases to exemplify the ubiquitous CSR reporting-performance gap. Furthermore, it reviews the scholarly concerns and debates surrounding CSR and CSR reporting, raising doubts on whether the CSR movement underpinned by CSR reporting encompasses merely symbolic, cosmetic business exercises instead of incurring meaningful social changes. Moreover, it empirically examines the CSR reporting reality in Canada and finds in practice a strong tendency to overstate accomplishments and understate risks and concerns in companies’ CSR reports.

The response to the first line of inquiry also includes a critical analysis of the exiting solutions and a proposal of a new solution to the research problem. In particular, the present study examines three approaches, which are all in the form of private actions, that have been tried out to address the CSR reporting-performance inconsistency. It argues that the existing solutions are limited in that the success of these private actions in triggering the CSR reporting-performance realignment has been episodic and provisional.

Reflecting upon existing CSR scholarship and empirical observations of the CSR reporting context, the present thesis argues that the reflexive law approach, which builds upon the reflexive law theory, is a more favourable solution to address the CSR reporting-performance inconsistency. However, the reflexive law approach is subject

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597 See Section 3.1 for the practical examples, Section 3.2 for the scholarly concerns and Section 3.3 for the empirical findings.
598 These solutions are all in the form of private actions. They include false advertising litigation, securities fraud litigation and shareholder resolutions. See Section 4.1 for the discussion of these solutions.
599 See Section 4.3 for the reflexive law proposal.
to two challenges. First, although reflexive law suggests a sound solution to the research thesis, the present research acknowledges that reflexive law is a theory that exists on a broad and abstract level. Consequently, in order to put the theory to practical use, the meaning of reflexive law ought to be substantiated in concrete settings. Second, self-reference—the key feature of reflexive law and the major tool that reflexive law adopts to foster the CSR reporting-performance realignment—is an unpredictable outcome rather than a natural and definitive consequence of reflexive law. Therefore, reflexive law ought to be refined in order to better catalyze and consolidate the self-referential capacity of the regulated bodies.

6.1.2 The Implicit Line of Argument: The Primary Goal of CSR Reporting

One implicit line of inquiry concerns the purpose of practicing CSR, and in particular, CSR reporting. The significance of the inquiry regarding the primary goal of CSR reporting lies in that it not only provides a solid basis for evaluating the effectiveness of the CSR reporting practice as it relates to individual firms, but also fundamentally determines whether CSR reporting as a regulatory mechanism is heading in the right direction. Although the present study does not explicitly raise this issue as a separate research question owing to its interwoven nature with the primary research question, the discussion on this topic runs through the entire dissertation.

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600 This refers particularly to Teubner’s model of reflexive law. This also explains why the standard practice of later scholarly work on reflexive law, a stance that the present research also adopts, is to elaborate the meaning of reflexive law in a more concrete way. For instance, see supra note 403-412 and the accompanying texts for a discussion of the approaches that Orts and Hess take to substantiate the theory.
Specifically, the present research makes the inquiry both theoretically and empirically. Theoretically, it distinguishes between two representative stances toward the purpose of CSR reporting: one that sees CSR reporting as one-dimensional information dump and one that views CSR reporting as an instrument that facilitates benchmarking, dialogue and corporate performance improvement.  

The present study argues that for CSR to act for the social good, CSR reporting should aim to change corporate misbehaviour, rather than simply provide access to CSR information.

Empirically, the present research examines the standpoints expressed by the corporate practitioners regarding the purpose of CSR reporting. It points out that in practice, practitioners have primarily viewed CSR reporting as a means to receive social and environmental credibility, not as a way to make improvements to a company’s own activities. In addition, the lack of a performance-driven purpose for CSR reporting has influenced companies’ personnel arrangements toward CSR reporting. In practice, CSR reporting is seen as a division-wide or a department-wide issue, not a company-wide one. Compatible with this observation is that right now, it is most often the public relations department that is responsible for CSR reporting.

Based on the theoretical and empirical analysis, the present study therefore concludes that the regulatory emphasis of CSR reporting ought to be placed on elevating corporate CSR performance. As such, the regulatory requirement of CSR reporting should explicitly note

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601 See Section 2.1.2.3 and supra note 140 and 141 for the discussion.
602 See Section 4.4.1.5 for the empirical research.
that the goal of CSR reporting is to promote more CSR-conscious and socially responsible corporate performance.\textsuperscript{603}

\textbf{6.1.3 The Implicit Line of Argument: The Regulatory Gap with Respect to CSR Reporting}

The other implicit line of discussion centres on addressing the regulatory gap in terms of CSR reporting. Because the present research studies the research thesis from a law and regulation perspective, it naturally puts a great emphasis on how CSR reporting interacts with law and regulation. Following this line of thought, the present study identifies the regulatory gap regarding CSR reporting within both theoretical and empirical frameworks.

In theory, the present research notes that the regulatory gap with respect to CSR reporting lies in the lack of governmental regulation.\textsuperscript{604} It finds that the heavy reliance—actually the sole reliance in the case of Canada—on private and corporate self-regulation for CSR reporting is problematic since both regulatory forms put self-interest ahead of public interest and are limited in their regulatory capacity to bridge the regulatory gap.

In practice, drawing from the field work, the present study provides a more concrete picture of the regulatory gap.\textsuperscript{605} Specifically, it identifies a series of commonly shared problems underpinning the current practice of CSR reporting. The empirical discussion

\textsuperscript{603} See Section 5.2.2.3 for the conclusion and its integration into the “reflexive law plus” regulatory model.
\textsuperscript{604} See Section 4.2 for a theoretical examination of the regulatory gap.
\textsuperscript{605} See Section 4.4.1 for a detailed description of the practical problems in CSR reporting.
not only provides solid evidence regarding the existence of the regulatory gap, but also suggests possible ways of improvement.

To fully respond to this line of inquiry, the present study also analyzes the governmental regulatory tools that can be applied to remediate the regulatory gap.\(^{606}\) It compares reflexive law with traditional regulation, management-based regulation and meta-regulation, in order to illustrate the pertinence of the reflexive law approach. In particular, noting that the regulatory gap concerns factors of corporate culture and corporate climate—which are associated with the “soft” side of business regulation—the present research posits that traditional top-down regulation is ill-equipped to deal with this “soft” aspect. In comparison to traditional regulation, reflexive law is more capable to reduce the resistance of the preexisting corporate culture and corporate climate and has a better opportunity to reshape them. Moreover, according to the present research, the official regulatory capacity, which is the prerequisite for both management-based regulation and meta-regulation to operate effectively, is insufficient in the present context of CSR reporting that is marked by a regulatory gap in governmental regulation. In contrast, reflexive law is more context-appropriate because it is less reliant on the above-mentioned external constraints.

Consequently, in addition to calling for governmental regulation to fill the regulatory gap, the present research concludes that the reflexive law approach is more pertinent than

\(^{606}\) See Section 5.3 for the discussion under the framework of the “reflexive law plus” model.
traditional and other contemporary regulatory models in dealing with the regulatory gap in terms of CSR reporting.

6.1.4 The Overarching Conclusion

The three lines of analysis are closely interrelated, as they complement each other in addressing the research thesis. In fact, the problem of CSR reporting-performance inconsistency manifests a deeper-level concern toward companies’ misplaced goals of CSR reporting and the regulatory gap that has yet to be bridged. The meeting point of these three lines of arguments therefore reveals the overarching conclusion of the present research: the proposal of the “reflexive law plus” model.

In particular, “reflexive law plus”, a reflexive law strategy that is upgraded in its regulatory design, resonates with the first line of argument in recognizing reflexive law as the basis to solve the CSR reporting-performance inconsistency. It provides a concrete way to bring reflexive law to life, while overcoming the challenges that reflexive law faces. Furthermore, “reflexive law plus” meets the second line of argument in that it takes elevating corporate performance changes as its ultimate goal. It conveys such a stance by explicitly noting in the regulatory texts that the purpose of CSR reporting is to promote more CSR-conscious and socially responsible corporate performance. Last but not least, “reflexive law plus” is supported by the third line of argument, in that “reflexive law plus” not only accords with the call for governmental regulation in the field of CSR reporting, but also presents a regulatory model that is pertinent to its regulatory context.
6.2 The Research Implications

6.2.1 Policy Implications

Globally, a growing trend in the development of CSR reporting is the increase of governmental regulation, as the major countries are either on their way or have already had CSR reporting legislation in domestic law and regulation.607 This effort has been endorsed at the international level, led by the United Nations Conference on Sustainable Development, which calls for the UN system to support the integration of CSR information into companies’ reporting cycles.608 Furthermore, the United Nations published the Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, in which the Panel proposed that “in future—at latest by 2030—all large businesses should be reporting on their environmental and social impact—or explain why if they are not doing so”.609

Against this background, the regulatory architecture that the present research establishes provides valuable insights into the construction of the Canadian regulatory regime surrounding CSR reporting. In particular, the present research systematically investigates why CSR reporting should become a legal mandate in Canada and how the regulatory

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607 KPMG, supra note 343, at 30 (noting that “there is a growing trend of regulations requiring companies to publish non-financial information”). The trend of governmental regulation is particularly salient in the EU, where member states have since July 2014 been required to transpose the EU Directive on non-financial and diversity disclosure into national legislation by December 2016. See: supra note 112.


requirements should be designed to fit the regulatory context and avoid problems with existing CSR reporting practices.

In addition to advocating for governmental regulation of CSR reporting, the present research informs policy making in a more nuanced way. It examines the role of the stock exchanges and securities regulators in imposing CSR regulatory rules, explaining why both methods should only be used provisionally.

The present research also has great implications for the reporting of other non-financial matters, such as climate change related disclosure. In particular, it provides rich thoughts on how laws and public policies may be adopted in those fields to avoid similar problems that surround CSR reporting.

Although the present research is a Canadian-based one, it has tremendous reference value for other countries as well, such as the United States, which adopts a similar regulatory attitude toward CSR reporting and is currently suffering from the same problem as Canada.610

6.2.2 Theoretical Implications

By elaborating on the meaning of reflexive law within concrete settings, the present research provides a helpful example of how the reflexive law theory can be practically

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610 In addition to the soft-handed pro-self regulation stance, the United States and Canada have a lot of similarities in the regulation of CSR reporting. Most significantly, both countries take securities regulation as the central disclosure mechanism that publicly-traded companies have to base for CSR reporting. According to the literature, the Canadian test for material information is consistent with the US approach. Moreover, “U.S. case law is often useful in interpreting Canadian securities legislation, much of which is quite similar to U.S. legislation”. See: Johnston, Rockwell & Ford, supra note 169, at 54.
substantiated and put to use. In particular, the present research situates the reflexive law theory in the regulatory setting of CSR reporting and makes a critical update of the theory. It illustrates a concrete way to bring the reflexive law theory to life.

In addition, the present research highlights the importance of regulatory context to the adoption of regulatory instruments. It conveys the point that what works best with respect to a certain regulatory matter is the method that is most pertinent to the regulatory setting. It also cautions that in terms of CSR issues, “legal self-restraint” does not mean that law should abdicate from regulation and that the significance of non-state actors should not be overstated.611

6.3 Research Contributions & Limitations

6.3.1 Research Contributions

The present research makes one of the first scholarly attempts to systemically analyze and respond to the CSR reporting-performance inconsistency. It takes a deep and evidence-based look at the inconsistency in a way that combines the literature and the empirical findings to identify the underlying problems and the solutions. The contributions it makes spread across the regulation literature, public policy and CSR research.

First, the present research contributes to the broader regulation and governance scholarship.

In particular, the present research helps to deepen the understanding of various regulatory models. To corroborate the necessity of the regulatory “license to operate” in terms of CSR reporting, the present research combines knowledge of traditional regulation, new governance scholarship and empirical observations in a mutually reinforcing manner. It unpacks the seemingly-complex relationship between governmental regulation and private and self-regulation within the current regulatory context of CSR reporting. It further compares the differences between disclosure-based regulation and reflexive law in terms of their key attributes, goals and mechanisms.

Furthermore, the current study contributes to theory building. Based on the theoretical and empirical analysis, the present research proposes a more concrete and learning-based model of reflexive law that absorbs the organizational learning literature in addressing the CSR reporting-performance inconsistency. This new regime—“reflexive law plus”—not only provides an update of reflexive law in concrete regulatory settings, but also enriches the new governance scholarship.

Second, the present research informs policy making and CSR advocacy practice in significant ways. In particular, the present research is among the first academic literature to consider governmental regulation of CSR reporting in Canada. It fills the research gap in debating the role of governmental regulation as it relates to CSR reporting on both theoretical and empirical grounds. In addition, the findings of the present research show that the major efforts that have been taken—such as attempts on the standardization of
voluntary CSR reporting, the rise in the number of CSR rating providers, and the maturity of CSR reporting assurance services—are inadequate and an unreliable means to address the CSR reporting-performance inconsistency. Furthermore, by critically analyzing the role of stock exchanges in regulating CSR reporting and the method of building CSR reporting programs within the existing securities reporting structures, the present research provides rich thoughts on the regulatory design issues underpinning the vibrant debate with respect to governmental regulation of CSR reporting.

Third, the present research acts as a wake-up call for CSR research. Although the academic research of CSR has, in general, been profound and helpful, it is not uncommon to see that scholarly work evaluates corporate CSR performance primarily based on a content analysis of their CSR reports. The present research does not intend to discredit these studies. However, it finds the methodology they adopt as over-simplistic or even flawed, in that the ubiquitous CSR reporting-performance inconsistency is underestimated in the research.

612 In particular, the Global Reporting Initiative (GRI) guideline is arguably the most influential standard for voluntary CSR reporting worldwide. A lot of international bodies and NGOs publicly urge companies to adopt the GRI standard for their CSR reporting. See Sarfaty, supra note 131 for a detailed summary of the organization and the GRI standard.

613 Chiu, supra note 52, at 364 (arguing that a universalist perspective of CSR, promoted by standardization in CSR reporting, entails imprecise measurement of corporate performance by relying heavily on indicators derived from corporate self-reporting).


615 This coincides with the view of Cochran & Wood, who argue that “content analysis is only an indication of what firms say they are doing, and this may be very different from what they actually are doing”. See: Philip L Cochran & Robert A Wood, “Corporate Social Responsibility and Financial Performance” (1984) 27:1 Acad Manage J 42 at 44.
gap, the present research shows that the focus of scholarly work needs to move away from generating greater paperwork compliance to stimulating substantive corporate performance improvement in CSR.

6.3.2 Research Limitations

The present research proposes a regulatory model of CSR reporting without exploring the political feasibility of it. In hindsight, given the political power of large, publicly-traded companies and their great influence in lobbying, it may take a long time for the proposal of the present research to become a reality. That said, researchers should not consider this political difficulty as an excuse for not taking action. On the contrary, voicing concerns regarding CSR is the first step toward addressing the problem. It is with this consideration that the present research insists upon its significance.

As aforementioned, despite the great effort taken, the present research is also limited in the empirical data collected.\textsuperscript{616} The research was conducted within a limited timeframe and only provided a temporal snapshot of CSR reporting in companies. Furthermore, the interview sampling is imperfect, as it covers only a fairly small number of companies. However, compared to the research limitations, a more worrisome issue is the lack of even an imperfect attempt among the literature to empirically study the problem, especially the CSR reporting-performance inconsistency. Research on this theme is not only attractive in theory, but also urgent in practice. As the recent Volkswagen crisis shows, different from previous crises,\textsuperscript{617} in the wake of the Volkswagen scandal,

\textsuperscript{616} See Section 1.4 for the discussion on the limits of the empirical research.
\textsuperscript{617} Such as the BP oil spill. See supra note 224 for names of similar crises.
practitioners have unanimously questioned the success of the CSR movement. In particular, some view the use of CSR reporting as a technique by companies to sidestep their true responsibility of taking actions, calling for academic research into this issue. Therefore, despite the limitations, the present research provides deep insights into understanding the problem of the CSR reporting–performance decoupling that is necessary to fill the research gap.

6.4 The Future Research Agenda

By conducting the research, the present study identifies three topics that require further investigation. First, the proper regulatory body and venue for CSR reporting regulation must be looked at further. Although the present research notes that securities regulation should not become the permanent venue for regulating CSR reporting owing to the differences of the regulatory rationales between securities regulation and CSR reporting regulation, it is unclear what the other alternatives are and whether new regulatory agencies specially dedicated to CSR reporting should be established. Second, future research should explore the role of corporate culture in CSR reporting and how it

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618 The Volkswagen saga brought many critics about CSR reporting. For instance, see: Linda Greer, “Volkswagen Takes down Corporate Social Responsibility in Its Plunge to the Bottom of the Sea”, Switchboard (September 23, 2015), online: <http://switchboard.nrdc.org/blogs/greer/volkswagen_takes_down_corporat.html> (arguing that Volkswagen “will probably severely tarnish this entire [CSR] movement” and questioning the CSR ranking efforts such as the DJSI); Leon Kaye, “VW Scandal Exposes What Has Gone Awry with ‘CSR’”, TriplePundit (September 23, 2015), online: <http://www.triplepundit.com/2015/09/vw-scandal-exposes-what-is-gone-awry-with-csr> (suggesting that “the trend in CSR has been to focus more on goals and aspirations, and less on concrete and tangible results”); Emily Peck, “Here’s the Joke of A Sustainability Report that VW Put Out Last Year”, the Huffington Post (September 24, 2015), online: <http://www.huffingtonpost.com/entry/volkswagen-sustainability-report-from-last-year-is-a-joke_56040f1ae4b0de8b0d17996> (noting that the Volkswagen’s crisis provides a vivid contrast to its commitment in the 2014 CSR report); Matthew Lynn, “Corporate Social Responsibility has become A Racket—and A Dangerous One”, The Telegraph (September 28, 2015), online:<http://www.telegraph.co.uk/finance/newsbysector/industry/11896546/Corporate-Social-Responsibility-has-become-a-racket-and-a-dangerous-one.html> (criticizing that CSR provides “moral cover for companies” and in the meantime “[allows] their own internal standards to get worse and worse”).
influences lawmaking in that regard. While acknowledging the importance of corporate culture in the research of CSR reporting, limited by its research scope, the present research has only made a preliminary examination of the interaction between corporate culture and CSR reporting, leaving more detailed issues to be tested in future research. Third, further attention must be given to what the right combination of market and regulatory forces is in terms of CSR reporting. The present research contributes to the literature by arousing attention to governmental regulation in the field of CSR reporting, yet it also recognizes that neither governmental regulation nor private and self-regulation can work on their own to provide adequate inspection and incentives for companies to persistently improve their environmental and social performance. With respect to how these approaches can be combined to complement rather than preclude each other, one key point illustrated by the present research is the importance of regulatory context. The regulatory design regarding CSR reporting should not be a one-size-fits-all and it should be responsive to local level knowledge and specific conditions of the industry subject to regulation. This observation may serve as a starting point for further research.
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