DEVELOPING CORPORATE GOVERNANCE IN NIGERIA: LESSONS FROM A COMPARATIVE ANALYSIS OF NIGERIAN AND CANADIAN CORPORATE GOVERNANCE FRAMEWORKS

by

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Abstract

The unexpected collapse of prominent companies like WorldCom and Enron led many developed countries to pay better attention to corporate governance. Regulators established laws, rules and codes of governance which were to guide corporate behaviour and essentially reduce the occurrence of fraudulent practices. In a bid to forestall future corporate collapses, many regulators across the world often take steps to review extant laws. This drive to foster good corporate governance has, however, not been confined to developed economies. Developing economies like Nigeria also seeking to enhance economic growth realize the importance of corporate governance and are making efforts to develop a corporate governance framework that will stand the test of time. Despite this, Nigeria is not making the desired economic progress. Critics have argued that Nigeria's corporate laws and governance codes are inadequate and cannot produce the desired results. Accordingly, this thesis seeks to appraise Nigeria's corporate governance framework with a view to ascertaining if the main challenge is one of inadequacy of laws or of implementation and enforcement.

This thesis commences by providing some background concerning corporate governance in Nigeria and Canada, respectively, and subsequently embarking on a comparative analysis of the two systems. Key issues discussed in the OECD Principles of Corporate Governance such as board structure and composition, board relationship with shareholders and stakeholders, board diversity, financial reporting and accountability amongst others are discussed. Findings from the comparative analysis reveal the viability of Nigeria's corporate governance framework—particularly with the recently issued Nigerian Code of Corporate Governance 2018 and the impending passage of the *Companies and Allied Matters Act*

(Repeal and Re-enactment) Bill 2018. However, key issues relating to the incorporation of technological innovations to corporate processes, appointment of Independent Non-Executive Directors (INEDs) rather than Non-Executive Directors (NEDs) amongst other things need to be addressed. Overall, findings reveal that although there are some loopholes that need to be plugged, Nigeria has a viable corporate governance framework. However, issues relating to corruption, multiplicity of corporate governance codes, inefficient judicial system, weak institutional framework, implementation and enforcement challenges undermine its efficiency.

Lay Summary

Developing countries like Nigeria seeking to turn around their economic fortunes are actively working to create a sound corporate governance framework. Nigeria has recently issued a national code of corporate governance and the repeal and re-enactment of the *Companies and Allied Matters Act 1990* is in the works. Despite this, critics have argued that Nigeria's corporate law and codes are inadequate and do not enhance economic growth. This thesis therefore seeks to investigate the veracity of this claim by undertaking a comparative analysis of the Nigerian corporate governance framework with that of another jurisdiction within the same legal family—Canada. The aim of this analysis is to ascertain the main factor militating against the effectiveness of the Nigerian framework. Findings reveal the viability of Nigeria's corporate law and codes, and point to challenges with corruption, implementation and enforcement as major culprits hindering the efficacy of Nigeria's framework.

Preface

This thesis is the original, unpublished, independent work of Oludolapo ‘Toyosi Makinde.

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List of Abbreviations

APC	Administrative Proceedings Committee
BCBCA	*British Columbia Business Corporation Act*
BOFIA	*Banks and Other Financial Institutions Act*
CAC	*Corporate Affairs Commission*
CAM Bill	*The Companies and Allied Matters Act* (Repeal and Re-enactment) Bill
CAMA	*Companies and Allied Matters Act*
CBCA	*Canadian Business Corporation Act*
CBi	Convention on Business Integrity
CBN	Central Bank of Nigeria
CCGG	Canadian Coalition for Good Governance
CEO	Chief Executive Officer
CGRS	Corporate Governance Rating System
CMRS	Capital Market Regulatory System
CSA	Canadian Securities Administration
CSR	Corporate Social Responsibility
EIRIS	Ethical Investment Research Services
EMSG	Expert Multi-Stakeholder Group
ESG	Environmental, Social and Governance
FACT	Fiduciary Awareness Certification Testing
FDI	Foreign Direct Investment
FIRS	Federal Inland Revenue Service
FRCN	Financial Reporting Council of Nigeria
GDP	Gross Domestic Product
ICAN	Institute of Chartered Accountants of Nigeria
INED	Independent Non-Executive Director
IOD	Institute of Directors
ISA	*Investment and Securities Act*
ISS	Institutional Shareholder Services

MD	Managing Director
MINT economies	Mexico, Indonesia, Nigeria and Turkey
M&S	Marks and Spencer
NAICOM	National Insurance Commission
NBCI	Nigerian Bank for Commerce and Industry
NCA	*Nigerian Communications Act*
NCCG	Nigerian Code of Corporate Governance
NDIC	Nigeria Deposit Insurance Corporation
NED	Non-Executive Director
NOSDRA	National Oil Spill Detection and Response Agency
NSE	Nigerian Stock Exchange
OECD	Organisation for Economic Co-operation and Development
ROSC	World Bank Report on the Observance of Standards and Codes
SCC	Supreme Court of Canada
SEC	Securities and Exchange Commission (Nigeria)
TSX	Toronto Stock Exchange
TWAIL	Third World Approach to International Law
UK	United Kingdom
US	United States of America
WCGI	World Corporate Governance Index

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Most of all, I am grateful to God for his constant love and faithfulness—without which I can do nothing.

Dedication

To Him through whom I can do all things.

Chapter 1: Introduction

"The proper governance of companies will become as crucial to the world as the proper governance of countries"

- James D. Wolfensohn, former President of the World Bank[1]

1.1 Research Overview

"Corporate governance" has become well-accepted corporate parlance all over the world. However, it is a term that is capable of a multitude of definitions. As it stands, there is no universal definition of corporate governance, and it is a term that is evolving and quite fluid.[2] Originally, corporate governance was understood as specific laws and rules that were set down by statute or case law which prescribe the manner in which a corporation is expected to operate—that is, in terms of requirements for board and shareholder meetings, filing of

[1] James D Wolfensohn, "The World in 1999: A Battle for Corporate Honesty", *The Economist* (1999) at 38.

[2] Although the term "corporate governance" is fluid, it has mainly been employed in respect of incorporated entities. This therefore creates the impression that only incorporated entities are subject to control and direction by regulatory agencies. Firms that are created as sole proprietorships or partnerships are left out of the loop as the word "corporate" appears to suggest that the principles and values which form the crux of corporate governance today, have nothing to do with firms and other unincorporated entities—which is not so. Whilst it is important to acknowledge that corporate governance does in fact revolve majorly around incorporated entities due to the divergence between shareholders, stakeholders, and management, we cannot rule out the fact that firms and other un-incorporate entities are also subject to certain legal and regulatory direction, supervision and control. Although it may be argued that issues of nomenclature should not be a focal consideration, I assert otherwise. This is because words have meanings and convey specific expectations. The use of an inappropriate word can cause a breach in communication and lead to unmet expectations. In the instant case, use of the word "corporate" seems to suggest that only companies need be concerned with issues of appropriate governance, supervision and regulation when the activities of all other forms of business also have some effect on the society in which they operate. I am therefore of the view that the word "corporate" in "corporate governance" is quite limited in scope and should be expanded to include non-corporate entities. Substituting the word "business" for "corporate" would be more beneficial and more rewarding in the long run, as this would create and foster the understanding that firms and other non-corporate entities are also required to put in place adequate governance structures that protect the interests of stakeholders.

statutory returns, etc.[3] Over time, corporate governance has evolved and expanded beyond the four-walls of legal requirements to a system—legal, cultural and institutional—that guides the conduct of corporate entities.[4] While there is no one universal definition of the term "corporate governance", the definition put forward by the Organisation for Economic Co-operation and Development (OECD) is the most prominent. The OECD defines corporate governance thus:

> Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing so, it provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance.[5]

In simple terms, "corporate governance is about promoting fairness, transparency and accountability in the running of an organization".[6] It aims to balance the interests of shareholder and stakeholders to the greatest extent possible.

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[3] Ronald J Gilson, "Corporate Governance and Economic Efficiency: When do Institutions Matter?" (1996) 74 Wash U LQ 327 at 327.

[4] See Simon Deakin & Alan Hughes, "Comparative Corporate Governance: An Interdisciplinary Agenda" (1997) 24:1 JL & Soc'y at 3. RI (Bob) Tricker, "The Evolution of Corporate Governance" in Thomas Clarke & Douglas M Branson, eds, *The SAGE Handbook of Corporate Governance* (London ; Thousand Oaks, Calif: SAGE, 2012) 39 at 60.

[5] OECD (1999) Principles of Corporate Governance, Paris: OECD.

[6] Priyanka Kaushik Sharma, "Conceptual Framework of Corporate Governance" in Priyanka Kaushik Sharma, eds, *Corporate Governance Practices in India: A Synthesis of Theories, Practices, and Cases* (London: Palgrave Macmillan UK, 2015) 12 at 12.

Corporate governance plays an important role in today's economy by fostering economic growth, sustainable development and ensuring financial stability.[7] This is because a company's activities not only affect the company and its shareholders, but has a rippling effect that trickles down to the average person on the street.[8] Corporate governance is of particular concern for companies seeking to attract funding because investors consider factors such as efficiency, transparency and accountability when deciding to invest in an enterprise.[9] However, corporate governance *simpliciter* is not sufficient to secure and maintain investor confidence—rather, what is required is *good corporate governance*. In the early 2000s, several prominent companies across the world collapsed unexpectedly.[10] These

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[7] See Organisation for Economic Co-operation and Development, ed, *G20/OECD Principles of Corporate Governance* (Paris, France: OECD, 2015).There are however some schools of thought that question the importance of corporate governance. These scholars assert that the justification given for evaluating corporate governance is based on a "chicken soup" type of argument—in the sense that it may not hurt but might help. They also assert that just like chicken soup, the obsession with corporate governance could be harmful if it prevents the development of more meaningful corporate reforms. See Mariana Pargendler, "The Corporate Governance Obsession" (2016) 42:2 J Corp L 359 at 400.

[8] The Enron collapse is a case in point. At the time, Enron held $US60 Billion in assets and was one of the biggest companies in the United States. When the company was still solvent, lower level employees were encouraged to invest in the company's shares for their retirement savings and unknown to them, the company's executives had adopted dubious accounting practices to create the illusion that the company was making profit. When the company eventually collapsed, the employees had to file a class action lawsuit to recover their funds. Shareholders also filed several suits against Enron, and Arthur Andersen (Enron's auditor) to recover their funds. See Peter Bondarenko, "Enron scandal: Summary, History, & Facts", (7 May 2019), online: *Encyclopedia Britannica* <https://www.britannica.com/event/Enron-scandal>. See also Tricker, *supra* note 4 at 49-50. It has also been said that "a corporation without corporate governance, is like a body without a soul or conscience". See "Why is Corporate Governance Important? - BusinessDictionary.com", online: <http://www.businessdictionary.com/article/618/why-is-corporate-governance-important/>.

[9] Ghulam Abid et al, "Theoretical Perspectives of Corporate Governance" (2014) 3:34 Bull Bus Econ 166 at 167.

[10] Some of these companies include Polly Peck International which crashed due to false accounting practices, Credit and Commerce International—due to massive money laundering and financial crimes, Baring Banks—due to fraudulent trading, and WorldCom—due to accounting fraud (recording expenses as investments).

collapses did not occur due to a lack of corporate governance frameworks, but a lack of *good* corporate governance frameworks which adequately protect shareholder and stakeholder interests and prevent accounting fraud, among other things.[11] These scandals caused regulators to subsequently take a look at the supervision mechanisms put in place to monitor management's activities, leading to the reform of UK listed companies and strict enforcement of corporate codes in the UK.[12] Similarly, in the US, the *Sarbanes-Oxley Act* was enacted in 2002 and the law laid out corporate governance rules which public companies in the US are required to comply with.[13]

The impact of these scandals and collapses resulted in a better appreciation of the importance of good corporate governance frameworks, among other things.[14] With the benefit of hindsight—albeit at a relatively dear cost, regulators are now more mindful of the fact that the impact of a company's activities go far beyond the company itself—a country's economy is also at stake.[15] Accordingly, if a country's corporate governance framework is weak, the country will struggle to attract foreign investment.[16] Corporate governance is therefore an

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[11] Rezart Dibra, "Corporate Governance Failure: The Case of Enron and Parmalat" (2016) 12:16 Eur Sci J 283 at 283.

[12] Brian R Cheffins, "The Rise of Corporate Governance in the UK: When and Why" (2015) 68:1 Curr Leg Probs 387 at 407.

[13] Prem Sikka, "Financial Crisis and the Silence of the Auditors" (2009) 34:6–7 AOS 868 at 871.

[14] Ana Paula Paulino da Costa, "Corporate Governance and Fraud: Evolution and Considerations" in Okechukwu Lawrence Emeagwali, ed, *Corporate Governance and Strategic Decision Making* (InTech, 2017) at 43. See also Tricker, *supra* note 4 at 60.

[15] Luzi Hail, Ahmed Tahoun & Clare Wang, "Corporate Scandals and Regulation" (2018) 56:2 JAR 617 at 618.

[16] Thomas Clarke, "The Transformation of Corporate Governance in Emerging Markets: Reform, Convergence, and Diversity" (2015) 51:sup2 Emerg Mark Financ Tr S25.

important subject that must be continuously evaluated by businesses, scholars, regulators, shareholders and stakeholders alike in order to improve existing standards that will minimize—if not completely prevent such corporate failures and scandals.

1.2 Problem Context

This research study is predicated on the understanding that corporate governance is important not only to businesses, but also to the country as a whole—especially in terms of economic development.[17] This is particularly so for developing countries like Nigeria because a strong corporate governance framework contributes to the efficiency of business enterprises, boosts investor confidence, improves decision making and reduces cost of capital—all of which contribute to economic growth.[18]

Given the importance of corporate governance to economic development, there is a crucial need to ensure that Nigeria's corporate governance framework is fashioned in such a way that it ensures continued improvement of the country's economy. Currently, in addition to the governing legislation—the *Companies and Allied Matters Act* 1990 (CAMA),[19] there are several corporate governance codes in force in Nigeria. These codes were issued by industry

[17] This position is taken in this paper because the subject of the study is an emerging market whose primary goal is to improve economic growth. The author however recognizes that there are some schools of thought that posit that the promotion of corporate governance should go beyond economic gains.

[18] OECD, "The Tangible Benefits of Good Governance" (2009) Practical Guide to Corporate Governance 169.

[19] Companies and Allied Matters Act CAP C20, LFN 2004.

operators such as the Nigerian Communications Commission,[20] Central Bank of Nigeria,[21] National Pension Commission,[22] and the National Insurance Commission[23] to regulate their different industry operators. The Securities and Exchange Commission (SEC) also issued the Code of Corporate Governance for Public Companies in 2011.[24] The impact of these corporate governance codes has however not been realized and this has led many scholars to assert that the issuance of multiple corporate governance codes which operate simultaneously, has led to much upheaval in the Nigerian corporate sphere. By way of illustration, Osemeke and Adegbite assert that the existence of conflict in corporate governance codes contributes to "reduced compliance by firms and ineffective enforceability by regulatory agencies."[25] This is in addition to several other factors that contribute to non-compliance in Nigeria—for example, corruption and weak institutional frameworks (in terms of enforcement of laws and regulations).

[20] The Nigerian Communications Commission Code of Corporate Governance for telecommunication companies (the NCC Code).

[21] The Central Bank of Nigeria Code of Corporate Governance for Banks and Discount Houses in Nigeria (the CBN Code) 2014.

[22] The Code of Corporate Governance for Licensed Pension Operators (the PENCOM Code) 2008.

[23] The NAICOM Code of Corporate Governance for the Insurance Industry in Nigeria (the NAICOM Code) 2009.

[24] "Rules & Codes", online: *The Securities and Exchange Commission, Nigeria* <http://sec.gov.ng/regulation/rules-codes/>.

[25] Louise Osemeke & Emmanuel Adegbite, "Regulatory Multiplicity and Conflict: Towards a Combined Code on Corporate Governance in Nigeria" (2016) 133:3 J Bus Ethics 431 at 431. See also Emmanuel Adegbite, "A Review of the Financial Reporting Council Code of Corporate Governance 2018", *BusinessDay* (2018), online: <https://businessday.ng/analysis/article/review-financial-reporting-councils-nigerian-code-corporate-governance-2018/>.

Based on this premise, in 2016, the Financial Reporting Council of Nigeria (FRCN) issued a Nigerian Code of Corporate Governance (NCCG) which sought to harmonize the existing sectorial codes of corporate governance.[26] The NCCG contained codes of conduct for the private sector, not-for-profit and public sector.[27] There was however some resistance from the corporate community due to the inclusion of certain provisions in the private sector code and more particularly, the not-for-profit code, which were not acceptable to companies/organizations falling under the codes.[28] The unpopularity of the NCCG 2016 led to its immediate suspension and a technical committee was appointed by the FRCN to review and re-issue the NCCG.[29]

On June 14, 2018, the technical committee released the revised NCCG, but the Code's scope was limited in that it applied solely to the private sector. In addition, the revised code has faced further resistance from certain quarters with professional bodies such as the Institute of Chartered Accountants of Nigeria (ICAN) picking holes in the draft code on issues relating to integrated reporting, unclear language with respect to appointment of Independent Non-Executive Directors (INEDs) on oversight committees such as the nomination, remuneration

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[26] "FRC issues National Code of Corporate Governance", online: *Deloitte Niger* < https://www2.deloitte.com/ng/en/pages/tax/articles/FRC-issues-national-code-of-corporate-governance.htmll>.

[27] Victor Banjo, "Nigeria's National Code of Corporate Governance", (2018), online: *Ethical Boardroom* < https://ethicalboardroom.com/nigerias-national-code-of-corporate-governance/>.

[28] *Ibid.*

[29] Iheanyi Nwachukwu, "Financial Reporting Council Inaugurates Technical Committee on National Codes of Corporate Governance", (18 January 2018), online: *Businessday NG* < https://businessday.ng/news/article/financial-reporting-council-inaugurates-technical-committee-national-codes-corporate-governance/>.

and audit committees, amongst others.[30] The main bone of contention however, is that the revised code is "not strong enough to engender investor confidence and could discourage Foreign Direct Investment (FDIs) into the nation's economy."[31] Experts have therefore called for more work to be done in scrutinizing and developing Nigeria's corporate governance framework into one that not only boosts investor confidence and attracts FDI, but also promotes corporate excellence in Nigeria.[32]

Given the amount of effort that has been put into revising Nigeria's corporate law and issuing multiple corporate governance codes without achieving the desired aim of improving economic growth, it has become necessary to take a second look at the adequacy or otherwise of Nigeria's framework. This study therefore seeks to unearth the challenge with Nigeria's corporate governance framework and to determine if it is a matter of inadequacy of laws and regulations or a matter of enforcement. To achieve this, I propose that we look beyond the Nigerian state to observe and understand how corporate governance works in a different legal system. A comparative analysis of this nature will be beneficial as it would provide us with a better understanding of the Nigerian framework on one hand, and also reveal its strengths and inadequacies. Accordingly, this research study will involve a comparison of the Nigerian and Canadian corporate governance frameworks. The choice of Canada is premised on similarities between both countries—they are both Commonwealth

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[30] Olaseni Durojaiye, "Before 2018 Nigerian Code of Corporate Governance is Passed", *ThisDay* (2018), online: <https://www.thisdaylive.com/index.php/2018/10/07/before-2018-nigerian-corporate-governance-code-is-passed/>.

[31] *Ibid.*

[32] Corporate excellence in relation to this study refers to the state of having an efficient corporate governance system which balances the interests of both shareholders and stakeholders.

countries, they operate a federal system of government and are resource-dependent economies. It will also highlight key recommendations derived from the comparative analysis that can be adapted to enhance both the Nigerian and Canadian corporate governance frameworks. The use of the word "adapted" here is deliberate as it emphasizes that the essence of this research is not to transplant corporate governance framework of one country to another, but to draw out lessons that can be utilized while taking into cognizance the peculiarities of each country's corporate environment.[33] The research will culminate in identifying key findings from the comparative analysis and discuss areas for future research.

1.3 Research Question

This research study seeks to answer the following question: Is Nigeria's ineffective corporate governance framework largely due to inadequate laws or a matter of enforcement? In the course of answering this question, I will also address the following:

a. Are there lessons Nigeria can learn from Canada's corporate governance regulations, and

b. Are there lessons Canada can also learn from Nigeria?

[33] Siems explains the need to be cautious when designing legal transplants and suggests that comparatists take cognizance of "the technical aspects of legal transplants and its normative implication". See Mathias Siems, "Malicious Legal Transplants" (2018) 38:1 LS 103 at 118. See also Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4:2 MJECL 111 at 117, where Legrand explains that rules are based on culture and when transplanting laws, specific attention must be paid to the culture of the legal systems to be compared. Brohman also explains that Western concepts may lose their utility in the process of being transplanted to developing countries. See John Brohman, "Universalism, Eurocentrism, and Ideological Bias in Development Studies: From Modernisation to Neoliberalism" (1995) 16:1 TWQ 121 at 128. In Toby S Goldbach, "Why Legal Transplants?" (2019) 15:1 Ann Rev L & Soc Sci, online: <https://doi.org/10.1146/annurev-lawsocsci-101518-042617>, Goldbach also suggests that comparatists "study the people involved in the movement of law" and "pay attention to the power and politics involved" when designing legal transplants.

1.4 Methodology

This research study will primarily employ a comparative methodology to answer the questions posed. According to Sasaki, a comparative methodology is one that aims to "compare and contrast nations, cultures, societies and institutions".[34] It is upon this precept that this thesis—which seeks to compare the corporate governance frameworks of two countries—is based. Erbele explains that a comparative methodology enables us understand how a foreign legal system functions, which in turn helps us understand our own legal culture.[35] Melinda et al also point out that comparative analysis draws our attention to specific qualities of the subjects under comparison which would otherwise not be easily detectable.[36] Accordingly, the comparative analysis in this thesis aims to provide insights into the workings of the Nigerian corporate governance framework by interacting with the Canadian framework.

The question of how to carry out comparative legal research also needs to be considered. Erbele points out that although comparing the letters of the law is one way to carry out comparative research, there is a need to go beyond the words on the pages of law books because law is driven and influenced by a country's culture.[37] As such, it is necessary to look beyond the law as merely formally written text, and at the underlying structure of law to have a better understanding of what the law really is and how it actually functions in a society. In

[34]Masamichi Sasaki, "Comparative Research" in Michael Lewis-Beck, Alan Bryman & Tim Futing Liao, eds, *The SAGE Encyclopedia of Social Science Research Methods* (Thousand Oaks: Sage Publications, Inc., 2004) at 153.

[35] Edward Erbele, "The Methodology of Comparative Law" (2011) 16:1 Roger Williams UL Rev 51 at 51.

[36] Melinda Mills, Gerhard G van de Bunt & Jeanne de Bruijn, "Comparative Research: Persistent Problems and Promising Solutions" (2006) 21:5 Int'l Soc 619 at 621.

[37] Erbele, *supra* note 35 at 52.

so doing, this thesis will consider both the written text of the law as well as the corporate governance practices that have been shaped by other agents apart from the law. It is however important to note that this thesis primarily examines Nigerian and Canadian laws and their respective historical and cultural backgrounds, as opposed to examining how these laws are applied in day-to-day business activities. This is because this thesis aims to ascertain the veracity or otherwise of the view that Nigeria's corporate laws are inadequate and cannot sufficiently boost economic growth. Focus is therefore placed on laws and their cultural/historical background rather than how they operate in action.

In addition, Erbele emphasizes the need for comparatists to free themselves from biases derived from their own culture (cognitive lock-in).[38] Erbele suggests that in order to do this, the comparatist must be immersed in the culture under review, collect data about the culture and while studying the collected data, must step outside that culture and view the data carefully and objectively. On the other side of the divide, De Coninck points out that scholars have argued that it is impossible to overcome one's biases and that it is best to abandon any claims of neutrality.[39] I however agree with Erbele on the point that neutrality is fundamental in research and even more so, a research study of this nature. Eliminating bias (to the extent possible) in a comparative legal study of two countries on different sides of the economic scale is important so as to eschew Eurocentrism—a tendency which arises when the comparatist has been immersed in Western culture and seeks to compare traditional cultures or developing economies against the backdrop of Western cultures or economies.

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[38] See also Vivian Grosswald Curran, "Cultural Immersion, Difference and Categories in U. S. Comparative Law" (1998) 46:1 Am J Comp L 43.

[39] Julie De Coninck, "The Functional Method of Comparative Law: Quo Vadis?" (2010) 74:2 Rabels Z 318 at 328. See also Curran, *supra* note 38 at 58.

Discussions on this point have also revolved around the Third World Approach to International Law (TWAIL) legal scholarship which posits that international law itself is Eurocentric and that it is more or less an approach that enhances the continued exploitation of the Third World.[40] TWAIL scholars therefore seek to develop an alternative dimension of international law than the current form in which it exists.[41] Considering that the focus of this thesis is not international law, but comparative corporate law, the TWAIL approach will not be employed either as a theory or as a methodology. It is however useful in that it provides some perspective on the challenges with Eurocentrism and supports the assertion that law is not culturally neutral.

I also find that the tendency towards Eurocentrism is not peculiar to comparatists that have been immersed in Western culture. Bias as a result of Eurocentrism also befalls comparatists who have been immersed in the life and culture of traditional societies or developing economies. When this happens, comparatists are more likely to, off the bat, assume that the legal framework of a developed economy is superior to that of a developing economy.[42] It is therefore important for comparatists such as myself, to be mindful of the existence of such bias when undertaking a research study of this nature. To achieve this neutrality, I will

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[40] Makau Mutua & Antony Anghie, "What Is TWAIL?" (2000) 94 ASIL PROC 31 at 31. See also Karin Mickelson, "Taking Stock of TWAIL Histories" (2008) 10:4 Int C L Rev 355 at 358 and Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective" (2005) 1 & 2 Osgoode Hall LJ 171 at 176.

[41] Mutua & Anghie, *supra* note 40.

[42] Brohman, *supra* note 33 at 128. Here, Brohman asserts that Eurocentrism has led to situations where developing countries depend on Western educational institutions who determine the research subject matter and research methods to be employed. He further asserts that "much of the discontent with development in the Third World can be traced to the displacement of traditional values, institutions, and relationships by alien Western counterpart." See also Henry J Bruton, "The Search for a Development Economics" (1985) 13:10–11 World Dev 1099 at 1104.

evaluate the respective corporate governance framework of both countries using the OECD Principles of Corporate Governance as a benchmark. The OECD Principles are adopted as a benchmark because it provides a "common frame of reference"[43] for corporate governance discussions.

The effectiveness of the comparative methodology has however been challenged by scholars who believe that globalization has rendered comparative law useless.[44] Michaels debunks this view by reiterating the importance of comparative law and advocates for comparative law to take on a transnational approach by looking beyond the state, beyond positive law and beyond legal science.[45] His suggestion that comparative law look beyond the state is based on the premise that "states have become… interdependent; their role depends on and in turn influences that of other states, and much of their activity now happens in cooperation with other states."[46] As such, rather than simply concerning ourselves with the actions of the state, we should consider the role played by different state agencies as well as that of non-state actors such as institutions, "multinational corporations, ethnic communities, and so on".[47] In looking beyond positive law, Michaels suggests that comparative law needs to "take functional equivalents of positive law into account—cultural norms and societal practices,

[43] Oscar Alvarez-Macotela & Mathias Siems, "The G20/OECD Principles of Corporate Governance 2015: A Critical Assessment of Their Operation and Impact" (2017) 4 J Bus L 310 at 328.

[44] Ralf Michaels, "Transnationalizing Comparative Law" (2016) 23:2 MJECL 352 at 358.

[45] *Ibid*.

[46] *Ibid*.

[47] *Ibid*.

rituals, traditions etc." and that if such developments are ignored, our comparative law studies would "become both less accurate and less relevant".[48]

This point was reiterated by Van Hoecke who posits that apart from the legislations of the two legal systems to be compared, there is a need to also take into account the socio-economic and historical aspect of the law when carrying out comparative legal research.[49] He stresses that comparing only legislation is risky when there is no information available on how it works in practice. In going beyond legal science, Michaels suggests that there is a need for contemporary comparative law to endorse extralegal sciences to achieve neutrality. He asserts that this will assist comparatists to develop a way of measuring the law.[50] For the purposes of this study, I will be implementing Michaels' call to "transnationalize" comparative law. This will entail not only examining existing legislative intervention in corporate governance in Nigeria and Canada, but also considering the historical background and the role played by non-state actors such as institutional investors, proxy firms and professional director associations in shaping both countries' corporate governance frameworks.

In carrying out this research, I will also adopt a normative comparative approach. Monateri explains that the normative approach is useful for comparing laws with the aim of highlighting policy goals.[51] Accordingly, this research study will compare how both Nigeria and Canada

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[48] *Ibid.*

[49] Mark Van Hoecke, "Methodology of Comparative Legal Research" (2015) Law Method at 3.

[50] Michaels, *supra* note 44 at 357.

[51] Pier Giuseppe Monateri, Methods of Comparative Law (Cheltenham, UK: Edward Elgar Publishing Limited, 2012) at 307-8.

have addressed key corporate governance issues (such as board diversity, board structure, corporate governance evaluations etc.) discussed in the 2015 OECD Principles of Corporate Governance. The result of this comparative analysis will inform recommendations that would foster the development of Nigeria's corporate governance framework.

1.5 Rationale for Choice of Canada as Comparative Jurisdiction

The choice of comparative jurisdiction is an important consideration in a comparative research study of this nature. Van Hoecke recognizes the fact that it is customary for language to play a major role in choosing a comparative jurisdiction.[52] According to Van Hoecke, this explains "why in the Anglo-Saxon world, most comparative legal research is focused on comparing common law countries that still use English as their official language".[53] In this instant case, both Nigeria and Canada are commonwealth countries (with the exception of Quebec which makes use of a civil code). As such, language plays a role in the choice of Canada as a comparative jurisdiction. Similarly, Nigeria and Canada both operate a "federal system of government, share bilateral economic and investment agreements"[54] and are both natural resource driven economies.

[52] Van Hoecke, *supra* note 49 at 3.

[53] *Ibid*.

[54] Charles Onyehinim Eluromma, "Majority Rule and Minority Protection in Private Corporations: A Comparative Appraisal of the Problems and Remedies Under the Canadian and Nigerian Jurisdictions" (2014), online: < https://doi.library.ubc.ca/10.14288/1.0103614>.

Another factor for the choice of Canada is Canada's ranking in Group 1 of the World Corporate Governance Index (WCGI).[55] This ranking indicates that Canada has an efficient corporate governance infrastructure that boosts investor confidence and promotes FDI. Therefore, a presumption (albeit rebuttable) exists that Canada must be doing something right with its corporate governance framework. In addition, "with its $1.53 trillion Gross Domestic Product, and $43,611 per capita, Canada ranks ninth in the United Nation's annual Human Development Index out of nearly 200 countries." [56] This therefore presupposes that Canada can reasonably be considered a suitable model in terms of economic development.

1.6 Thesis Overview

This thesis is structured into five chapters which altogether address the research questions posed above. This current chapter provides background to the research study by setting out the research questions and explaining the comparative methodology to be applied.

Chapter 2 provides an overview of the evolution of corporate governance in Nigeria. This section explores the history and evolution of corporate governance in Nigeria from the days of customary law, to the colonization era and post-colonial developments. Various laws that

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[55] SAHA, "World Corporate Governance Index", online: *SAHA* <http://www.saharating.com/~saharati/en/world-corporate-governance-index/>. The WCGI is an initiative set up for the purpose of comparing the corporate governance infrastructure and applications in about 150 countries. Following a study of the corporate governance practices of these countries, they were divided to 5 main groups; with Group 1 representing the highest scorers and Group 5 the lowest. The study considered the existence of corporate governance code, independent board membership, barring privileges, social responsibilities, the existence of stock-exchanges, capital markets board and a banking supervisory authority, corruption index and the presence of non-governmental organizations operating in the field of corporate governance in arriving at the rating.

[56] "Canada at 150: Lessons for Nigeria", *The Punch* (16 July 2017), online: <https://punchng.com/canada-at-150-lessons-for-nigeria/>.

comprise the Nigerian corporate governance framework—in the form of CAMA, the SEC Code of Corporate Governance and the sectoral codes of corporate governance—are also discussed. Recent developments relating to the attempted issuance of the NCCG 2016, issuance of the NCCG 2018 and proposed amendments to the CAMA are equally discussed. The Nigerian model of corporate governance is assessed and we also examine the Nigerian corporate governance scorecard.

Chapter 3 equally provides insights into how corporate governance in Canada has evolved over the years. We explore key issues that have been debated over the years—particularly concerning Canada's approach towards legislating corporate norms as well as prior and recent attempts to establish a single securities regulator and a national securities law. The judiciary's intervention in determining to whom directors owe fiduciary duties through the cases of *Peoples Department Stores Inc (Trustees of) v. Wise*[57] and *BCE Inc v. 1976 Debentureholders*[58] and the utility of the business judgment rule is discussed. We similarly evaluate the Canadian model of corporate governance and the Canadian corporate governance scorecard.

Chapter 4 crystalizes with a comparative analysis which investigates the different mechanisms put in place in Nigeria and Canada to address key corporate governance issues discussed in the 2015 OECD Principles of Corporate Governance. Recommendations for the

[57] 2004 SCC 68, [2004] 3 SCR 461.

[58] [2008] 3 S.C.R. 560, 2008 SCC 69 (CanLII).

development of Nigeria’s corporate governance framework are highlighted and recommendations which could be beneficial to Canada are also included.

Chapter 5 concludes the thesis by providing a summary of key findings made in the course of this thesis and discussing areas for further research.

Chapter 2: The Nigerian Corporate Governance Framework

2.1 Evolution of Corporate Governance in Nigeria

Corporate governance is often regarded as a relatively new development in Nigeria and a product of Nigeria's colonial history with the UK.[59] The later view is however not shared by all. Chukwuemeka George Nnona asserts that prior to colonization, Nigeria operated a customary corporate law system.[60] He explains that customary corporate law existed in the form of family land holding systems and apprenticeships where the apprentice (usually a teenager), works with a master for a given period of time with the goal of receiving a segment of the business once the duration of the service year is completed. He compares this arrangement to the western concept of "sweat equity"—which essentially relates to a person's contribution to a project through labor as opposed to financial equity. However, following the advent of British rule, the doctrines of customary law have been largely done away with. Although it still exists in some form, its application has been limited compared to customary family law and succession doctrines.[61] He writes:

> … the existence of the corporation in customary law is not in doubt and its longstanding application to mercantile ends can be ascertained. Its continued non-recognition in the legal literature arises from the inclination of lawyers in common law Africa to displace and countenance the displacement of homegrown legal concepts with newfangled imports which are presumed to be better in all respects, coupled with their disinclination towards recourse to the resources of other disciplines, especially in the cognate humanities and social sciences. But for the latter, they would have discovered, by recourse to historical and allied

[59] Boniface Ahunwan, "Corporate Governance in Nigeria" (2002) 37:3 J Bus Ethics 269 at 270.

[60] Chukwuemeka George Nnona, "Customary Corporate Law in Common Law Africa" (2018) 66 Am J Comp Law 639 at 640.

[61] *Ibid*.

> literature, the longstanding application of the corporation to mercantile ends in Africa and traced the contours of their regulation under customary law.[62]

The above shift from customary corporate law to western corporate law took root in Nigeria when the *UK Companies Ordinances* of 1912 was enacted during British rule.[63] This continued in 1960 when Nigeria attained independence and the *UK Company Ordinances of 1922* were repealed and the *Companies Act,* 1968 (which was essentially based on the *English Companies Act* of 1948) was enacted.[64] The Act however did not "appreciate the economic realities of the Nigerian state"[65] and was subsequently repealed. This led to the establishment of the CAMA 1990,[66] which is still currently in operation in Nigeria.[67] Although the Act does not mention the term "corporate governance," it contains provisions which essentially stipulate the manner in which companies should be governed. It stipulates the procedure for incorporating companies, business names and incorporated trustees in Nigeria and also establishes rules by which said organizations may be run.[68] These rules prescribe a minimum number of

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[62] *Ibid* at 648.

[63] "Guide to Business in Nigeria", online: *Nigeria Law* <http://www.nigeria-law.org/BusinessInNigeria.htm>.

[64] Olufemi Amao, "Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States" (2008) 52 J Afr Law 83 at 96. See also Junaidu Bello Marshall, "Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria" (2015) 3:3 Int'l J Bus & L Res 49 at 51-52.

[65] Marshall, *supra* note 64 at 52.

[66] *Companies and Allied Matters Act* 1990 (Nigeria), Cap C 20 Laws of the Federation 2004.

[67] Dorothy Nelson, "The Dilemma of the Shareholders under the Nigerian Company Law" (2015) 37 JL Pol'y & Glob 89 at 89.

[68] See ss. 18-26 of CAMA which provide for the incorporation of a company limited by shares (private and public companies), companies limited by guarantee, and unlimited companies.

shareholders,[69] the procedure for appointing directors[70] as well as annual, board and extraordinary general meetings,[71] publication of financial statements[72], and so on. It is also important to note that over the years, apart from CAMA, a number of laws have been promulgated to regulate corporate behavior—usually industry specific laws that regulate organizations operating within their industry. These laws include the *Central Bank of Nigeria Act* (CBN Act),[73] *Banks and Other Financial Institutions Act* (BOFIA)[74] and the *Nigerian Deposit Insurance Corporation Act 2006* (NDIC Act)[75] which regulate banks and other financial institutions. Others include the *National Insurance Commission Act 2004* (NAICOM Act)[76] which regulates insurance companies, the *Pension Reform Act 2014*[77] which regulates Pension Fund Administrators and Custodians, and the *Nigerian Communications Act* 2003 (NCA)[78] which regulates the telecommunications sector. The *Investment and Securities Act 2007* (ISA)[79] also

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[69] *CAMA*, 1990 (Nigeria), s. 18 prescribes that a company can be formed by two shareholders.

[70] *CAMA*, 1990 (Nigeria), s. 246 requires a company to have at least two directors and a sole director acting alone is liable for all debts and liabilities incurred by the company if acting alone.

[71] *CAMA*, 1990 (Nigeria), s. 213 and 215 provide for the procedures for calling annual and extra-ordinary general meetings and s. 263 lays down the procedure for board meetings.

[72] Part XI of *CAMA* states the various components of the financial statement which the board is to place before the shareholders annually.

[73] CAP C4 LFN 2004.

[74] Cap B3, LFN, 2004.

[75] CAP N102 LFN 2004.

[76] CAP N53 LFN 2004.

[77] CAP P4 LFN 2004.

[78] CAP N97 LFN 2004.

[79] CAP 124 LFN 2004.

regulates all companies trading on the stock exchange irrespective of the sector in which they operate.

Little more than a decade after CAMA came into force, corporate scandals such as the likes of Enron and Arthur Andersen caused many countries to take a second look at their corporate laws.[80] This led to the development of corporate governance in the sense in which it is understood today, as a mechanism through which companies are controlled or supervised.[81] Nigeria was not left out of this foray as many financial institutions operating in the country were going into distress.[82] This led to the issuance of Nigeria's first Code of Corporate Governance—the Code of Best Practices on Corporate Governance in Nigeria, (the 2003 SEC Code).[83] This Code was however amended in 2011 and was aimed at ensuring "the highest standards of transparency, accountability and good corporate governance, without unduly inhibiting enterprise and innovation."[84] Further amendments were made to the Code in 2014 with the

[80] Bondarenko, *supra* note 8.

[81] Thomas Clarke, *International Corporate Governance: A Comparative Approach*, 2nd ed (New York: Routledge, 2017).

[82] Junaidu Bello Marshall, "Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria" (2015) 3:3 Int'l J Bus & L Res 49 at 55.

[83] The Securities and Exchange Commission's Code of Best Practices on Corporate Governance in Nigeria 2003.

[84] See SEC Code. The 2011 Code was initiated when SEC constituted a national committee headed by M.B Mahmoud to review the 2003 Code with a view to identifying its weaknesses and to improving upon same, as well as to provide suggestions for the improvement of corporate governance enforcement mechanisms in Nigeria. The Code was made applicable to all public companies in Nigeria and it is regarded as the minimum standard for public companies in Nigeria.

major aim of mandating compliance with the code as opposed to the voluntary approach applied previously.[85]

Apart from the SEC Code, other regulatory agencies have over the years, issued corporate governance codes to guide the operation of companies within their sector. This includes the CBN Code of Corporate Governance for Banks Post Consolidation 2006, the Code of Corporate Governance for Licensed Pension Operators 2008.[86] The National Insurance Commission (NAICOM) also issued a Code of Corporate Governance for the Insurance Industry in 2009. The Code was issued in order to "rebuild and sustain the declining confidence of stakeholders in the insurance sector and recognise certain basic principles of corporate governance."[87]

In 2014, the Code of Corporate Governance for Banks and Discounts Houses in Nigeria and Guidelines for Whistle Blowing in the Nigerian Banking Industry was also issued to address weaknesses in the banking industry.[88] In the same year, the National Communications Commission (NCC) issued a Code of Corporate Governance for the telecommunication industry which was aimed at enhancing corporate governance within the Nigerian telecommunications industry and in the long run, enhancing stakeholder value.[89] The

[85] The Code was regarded as a framework created to facilitate sound corporate governance practices and behavior which defines minimum standards of corporate governance expected particularly of public companies with listed securities.

[86] Marshall, *supra* note 64.

[87] *Ibid*.

[88] Chris Ogbechie, "Corporate Governance Practices in the Nigerian Banking Industry" in *Handbook on Corporate Governance in Financial Institutions* (Cheltenham, UK: Edward Elgar Publishing, 2016).

[89] The Communicator Magazine, "NCC Unveils Code of Corporate Governance for Telecommunications Companies - The Communicator Online", (December 2018), online: *The Communicator* <

multiplicity of corporate governance codes/codes of conduct within a singular legal system portends that some level of conflict is bound to exist. According to Osemeke and Adegbite, the existence of such conflict in codes, “contributes to reduced compliance by firms and ineffective enforceability by regulatory agencies”[90] (although there are several other factors that contribute to non-compliance with corporate governance legislation in Nigeria—for example, corruption and weak institutional framework).[91] It was on this basis that in 2016, the FRCN issued a Nigerian Code of Corporate Governance (NCCG) which sought to address this conflict by harmonizing the existing sectorial codes of corporate governance.[92] The NCCG contained codes of conduct for the private sector, not-for-profit and public sector.[93] The NCCG 2016 however met with resistance due to the inclusion of certain provisions in the private sector code and more particularly, the not-for-profit code which were not acceptable to companies/organizations falling under the code.[94] Essentially, the NCCG 2016 was considered to be quite restrictive. The NCCG 2016’s unpopularity resulted in its immediate suspension and a technical committee was appointed by the FRCN to review and re-issue the NCCG.[95]

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https://www.ncc.gov.ng/thecommunicator/index.php?option=com_content&view=article&id=662:ncc-unveils-code-of-corporate-governance-for-telecommunications-companies&catid=23&Itemid=179>.

[90] Osemeke & Adegbite, *supra* note 25.

[91] *Ibid.*

[92] Emmanuel Adegbite, "A Review of the Financial Reporting Council Code of Corporate Governance 2018", *BusinessDay* (2018), online: <https://businessday.ng/analysis/article/review-financial-reporting-councils-nigerian-code-corporate-governance-2018/ >.

[93] Victor Banjo, "Nigeria’s National Code of Corporate Governance", (2018), online: *Ethical Boardroom* < https://ethicalboardroom.com/nigerias-national-code-of-corporate-governance/>.

[94] Emmanuel Adegbite, *supra* note 25. In particular, the controversy revolved around the section of the Code which specified a 20-year term limit for founders and leaders of non-profit organizations (including churches and mosques) following which Pastor E.A Adeboye, the General Overseer of the Redeemed Christian Church of God, a foremost Christian organization in Nigeria, retired as General Overseer.

[95] Elijah Bello, “Financial Reporting Council Inaugurates Technical Committee on National Codes of Corporate Governance”, (18 January 2018), online: *Businessday NG* <

Following the debacle that met with NCCG 2016's issuance, the FRCN constituted a technical committee to review the suspended Code.[96] The committee consisted of a diverse range of corporate governance experts across various sectors and industries whose mandate was to develop a code would boost investor confidence and promote economic growth. The committee commenced work on the review of the Code, released an exposure draft on June 14, 2018 and embarked upon public hearings and awareness campaigns across the country in order to obtain feedback from stakeholders.[97] Following this, the Nigerian Code of Corporate Governance 2018 (NCCG 2018 or the Code) came into effect on January 15, 2019 and was issued by the Minister of Trade and Investment, Dr. Okechukwu Eyinnaya, Enelamah upon recommendation and approval by the FRCN. Essentially, NCCG 2018 expresses the current state of corporate governance in Nigeria. The authority for the issuance of the Code is set out in the introductory chapter and states as follows:

> Sections 11c and 51c of the *Financial Reporting Council of Nigeria Act (FRCN Act)* confer upon the Council, the powers to ensure good corporate governance practices in the public and private sectors of the Nigerian economy and to issue the code of corporate governance and guidelines. The Nigerian Code of Corporate Governance 2018 was approved by the Council pursuant to this authority and commended to the Minister for issuance in accordance with Section 73 of the Act.

https://businessday.ng/news/article/financial-reporting-council-inaugurates-technical-committee-national-codes-corporate-governance/>.

[96] *Ibid*.

[97] 'Femi Asu, "FRC Unveils Draft Corporate Governance Code, Seeks Input", *The Punch* (14 June 2018), online: <https://www.pressreader.com/>.

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Despite this, some legal practitioners have faulted the procedural basis upon which the Code was issued. They assert that the FRCN of itself does not have the power to issue a Code of Corporate Governance.[98] This assertion is predicated on the provisions of ss. 50 and 51 of the *FRCN Act*, particularly s. 51(a) which confers the responsibility for the issuance of the code of corporate governance and guidelines on a "Committee on Corporate Governance" to be established by the FRCN. The NCCG 2018's validity is however yet to be challenged in court and remains valid until it is declared otherwise by a court of law.

Furthermore, the Code is the first national code of corporate governance that cuts across all sectors. Unlike the NCCG 2016 which sought to harmonize all sectoral codes mentioned previously, the NCCG 2018 simply recognizes the existence of these codes and explains that it seeks to "institutionalise corporate governance best practices in Nigerian companies". The Code also aims to "promote public awareness of essential corporate values and ethical practices that will enhance the integrity of the business environment"[99] and in the long run, facilitate trade and investment in Nigeria. The inherent challenge with this, however, is the question of superiority between the respective sectoral codes and the NCCG 2018 where there is a conflict. Although it can be argued that the sectoral code will take precedence based on a myriad of cases which stipulate that a situation/sector-specific legislation will prevail over a general legislation,[100] it would have been optimal for the FRCN to have expressly spelt out the

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[98] Joseph Onele, "What is Wrong with the Nigerian Code of Corporate Governance 2018?", *Businessday NG* (27 February 2019), online: <https://businessday.ng/opinion/article/what-is-wrong-with-the-nigerian-code-of-corporate-governance-2018/>.

[99] The Nigerian Code of Corporate Governance 2018.

[100] For example, the Court of Appeal in *Olawepo v. Securities and Exchange Commission* (2011) LPELR-CA/A/257/08, Hon. Justice Nwodo, held that "…where there is specific provision to cover certain specified circumstances, there will be no need to import another legislation to support that statute."

hierarchical relationship between the NCCG 2018 and the sectoral codes to remove room for argument. Especially considering the fact that the Code's implementation is to be monitored by the FRCN through sectoral regulators and registered exchanges. The NCCG 2018's silence creates the impression that the FRCN is hesitant to expressly define the relationship between the Codes for fear that it may meet the same fate as its predecessor. It attempts to fill this gap by stating that "in consonance with the relevant regulatory agencies of the Federal Government of Nigeria, the Council will subsequently issue corporate governance guidelines to assist implementation as may be required to respond to prudential considerations in different sectors of the economy." The hope is that this will be sufficient to address any challenges that may arise in the future.

The underlying philosophy of the Code also differs from its predecessor in the sense that unlike the previous Code which prescribed itself as mandatory, the NCCG 2018 adopts an *apply and explain* principle-based approach similar to that of South Africa's King IV Report on Corporate Governance.[101] The *apply and explain* approach while not portraying the NCCG 2018 as a mandatory code, assumes that companies will take steps to comply with principles set out in the Code and also sets out steps which could be taken to actualize these principles. The aim is to avoid companies simply embarking on a 'box ticking' exercise and making little or no effort to actively achieve the outcomes set out in the Code, which was essentially the effect of the *apply/comply or explain* approach adopted in most countries.

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[101] Institute of Directors, Southern Africa, "King IV Report on Corporate Governance for South Africa 2016" <https://c.ymcdn.com/sites/iodsa.site-ym.com/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf >.

In terms of structure, the Code is comprised of seven parts and 28 principles along with practices recommended for implementation of each principle.[102] The Code however omitted to expressly state the type of companies/organizations to which it applies. This was however remedied by the Regulation on the Adoption and Compliance with Nigerian Code of Corporate Governance 2018 issued by Dr. Enelemah which prescribes that the Code will apply to the following entities:

a. all public companies (whether a listed company or not);
b. all private companies that are holding companies of public companies or other regulated entities;
c. all concessioned or privatised companies; and
d. all regulated private companies being private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service (FIRS) and the Corporate Affairs Commission (CAC).

As such, unlike the NCCG 2016 which contained provisions that also catered to the not-for-profit and public sector, the NCCG 2018 is limited in scope and is directed specifically at the for-profit sector. The rationale for this is not afar off. The resistance put forward in respect of the not-for-profit code indicates that this territory is quite delicate and should be handled with kid gloves. This is especially so considering the myriad of arguments thrown up concerning the involvement of the state in religious affairs.[103] The FRCN has indicated that a code dealing with these sectors will be released in the future.[104] It is hoped that this would be done sooner rather than later.

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[102] NCCG 2018. Companies will be required to commence reporting on their compliance with the Code after January 1, 2020.

[103] Iyobosa Uwugiaren, “Corporate Governance Code: The Intrigues, the Politics and the Untold Story”, *THISDAY* (15 January 2017), online: <https://www.pressreader.com/>.

[104] Asu, *supra* note 97.

The Code's applicability to private companies has also come into question. This is because the Code prescribes that it applies to regulated private companies that file annual returns to other regulatory authorities other than the CAC and the FIRS. That is, private companies such as financial institutions (Deposit Money Banks, Bureau De Change, Discount Houses, Microfinance banks and Finance Companies) under the supervision of the CBN. Although the rationale behind expanding the scope of application to include regulated private companies such as banks and discount houses is understandable, there has been some speculation as to the propriety of including private companies within the scope of the Code.[105] Those who contest the applicability of the Code to private companies do so in light of the Federal High Court's decision in *Eko Hotels Limited v. Financial Reporting Council of Nigeria*[106] delivered by Honourable Justice Okon Abang on March 21, 2014. In this case, FRCN had demanded that the Plaintiff register and file returns with it pursuant to the *FRCN Act*[107]. The Plaintiff however contended *inter alia* that being a private company meant it did not come under the regulatory framework of FRCN. The Court agreed with the submission of counsel to Eko Hotels Ltd and held that by the combined effect of *ss.* 7(1),8(f),41(1) and 77 of the *FRCN Act*, FRCN lacked statutory power to exercise control over private companies and that the Hotel was not liable to register with the FRCN. In essence, the Court's position is that FRCN's regulatory jurisdiction is limited to publicly quoted companies and public interest companies. The FRCN has however appealed against the Court's judgment on the ground that s. 77 of the *FRCN Act* was not taken into cognizance. S. 77 defines a public interest entity as

105 "Nigerian Code of Corporate Governance 2018", (18 February 2019), online: *Templars* < https://www.templars-law.com/wp-content/uploads/2019/02/Highlights-of-the-Nigerian-Code-of-Corporate-Governance-2018.pdf>.

106 Unreported: Suit No. FHC/L/CS/1430/2012 delivered on 21/03/2014).

107 *Financial Reporting Council of Nigeria Act* (Nigeria) No. 6 of 2011.

> governments, government organisations, quoted and unquoted companies and all other organisations which are required by law to file returns with regulatory authorities and this excludes private companies that routinely file returns only with the Corporate Affairs Commission and the Federal Inland Revenue Service.

A careful reading of this section will however reveal that not all private companies are exempted from the FRCN's regulatory jurisdiction. The above quoted s. 77 limits the exemption to private companies that routinely file returns only with the CAC and FIRS. The idea behind this provision is to exempt private companies, which are private in the sense of the word, and operate majorly as family-owned businesses (or what is referred to as "closely-held corporations" in other jurisdictions) from regulation by the FRCN. It is for this reason that the term "public interest companies" can be interpreted to include private companies that file returns to other regulatory authorities other than the FIRS and the CAC (and these companies are referred to as "regulated private companies" under the NCCG 2018).

The NCCG 2018 contains salient provisions which would be discussed briefly in this section and expounded upon in the comparative analysis. The NCCG 2018 similar to the King IV Report, sets out principles companies are expected to follow and also recommends practices that can help actualize the listed principles. For example, Principle 1 of the Code provides thus:

> Principle 1: A successful company is headed by an effective Board which is responsible for providing entrepreneurial and strategic leadership as well as promoting ethical culture and responsible corporate citizenship. As a link between stakeholders and the company, the Board is to exercise oversight and control to ensure that management acts in the best interest of the shareholders and other stakeholders while sustaining the prosperity of the company.

To actualize this principle, the Code *inter alia* recommends that the board have a board charter setting out its responsibilities. The board charter could contain amongst other things, guidelines ensuring that the board acts in the company's best interest at all times, that the board complies with extant laws, establishes and maintains company values and standards, etc. The NCCG 2018 also contains principles on board composition and diversity, prescribes requirements for appointment as chairman, the need for regular board evaluations, corporate governance evaluations, steps to enhance shareholder engagement, etc. The NCCG 2018 is innovative because it addresses many issues not previously covered (or in some cases, inadequately covered) by the sectoral codes of corporate governance as well as the SEC Code 2014. These innovations will be discussed in depth in the course of the comparative analysis.

In addition, it is important to discuss the impending repeal of the CAMA 1990 which is to be replaced by the *Companies and Allied Matters Act (Repeal and Re-enactment) Bill* 2018 (CAM Bill or Bill).[108] On May 15, 2018, the Senate passed the CAM Bill and same has now been passed by the House of Representatives on January 17, 2019. As such, upon assent by the President, the Bill will become law.[109] The Bill seeks to repeal and replace the CAMA and was mainly driven by the Presidential Enabling Business Environment Council (PEBEC), whose mandate is to enhance the ease of doing business in Nigeria.[110] Accordingly, the Bill's

[108] *Companies and Allied Matters Act (Repeal and Re-enactment) Bill* (Nigeria), 2018, (SBs 355 and 384).

[109] Kehinde Akintola, "Reps: Passage of new CAMA bill will boost ease of doing business in Nigeria", *Businessday NG* (17 January 2019), online: <https://businessday.ng/news/article/reps-passage-of-new-cama-bill-will-boost-ease-of-doing-business-in-nigeria/>.

[110] Jumoke Oduwole, "Companies and Allied Matters (CAM Bill) Passes Third Reading at the House of Representatives", (22 January 2019), online: *Presidential Enabling Business Environment Council (PEBEC)* <https://easeofdoingbusinessnigeria.com/publications/press-release-s>.

focus is to boost the ease of doing business in Nigeria rather than to improve corporate governance in Nigeria.[111] For example, the Bill permits the incorporation of a private company by a single person as opposed to two persons prescribed by CAMA.[112] The CAM Bill also allows a person who has reserved a name to "transfer the name to another person (before the expiration of the reservation period) if the Commission is satisfied that the transfer is not an attempt to sell access to or trade in or market the reserved name".[113] With respect to companies limited by guarantee, the requirement for the Attorney-General's consent to be obtained prior to incorporation has been done away with.[114] Also, under the CAM Bill, private companies can hold general meetings electronically.[115] The CAM Bill also exempts a company other than an insurance company, a bank or any other company as prescribed by the Commission from carrying out an audit in a financial year, provided the company has not carried on business since its incorporation or the company's turnover in that year is not more than NGN10,000,000 and balance sheet total, not more than NGN5,000,000.[116] The crux of this provision is to exempt private companies (which often operate as family businesses) from the burden of audit requirements. As previously stated, the main aim behind the repeal of CAMA and its re-enactment in the form of the CAM Bill is to improve the ease of doing business in Nigeria.

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[111] Rotimi Adeniyi Akintola, "Developments in Corporate Governance Regulation in Nigeria: A Step Forward, Two Steps Back? (2018) J Corp Gov 10(1) 2123.

[112] *CAM Bill (Nigeria)*, s.18.

[113] *Ibid*, s. 31(6).

[114] *Ibid*, s. 26.

[115] *Ibid,* s. 213.

[116] *Ibid*, s.356.

In addition to the above, the CAM Bill which has been tagged "the boldest reform in Nigeria's corporate environment in the last 30 years,"[117] makes changes which would impact corporate governance. Corporate governance wise, the Bill requires every shareholder to disclose the capacity in which they hold shares within seven days of acquiring said shares. The company is also obligated to provide this information to the CAC.[118] There are further provisions as to the registration of shareholders who are beneficial owners and penalties to be paid in the event of default of these provisions. This provision is laudable as it serves to unveil shadow shareholders or persons who hold shares in proxy/for the benefit of a third party in a bid to circumvent the provision of a statute (particularly the *Local Content Act*).

The Bill also changes the composition of the audit committee from an equal number of directors and shareholder representatives to seven shareholders who are not directors.[119] The hope is that this will ensure that directors, particularly managing directors[120] and CEOs who are usually involved in the day-to-day running of the business, do not influence audit exercises. Also, s. 359 of the CAM Bill is a novel section which seeks to enshrine corporate responsibility for financial reports. It provides for certification of the auditor's report by the company's managing director and internal auditor. This would ensure that managing directors and internal auditors take responsibility for any report provided by external auditors and be in a position to defend any report put out by the external auditor as the true and fair position

[117] Oduwole, *supra* note 110.

[118] *CAM Bill*, s. 92.

[119] *Ibid*, s. 358(4).

[120] The role of managing director is provided for under s. 64(b) of CAMA. This section permits the board to delegate all or any of its powers to a member of the board who will be designated as the managing director. In practice, the managing director is an executive director that is responsible for monitoring the day to day activities of the company.

of the company at the date the report is given. S. 386 of the Bill also gives a shareholder a perpetual right to recover dividends from a company, as opposed to 12 years provided under the extant Act.[121]

In all, from the above discussion, we observe that the Nigerian focus has been to place emphasis on corporate governance codes. This has led to the issuance of several sectoral codes, and now, the NCCG 2018. As indicated, there is some concern that issuance of these multiple codes inhibits the implementation and proper monitoring of corporate governance practices.

2.2 The Nigerian Corporate Governance Model and Scorecard

In terms of corporate governance model, due to Nigeria's history with the UK and the fact that many laws are either exact replicas of UK laws or borrow heavily from them, Nigeria is often classified as operating the Anglo-American model.[122] This proves challenging considering that the adoption of these models in emerging markets wrongly "assume that the institutional conditions found in developed economies are also present in emerging

[121] This is laudable considering that shareholders have a right to dividend and there should not be any limitation to the exercise of such right. However, the practicality of this will come into question considering that reasonable statutory limitations are at times necessary, as a contractual right should not exist in perpetuity. Reasonable statutory limitations similar to the limitations for claims of breach of contract or debt recovery could therefore be prescribed.

[122] Elewechi N M Okike, "Corporate Governance in Nigeria: The Status Quo" (2007) 15:2 Corp Gov Int Rev 173 at 175. The Anglo-American corporate governance model is characterized by ownership of shares by outsiders who are not associated with the company and involves three key players—directors, management and shareholders. Here, the board functions as a unitary board which includes executive and non-executive directors.

economies".[123] I am of the view that Nigeria does not strictly operate the Anglo-American model as it obtains in the UK and in the US—especially in view of cultural differences as well as specific regulatory drives.[124] As a MINT emerging economy,[125] Nigeria's focus is to enhance its economic development and regulatory actions taken in the corporate sphere are targeted at achieving economic growth and development. As previously mentioned, the drive behind the CAM Bill is to enhance the ease of doing business in Nigeria and consequently attract foreign direct investment which will in the long run boost the country's gross domestic product. This is also reflected in the spirit of the NCCG 2018 which was issued with the aim of promoting trade and investments.

Furthermore, similar to the UK, Nigeria has established a national code of corporate governance—the NCCG 2018. However, unlike the UK which applies the *comply or explain* approach to implementing the principles contained in the Code, the NCCG 2018 adopts the *apply and explain* approach introduced under South Africa's King IV report which sets out principles rather than rules which companies are to subscribe to and apply in their operations. Given the current deficiency in enforcement of laws and regulations in Nigeria, the *apply and explain* approach appears to hold some relief because it assumes that companies would as

[123] Michael N Young et al, "Corporate Governance in Emerging Economies: A Review of the Principal-Principal Perspective: Corporate Governance in Emerging Economies" (2008) 45:1 J Mgt Stud 196 at 198.

[124] Jingchen Zhao, "Promoting a More Efficient Corporate Governance Model in Emerging Markets Through Corporate Law" (2016) 15:3 Wash U Glob Stud L Rev 447 at 491. Here, Zhao explains the school of thought of path dependence theorists that corporate governance in emerging markets, is a function of the country's value system and cultural identity.

[125] MINT is an acronym referring to Mexico, Indonesia, Nigeria, and Turkey. MINT economies. MINT economies are reckoned to be smaller than BRICS but are regarded as the next set of strong emerging markets after BRICS. See "What Are the MINT Economies?", online: *WorldAtlas* <https://www.worldatlas.com/articles/what-are-the-mint-economies.html>.

a matter of course, apply the principles and subsequently report on the steps taken in that regard. As opposed to providing leeway for non-compliance as is the case with the *comply or explain* approach. It therefore appears that the Nigerian model of corporate governance draws inspiration from the Anglo-American and South African models.[126]

It is however difficult to precisely pinpoint the corporate governance model applied in Nigeria. This is because on one hand, s. 279(3) of CAMA requires directors to:

> … act at all times in what he believes to be the best interest of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and on such manner as a faithful, diligent, careful and ordinarily skillful director would act in the circumstances.

S. 279(4) also requires directors to "have regard to the interest of the company's employees". On the other hand, the NCCG 2018 states thus:

> as a link between stakeholders and the Company, the Board is to exercise oversight and control to ensure that management acts in the best interest of the shareholders and other stakeholders while sustaining the prosperity of the Company.

The confusion lies in the fact that while the statutory provision and case law such as *Artra Industries Nig. Ltd. v. Nigerian Bank for Commerce and Industry* (NBCI)[127] state that directors owe their fiduciary duties to the company, the NCCG 2018 appears to depart from this approach. CAMA essentially identifies the company's interest as the primary consideration

[126] It is however interesting to note that unlike the NCCG 2018, the King IV Report applies to all organizations in South Africa regardless of their form of incorporation. The main aim of the King IV Report is to make the corporate governance principles prescribed, capable of being adopted by all types of organizations.

[127] (1998) 3 SCNJ, 97.

and also requires that employees' interest be considered. However, the exact implication of this provision has not been interpreted by the courts. In *Artra* referred to above, the facts of which are that Artra was granted a loan by NBCI for the production of medicated cotton wool. The terms of the agreement between the parties required NBCI to grant consent for any mortgage transaction to be entered into by Artra. Artra had sought consent for two mortgages which NBCI granted, but on the third request, NBCI refused consent. Artra thus sued NBCI for refusing consent to the mortgage transaction. In arriving at its decision, the Supreme Court referred to s. 279(3) in holding that directors of NBCI were not mandated to grant consent and are instead required to act in the best interest of the company. However, the Supreme Court did not throw more light on what it means to act in the best interest of the company and the exact ramifications of this statutory provision is unclear.[128] In practice, directors often interpret this duty to mean the maximization of shareholder value.

The NCCG 2018 however lists shareholders and stakeholders as specific constituents whose interests must be considered and implies that directors' decision to uphold any one interest should be based on that which promotes the company's prosperity. The NCCG approach therefore appears to adopt an enlightened shareholder approach which requires that both stakeholder and shareholder interests be considered with the aim of promoting the company's success. This discrepancy indicates that there is a need to deliberately take a look at the models adopted in these governance laws and codes with a view to clarifying the exact model to be applied by corporate entities.

[128] Hannatu Adamu, "A Critical Analysis of the Director's Duty to Act in What he Believes to be the Best Interests of the Company: A Proposal for Amendment" (2014 & 2015) 7(1) Ahm Bell Univ J Comm Law 166.

Considering that the essence of establishing corporate governance laws and codes is to improve corporate governance practices within the country, it is important to take a step back to evaluate the effectiveness or otherwise of Nigeria's framework. One way to evaluate corporate governance regulation is by taking a look at rankings generated by institutions outside Nigeria. This will provide us with an outsider's perspective of Nigeria's corporate governance regime in comparison to other countries in Africa and the world at large. One of such ratings is the SAHA Rating revised World Corporate Governance Index (WCGI) for 2018. The index is based on a comparative examination of corporate governance infrastructures and implementation processes put in place by various countries around the world.[129] Each country is assigned a grade based on a number of components and are divided into "five main groups according to their grades, with group one representing the highest scorers and group five the lowest. The first two groups gain the right to enter the index, and groups three, four, and five remained outside."[130] Nigeria is not listed in either group one or two and has therefore been left out of the index. However, a host of other African countries like Egypt, Mauritius, Morocco, South Africa, and Tunisia with grades between 60-80 are listed on the index.[131]

This issue is compounded by the fact that Nigeria currently ranks 146th out of 190 countries in the World Bank 2018 Ease of Doing Business Index[132] and 144th out of 175 countries

[129] SAHA, *supra* note 55.

[130] *Ibid.*

[131] *Ibid.*

[132] The World Bank, "Ease of doing business index", online: < https://data.worldbank.org/indicator/ic.bus.ease.xq>.

according to Transparency International's 2018 Corruption Perception Index.[133] These rankings indicate that the current regulatory framework has not been effective in achieving the desired objective. Although the hope is that the newly issued NCCG 2018 and the soon to be passed CAM Bill will pave the way for the radical transformation of the Nigerian corporate sphere, it is clear that much work still needs to be done to set Nigeria on the path of steady growth and development. This requires that we scrutinize the existing framework and develop it into one that not only fosters investor confidence and attracts foreign direct investment, but also promotes corporate excellence in Nigeria.

To achieve this, there is a need to look beyond the Nigerian state and observe how corporate governance works in a different legal system. This understanding therefore serves as the background upon which this study is set. While there is no failure-proof framework of corporate governance anywhere in the world, a number of lessons can be learnt by observing and interacting with corporate governance frameworks of other jurisdictions.

[133] Transparency International, "Corruption Perceptions Index 2018", online: *www.transparency.org* < https://www.transparency.org/cpi2018>.

Chapter 3: The Canadian Corporate Governance Framework

3.1 Evolution of Corporate Governance in Canada

Similar to Nigeria, Canada is a resource-dependent economy and operates a federal system of government. The evolution of corporate governance in Canada can be said to have commenced with the incorporation of Hudson Bay Company[134] and Royal African Company[135] by Royal Charter on May 2, 1670. The Hudson Bay Company, which was established for North American territories, was in some ways run in a similar fashion to the modern corporation.[136] The royal charter later gave way to the use of letters patent for company incorporations, which eventually gave way to incorporation by registration.[137] Subsequently, the federal government, the 10 provinces and three territories enacted respective corporate laws which provided for incorporation of companies by registration.[138]

[134] The charter stipulated the company's objective to be trading in fur, mineral exploration and finding a northwest passage. See Elle Andra-Warner, *Hudson's Bay Company Adventures: Tales of Canada's Fur Traders* (Heritage House Publishing, 2011) at 30.

[135] The Royal African Company is a British trading company that had a monopoly in slave trade and was responsible for the shipment of Africans to the Americas during the transatlantic slave era. See William A Pettigrew, *Freedom's Debt : The Royal African Company and the Politics of the Atlantic Slave Trade, 1672-1752.* (Chapel Hill: University of North Carolina Press, 2016) at 11.

[136] Fenner L Stewart, "A History of Canadian Corporate Law: A Divergent Path from the American Model?" in Harwell Wells, ed, *Research Handbook on the History of Corporate and Company Law* (Massachusetts: Edward Elgar Publishing, 2018) at 454. Stewart explains that the company had shareholders and a management unit referred to as "the Governor" and the "Committee" and annual meetings where a new Governor could be elected.

[137] *Ibid*.

[138] Taylor R Gray, "A Corporate Geography of Canada: Insights into a Multi-Jurisdictional Model of Corporate Governance." (2010) 41:4 Growth Change 467 at 473.

A number of corporate governance reforms occurred through committees that were established to improve Canada's corporate governance framework.[139] In 1967, the federal government constituted a committee known as the Dickerson committee to review the federal corporate law.[140] The committee completed the review and issued the Dickerson Report 1971.[141] The report contained recommendations concerning oppression remedy for the protection of minority shareholders and stakeholders amongst other things. These recommendations were accepted with slight modifications and led to the promulgation of the *Canadian Business Corporations Act* (CBCA)[142]. Following this, most provinces amended their corporate laws to substantially reflect the provisions of the CBCA.[143] The most significant addition to the CBCA at the time was the expansion of the oppression remedy to also benefit non-shareholders such as security holders, directors or officers, creditors.[144] The Dickerson Committee explained the rationale for this approach thus:

> Suggestions have been made from time to time that corporation law focuses too narrowly on shareholders, and ignores the reality that others, especially the corporation's employees and creditors, are affected by and concerned with what corporations do. It follows from this, so the argument goes, that these groups should have some

[139] Stéphane Rousseau, "Canadian Corporate Governance Reform: In Search of a Regulatory Role for Corporate Law" in Janis Sarra, ed, *Corporate Governance in Global Capital Markets* (Vancouver: UBC Press, 2014) at 3.

[140] PM Vasudev, "Corporate Stakeholders in Canada - An Overview and a Proposal" (2014) 45:1 Ottawa L Rev 137 at 146.

[141] Robert WV Dickerson, John L Howard & Leon Getz, Proposals for a New Business Corporations Law for Canada (Ottawa: Information Canada, 1971).

[142] *Canada Business Corporations Act*, RSC 1985, c C-44.

[143] Prince Edwards Island and Nova Scotia's corporate laws were not amended to conform with the CBCA.

[144] Vasudev states that Canada was in fact the first common law country to adopt this approach. See Vasudev, *supra* note 140.

> voice in the choice of corporate directors. Moreover, it is said, there is a broad public interest in corporations, and this interest should also be represented in corporate boardrooms.

Through this, the stakeholder approach to corporate governance was infused into the Canadian system. However, although the stakeholder approach is applied in the context of the oppressive remedy contained in s. 241(2) of the CBCA, there appears to be divergence when it comes to fiduciary duties and determining in whose interest directors are to act. This divergence came to play through the decision of the courts in two notable cases. The first of these cases is *Peoples Department Stores Inc (Trustees of) v. Wise.*[145] The facts of this case are that Marks & Spencer (M&S), a retail clothing store, owned Peoples Department Stores Inc and sought to sell the company. Wise acquired the company, but due to certain covenants with M&S, could not merge with Peoples until the purchase price was paid. From the onset, the joint operations of the two companies was not cohesive. Wise subsequently put in place a joint inventory procurement policy that involved purchasing goods through Peoples and transferring it to Wise. Soon afterwards, both Peoples and Wise went bankrupt. The creditors sued the directors for breach of fiduciary duty contained in s. 122 of the CBCA. Although the Quebec Superior Court found for the plaintiffs, the matter went on appeal up to the Supreme Court of Canada (SCC). In arriving at its decision, the SCC held that the directors did not owe a fiduciary duty to the creditors but to the company. In the words of the Court:

> An honest and good faith attempt to redress a corporation's financial problems does not, if unsuccessful, qualify as such a breach. The fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". <u>At all times, they owe their fiduciary obligations to the corporation, and the corporations'</u>

[145] 2004 SCC 68, [2004] 3 SCR 461.

> <u>interests are not to be confused with the interests of the creditors or those of any other stakeholder.</u> [Emphasis added]

The SCC made it a point of duty to distinguish the beneficiaries of ss. 122 on one hand, and 241(2) on the other, by stating that fiduciary duties are owed to the corporation and not any particular group of persons, whilst stakeholders are entitled to relief from actions bordering on oppressive or unfairly prejudicial conduct. Another opportunity for the Court to expand on this issue came four years later in the case of *BCE Inc v. 1976 Debentureholders.*[146] The facts of this case are that a consortium of purchasers sought to purchase shares in BCE Inc through a leveraged buyout. The directors of BCE sought court approval for a plan of arrangement that would involve taking on more debt. However, only 97.93% of BCE's shareholders approved the plan of arrangement. The rest opposed it on the ground that it would reduce the value of their debentures. They then proceeded to file a suit, seeking relief under the oppression remedy on the basis that the arrangement was unfair and unreasonable. The Court however decided in favour of BCE. In arriving at its decision, the Court revisited the subject of fiduciary duty and in whose interest directors are to act. According to the Court:

> 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 directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such

[146] [2008] 3 S.C.R. 560, 2008 SCC 69 (CanLII).

> cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

The Court's decision in both cases met with mixed reactions from corporate players and stakeholders. Many argued that the Court's decision did no more than reiterate the shareholder-centric approach to corporate governance[147] and that the BCE decision established "an indeterminate fiduciary duty" as it did not provide specific direction as to which group's interest will trump the other.[148] MacIntosh did not mince words when he stated that the BCE decision had plunged the Canadian corporate sphere into a well of "uncertainty and confusion."[149] It is also this author's view that this interpretation by the SCC gives directors wide discretionary powers to determine what the corporation's best interest is at any given point in time. These powers are further entrenched when we consider the "business judgment rule". The business judgment rule was applied in both the BCE and Peoples case. In the Peoples case, the Court stated that, "while courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are often involved in corporate decision-making, they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision." In the BCE case, the Court also stated that "under the business judgment rule, deference should be accorded to the business decisions of directors acting in good faith in performing the functions

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[147] Patrick Lupa, "The BCE Blunder: An Argument in Favour of Shareholder Wealth Minimization in the Change of Control Context" (2011) 20 Dal J Leg Stud 1 at 21.

[148] Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties Symposium on the Supreme Court's BCE Judgment" (2009) 2 Can Bus LJ 232 at 241.

[149]Jeffrey G MacIntosh, "BCE and the Peoples' Corporate Law: Learning to Live on Quicksand Symposium on the Supreme Court's BCE Judgment" (2009) 2 Can Bus LJ 255 at 272.

they were elected to perform".[150] In both cases, stakeholders were unable to take advantage of the statutory protection afforded to them due to the court's application of the business judgment rule. Vasudev acknowledges this challenge and suggests that as an alternative to traditional courts, the "creation of panels with representatives from a cross-section of disciplines, such as finance, law, management and other relevant disciplines, to deal with stakeholder disputes."[151]

In June 2019, the federal government amended the CBCA to codify the BCE decision. S. 122 (1.1) of the CBCA amendment reads:

> When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors:
> (a) the interests of shareholders, employees, retirees and pensioners, creditors, consumers, and governments;
> (b) the environment; and
> (c) the long-term interests of the corporation.[152]

The import of this is that the statutory provision reinforces the BCE decision and directs directors to consider shareholder and stakeholder interests on one hand, environmental interests as well as the long-term interests of the company in determining the best interest of the corporation. The codification of the BCE Decision as outlined above has been criticized by scholars. For one, Ed Waitzer has expressed concern that "instead of making it easier for

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[150] *BCE*, par 24.

[151] Vasudev, *supra* note 140. If this proposal is taken up, it could possibly fill the gap created by the business judgment rule and curtail the wide discretionary powers of directors.

[152] Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures,* 1st Sess, 42nd Parl, 2019, cl 141 (as passed by the House of Commons 6 June 2019).

a board of directors to consider a company's climate impact, the revised act could make it harder".[153] Waitzer argues that listing the long-term interest of the corporation as one of the factors to be considered by directors when making decisions suggests that "the consideration is permissive".[154] He adds that by outlining a specific list of stakeholders, some stakeholders may be given less attention that they deserve. These objections are substantial especially considering that a company's long-term interest should *ipso facto* translate to the best interest of the company. Listing it as a separate factor to be considered undermines its importance.

In addition to discussions on directors' fiduciary duties, scholars have also raised concerns about the Canadian approach towards implementing corporate reform proposals. The approach has largely been to view compliance with corporate law as "private matters that should be left to the discretion of corporate actors".[155] Essentially, apart from the provisions of corporate and security statutes, there are no mandatory corporate governance requirements in Canada.[156] This approach is based on the theory that the "corporation is a nexus of contracts and that corporate law should generally defer to the wishes of the

[153] Ed Waitzer, "Feds' Corporate Law Reform May Create More Problems Than it Solves", (20 June 2019), online: *Corporate Knights* <https://www.corporateknights.com/channels/leadership/feds-corporate-law-reform-may-create-problems-solves-15610428/>.

[154] *Ibid*.

[155] Stéphane Rousseau, "Canadian Corporate Governance Reform: In Search of a Regulatory Role for Corporate Law" in Janis Sarra, ed, *Corporate Governance in Global Capital Markets* (Vancouver: UBC Press, 2014) at 3. See also Janis Sarra, "Oversight, Hindsight, and Foresight: Canadian Corporate Governance through the Lens of Global Capital Markets" in Janis Sarra, ed, *Corporate Governance in Global Capital Markets* (Vancouver: UBC Press, 2014) at 43.

[156] Sarra, *supra* note 139.

contracting parties".[157] This view is reflected in the Dickerson Committee Report which states that:

> The primary purpose of corporation laws is not regulatory. They are enabling acts, to authorize businessmen to organize and to operate their business, large or small, with the advantages of the corporate mechanism. They are drawn with a view to facilitate efficient management of business and adjustment to the needs of change.[158]

This trend continued in 1978 with the Royal Commission on Corporate Concentration (the Bryce Commission),[159] and in 1993, with the Peter Dey Committee Report titled, "Where Were the Directors?" [160] Although this report was incorporated into the TSX Company Manual, compliance was not made mandatory.[161] In 2000, the TSX in conjunction with the Canadian Venture Exchange and the Chartered Accountants of Canada also set up the Saucier Committee which issued a report titled, "Beyond Compliance: Building a Governance Culture."[162] The report revealed that there were deficiencies in the areas of risk management, board independence, training of directors and also revealed that 51 percent of listed companies did not report compliance with the TSX guidelines.[163] Canadian corporate

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[157] Stéphane Rousseau, *supra* note 139.

[158] Henry Winthrop Ballantine, *Ballantine on Corporations*, (Callaghan and Company: 1946) at 41.

[159] Bryce Broughton, Robert W Dickerson & Pierre A Nadeau, *Report of the Royal Commission on Corporate Concentration* (Ottawa: Privy Council Office, 1978).

[160] Toronto Stock Exchange Committee on Corporate Governance in Canada, *Where were the Directors? Guidelines for Improved Corporate Governance in Canada* (Toronto: Toronto Stock Exchange, 1994).

[161] Rousseau, *supra* note 139.

[162] Joint Committee on Corporate Governance, *Beyond Compliance: Building a Governance Culture,* Final Report (TSX|CNDX|CICA, 2001).

[163] Sarra, *supra* note 155.

governance scholars have therefore suggested that rather than stand aloof, regulators should seek to "strengthen enforcement mechanisms while avoiding the imposition of specific governance principles on corporations".[164]

In addition to corporate law, changes to Canadian corporate governance have occurred through the instrumentality of Securities Law. This is because provincial regulators have taken up the role left by legislatures and courts in developing Canada's corporate governance framework.[165] Securities regulation falls squarely within the ambit of provincial and territorial governments, as such, there are 10 provincial and three territorial securities regulators and no federal regulator.[166] Rather, the Canadian Securities Administrators (CSA), which is essentially an alliance involving provincial and territorial regulators, was formed. Its mandate is to "protect Canadian investors from unfair, improper, or fraudulent practices and foster fair and efficient capital markets".[167] The various provincial and territorial securities regulators monitor the different stock exchanges operating within the country, although the Toronto Stock Exchange (TSX) in Ontario is the main exchange for trading senior equities and the 9th

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[164] Rousseau, *supra* note 139.

[165] Carol Liao, "A Canadian Model of Corporate Governance" (2014) 37:2 Dal LJ 559 at 592. Liao reveals that legal practitioners have expressed concern that the role played by securities regulators in corporate governance tends to reinforce a shareholder-centric approach, given that the focus of securities regulators is the protection of capital market investors.

[166] This is because pursuant to s. 92(13) of the Constitution Act, 1867, provincial governments in Canada have jurisdiction over property and civil rights within the province. See Ramandeep K Grewal & Edward J Waitzer, "National Securities Regulation — Centralization and Its Discontents" (2012) 27:3 BFLR 529 at 529.

[167] CSA, "Canadian Securities Administrators", online: <https://www.securities-administrators.ca/aboutcsa.aspx?id=77>. See also Jeffery A Barnes, Leslie A Johnson & Joshua S Yarmus, "Corporate governance reform in Canada" (2004) 1:3 IJDG 260 at 261.

largest in the world by market capitalization.[168] The CSA has over the years released a number of national instruments such as the 51-102: Continuous Disclosure Obligations, 52-10: Audit Committees and 58-101: Disclosure of Corporate Governance Practices.

However, the complexity that comes with having 13 securities regulators rather than a federal regulator has led to concerns about the efficiency of the Canadian securities regulation system.[169] The various rules put in place by stock exchanges makes it a complicated task for companies to understand and comply with corporate governance rules, guidelines and best practices. This is even so despite the passport system which only requires market participants seeking to trade securities in other "passport jurisdictions"[170] across Canada to deal with their principal regulator and abide by a set of harmonized rules.[171] Recommendations for a national single securities regulator have been put forward by the Wise Persons Committee[172] set up by the federal government in 2003 and by the Crawford

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[168] "What are the Largest Stock Exchanges in the World?", online: *IG* <https://www.ig.com/uk/trading-strategies/what-are-the-largest-stock-exchanges-in-the-world--180905>. Other stock exchanges include the TMX Venture Exchange, the Neo Exchange Inc, Canadian Securities Exchange, the TSX Alpha Exchange, the Montreal Exchange Inc, the ICE Futures Canada amongst others.

[169] Gray, *supra* note 138 at 475. See also Anita Indira Anand & Peter Charles Klein, "Inefficiency and Path Dependency in Canada's Securities Regulatory System: Towards a Reform Agenda" (2005) 42:1 Can Community LJ 41.

[170]Pursuant to the Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation executed in 2004, all provinces and territories except Ontario constitute the passport jurisdictions. See "Improving Securities Regulation in Canada", online: *Securities Canada* <https://securitiescanada.org/>.

[171] CSA, *supra* note 167. The Ontario Securities Commission does not participate in the passport system. The International Monetary Fund (IMF) has also expressed concern about the efficiency of the provincial and territorial securities regulation system and suggests that having a federal securities regulator will be more efficient. See International Monetary Fund, "Canada: Financial System Stability Assessment-Update" (2008) 08:59 IMF Staff Country Reports 1.

[172] Department of Finance Government of Canada, "Wise Persons' Committee", (19 March 2009), online: <https://www.fin.gc.ca/wise-averties/main_-eng.asp>.

Panel Single Canadian Securities Regulator's in its report titled "Blueprint for a Canadian Securities Commission"[173] which recommended the enactment of a Canadian securities law and the establishment of a single securities regulator. The Crawford Panel particularly applauded the passport system, urged Ontario to get on board but also admonished that the passport system should only be regarded as an interim measure and not an end of itself.[174]

Also, in 2008, concerns about the securities regulatory system's efficiency was raised by the Expert Panel on Securities Regulation appointed by the federal government to look into key securities regulation issues and to draft a model securities act.[175] The panel report was released in January 2009, the crux of which recommended the establishment of a national securities regulator and a national securities act.[176] Acting on this recommendation and with support from the Canadian Securities Transition Office, in May 2010, the Minister of Finance presented a draft *Securities Act* which sought to harmonize provincial securities regulations to the Parliament.[177] Concurrent to submitting the draft securities statute to the Parliament, the Governor General in Council on the recommendation of the Ministers of Justice and

[173] *Blueprint for a Canadian Securities Commission* (Crawford Panel on a Single Canadian Securities Regulator, 2006).

[174] *Ibid*.

[175] Department of Finance Government of Canada, "Archived - Government of Canada Appoints Expert Panel to Review Securities Regulation", (21 February 2008), online: <https://www.fin.gc.ca/n08/08-018-eng.asp>.

[176] Department of Finance Government of Canada, "Archived - Minister of Finance Welcomes Report on a Single Securities Regulator for Canada", (12 January 2009), online: <https://www.fin.gc.ca/n08/09-006-eng.asp>. See Department of Finance Canada & Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets: Final Report and Recommendations* (Ottawa, Ontario: Department of Finance Canada, 2009).

[177] Department of Finance Government of Canada, "Archived - Government of Canada Moves to Protect Canadian Investors", (26 May 2010), online: <https://www.fin.gc.ca/n10/10-051-eng.asp>.

Finance, referred the draft Act to the SCC for its opinion as to whether the "proposed *Canadian Securities Act* was within the legislative authority of the Parliament of Canada".[178] The SCC heard the reference in April 2011 and delivered its decision in December 2011. The SCC had arrived at the conclusion that "the Act, viewed in its entirety, cannot be classified as falling within the general trade and commerce power" and was therefore unconstitutional.[179] According to the Court:

> …the Act is chiefly concerned with the day-to-day regulation of all aspects of contracts for securities within the provinces, including all aspects of public protection and professional competences. These matters remain essentially provincial concerns falling within property and civil rights in the provinces and are not related to trade as a whole.
>
> … While the economic importance and pervasive character of the securities market may, in principle, support federal intervention that is qualitatively different from what the provinces can do, they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the proposed federal legislation. A cooperative approach that permits a scheme recognizing the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available and is supported by Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities.[180]

Following this, the federal government indicated that it will not go ahead with the proposed Act, but there has been ongoing collaboration between the federal government and some

[178] *Ibid*.

[179] See *Reference Re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

[180] *Ibid.*

provincial governments towards fashioning a workable solution.[181] This subsequently led to an agreement between the federal government and some provinces to create a Cooperative Capital Market Regulatory System (CMRA) in 2014.[182] By the agreement, the participating jurisdictions agreed that the Cooperative system will *inter alia* include: [183]

1. Uniform provincial and territorial laws addressing all matters of provincial and territorial jurisdiction in the regulation of capital markets (the *Capital Markets Act*).[184]

2. Complementary federal legislation applying throughout Canada that addresses criminal matters and matters relating to systemic risk in national capital markets and national data collection (the *Capital Markets Stability Act*).[185]

3. A single operationally independent capital markets regulatory authority (the CMRA), with an expert board of directors (the Board of Directors), a regulatory division and an adjudicative tribunal (the Tribunal), that administers the *Capital Markets Act* and the *Capital Markets Stability Act*.

4. A council comprising the Ministers responsible for capital markets regulation in each provincial and territorial Participating Jurisdiction

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[181] Financial Post, "National Securities Regulator Plan Rejected by Supreme Court of Canada", *Financial Post* (22 December 2011), online: <https://business.financialpost.com/legal-post/supreme-court-rejects-national-securities-regulator-plan>.

[182] Department of Finance Government of Canada, "Archived - British Columbia, Ontario, Saskatchewan, New Brunswick and Canada Strengthen their Commitment to the Cooperative Capital Markets Regulatory System", (8 September 2014), online: <https://www.fin.gc.ca/n14/14-119-eng.asp>. These provinces include British Columbia, Ontario, New Brunswick, Saskatchewan, Prince Edward Island and the Yukon territory.

[183] "Memorandum of Agreement Regarding the Cooperative Capital Markets System", online: <http://ccmr-ocrmc.ca/>.

[184] "Capital Markets Act: A Revised Consultation Draft" (August, 2015): <http://ccmr-ocrmc.ca/wp-content/uploads/cma-commentary-en.pdf>.

[185] "Capital Markets Stability Act — Draft for Consultation" (January, 2016): <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf>.

and the Minister of Finance of Canada (the Council of Ministers) that oversees the CMRA.

In reaction to this, although not being a party to the agreement, the Quebec government referred the following questions to the Quebec Court of Appeal:

1. Does the Constitution of Canada authorize the implementation of pan-Canadian securities regulation under the authority of a single regulator, according to the model established by the most recent publication of the Memorandum of Agreement regarding the Cooperative Capital Markets Regulatory System?

2. Does the most recent version of the draft of the federal *Capital Markets Stability Act* exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act*, 1867? [186]

The Quebec Court of Appeal handed down its decision in 2017 and in response to the first question, held that the Canadian Constitution does not allow the cooperative regulatory model. Concerning the second question, the Court stated that "the most recent version of the draft federal Act entitled "*Capital Markets Stability Act*" does not exceed the jurisdiction of the Parliament of Canada under s. 91 (2) of the *Constitution Act*, 1867 unless with regard to articles 76 to 79 on the role and powers of the Council of Ministers, which articles make the proposed law unconstitutional as a whole if not withdrawn."

Following this decision, three appeals were lodged at the SCC, of which two were allowed and the other dismissed.[187] In November 2018, the Court answered question one in the

[186] Reference re Canada-wide securities regulation, 2017 QCCA 756 (CanLII).

[187] The appeals were lodged by the Attorney General of Canada in respect of both question, the Attorney General of Quebec with respect to the second question and the Attorney General of British Columbia with respect to the first question. The appeal brought by the Attorney General of Quebec was dismissed. See

affirmative and question two in the negative. In so doing, the Court upheld the constitutionality of the cooperative capital market regulatory system. The Court based its decision on the principle of parliamentary sovereignty and the reasoning that the cooperative regulatory system will not "result in a transfer or abdication of participating province's primary legislative authority". The proposed act was also declared *intra vires* as it was in consonance with Parliament's trade and commerce powers pursuant to s. 91(2) of the *Constitution Act*. The Court similarly upheld the constitutionality of delegating administrative powers to the Council of Ministers as it was not incompatible with the principle of federalism. There have been mixed reactions to the Supreme Court's decision, and the efficacy of the proposed cooperative system, but on the whole, it is clear that the success of the cooperative regulatory system depends on the collaboration of all provinces and territories. Currently, only six provinces and one territory (out of 10 provinces and three territories) have acceded to the Memorandum of Agreement.[188] In the words of Ritchie et al, "…now that the constitutional uncertainty has been removed, market participants and investors who operate within and are protected by the capital markets regulatory system, will be watching to see if there is sufficient political will among the participating jurisdictions to see this initiative to fruition."[189]

Attorney General of Canada, et al. v. Attorney General of Quebec Reference re Pan Canadian Securities Regulation, 2018 SCC 48.

[188] Nova Scotia agreed to join the Cooperative Capital Markets Regulatory System in April 2019. See "Nova Scotia Agrees to Join the Cooperative Capital Markets Regulatory System", (10 April 2019), online: *Cooperative Capital Market Regulatory System* <http://ccmr-ocrmc.ca/nova-scotia-agrees-to-join-the-cooperative-capital-markets-regulatory-system/>. See also Saad Gaya, "Pan-Canadian National Securities Regulation", (14 November 2018), online: *TheCourt.ca* <http://www.thecourt.ca/reference-re-pan-canadian-securities-regulation-a-unified-approach-to-securities-regulation/> and Alan Monk, Jake Schroeder & Katie Gordon, "SCC Paves the Way for National Securities Regulator, but What Will It Look Like?" (2019) 34:2 BFLR 253 at 263.

[189] Lawrence E Ritchie et al, "Reference re Pan-Canadian Securities Regulation", online: *Osler, Hoskin & Harcourt* <https://www.osler.com/en/blogs/risk/november-2018/reference-re-pan-canadian-securities-regulation >.

Daly has however expressed optimism that the cooperative system will "produce beneficial systemic effects". [190]

Overall, from the above discussion on the evolution of corporate governance in Canada to date, we see that the Canadian focus has been mainly geared towards providing an answer to the seemingly elusive question of, in whose interest should directors act? We also see that the aim of Canadian corporate law reform is not to regulate businesses, but to serve as a guide and that the lacuna created by this approach has led to the significant role played by securities regulators in establishing good corporate governance practices. The lack of a single regulator or a federal securities act also adds to the challenges faced as the current passport system is inefficient.

3.2 The Canadian Corporate Governance Model and Scorecard

The Canadian model of corporate governance has usually been deemed to be that of the US. This is perhaps a result of the fact that Canadian legislators drew inspiration from US laws when drafting legislations.[191] It has also been described as a fusion of the British common law and the United States model.[192] However, Hutchinson through an analysis of Canadian corporate cases, reveals that Canadian corporate law cases are predominantly Canadian precedents even though judges do rely on English law when faced with novel issues that are

[190] Paul Daly, "Parliamentary Sovereignty and Intergovernmental Agreements: Reference Re Pan-Canadian Securities Regulation, 2018 SCC 48" (2019) 32:1 Can J Adm Law Pract 57 at 62.

[191] Thomas Mulvey, Blue Sky Law, 36 Can L Times 37, 37 (1916).

[192] Andrew MacDougall, Robert Yalden & John Valley, "Canada" in Willem J L Calkoen, ed, *The Corporate Governance Review*, 8th ed (Law Business Research Limited, 2018).

not addressed under Canadian law.[193] He further points out that judges have not relied on US law in deciding cases and that "Canadian corporate law has formed its own distinct identity".[194]

Stewart however points out that the current state of securities regulation in Canada where provincial and territorial regulators establish differing securities regulations has given "rise to a political landscape ripe for regulatory arbitrage".[195] Stewart adds that, unlike the US, "convergence towards a single regulatory model" in Canada seems unlikely because of the "regulatory lock-in" that has been created with each province having its distinct regulatory framework in order to provide a conducive environment for resources and markets within the province. This led Stewart to suggest that the Canadian corporate governance model is more aligned with the Continental European approach than the American model. The point that the Canadian model differs from that of the US has also been put forward by Liao who through a survey of 32 leading legal practitioners in Canada, revealed key differences between the US and Canadian model.[196] Findings from this survey revealed that as opposed to the shareholder-centric approach which forms the basis of the Anglo-American model, Canadian corporate governance has moved on to what practitioners termed, "a broader stakeholder model"[197], and what Ben-Ishai categorizes as the team production theory of corporate law.[198]

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[193] Camden Hutchison, "The Patriation of Canadian Corporate Law" (2019) UTLJ, Forthcoming. Available at SSRN:<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389593>.

[194] *Ibid.*

[195] Stewart, *supra* note 136.

[196] Liao, *supra* note 165 at 561.

[197] *Ibid* at 597.

[198] Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2015) 44:2 Alta L Rev 299. The team production theory of corporate governance views the corporation as a "nexus of team-

The team production theory comes to play in the Canadian corporate governance framework through the SCC's decision in both *Peoples* [199] and *BCE*[200] where the Court held that the board of directors owe their fiduciary duties to the corporation itself and not to any particular shareholder or stakeholder. Ben-Ishai has also argued based on the team production theory that Canada's corporate law regime emphasizes director primacy.[201] Ben-Ishai asserts that considering that "Canadian corporate law does not grant shareholders any power to initiate action or to control the board", directors are not agents of shareholders. Rather, the Canadian corporate law framework has adopted the team production theory by designating directors as "mediating hierarchs" who are not required to be loyal to either shareholder or stakeholders.[202] Ben-Ishai however expresses concern about directors' ability to protect minority shareholder or stakeholder interests given that directors are often drawn from a long

specific assets invested by shareholders, managers, employees, and others who hope to profit from team production".[198] See Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85:2 Va L Rev 248 for a detailed exposition on this theory. Essentially, this theory adopts a "mediating hierarch" approach which requires team members to give up important rights to the corporation. Here, the corporation is viewed not just as a bundle of assets owned by shareholders, but as a team of people who come together to work toward a mutual gain. As such, corporate assets belong to the company itself and not the shareholders. Within this hierarchy, there is also an internal hierarchy whose duty is to allocate resources amongst team members and to mediate disputes. The board of directors sits at the top of this hierarchy and exercises absolute authority over the company's assets. As such, under a mediating hierarch model, the board does not maximize shareholder value rather, it resolves competing claims that various stakeholders might have to the firm's production output. See also See See also Alan J Meese, "The Team Production Theory of Corporate Law: A Critical Assessment" (2002) 43:4 Wm & Mary L Rev 1629 at 1632.

[199] *Peoples*, *supra* note 57.

[200] *BCE*, *supra* note 58.

[201] Ben-Ishai, *supra* note 198 at 302.

[202] *Ibid* at 306. Ben-Ishai bases this argument on the decision of the Supreme Court of Canada in *Peoples*, which though a precursor to the BCE case, was the first time the Supreme Court of Canada held that directors are to act in the best interest of the corporation and not in the interest of a particular corporate group. The oppression remedy stipulated in s.122 of the CBCA, the business judgment rule and limits placed on shareholder voting amongst other things, are also presented as the basis for the argument that in Canada, directors act as "mediating hierarchs".

list of company stakeholders. She cautiously suggests that director education and training may be a way to equip directors for this role.

However, due to the uncertainty and confusion that revolves around the Court's interpretation of the best interest provision as well the consequent statutory codification, there is generally some level of uncertainty about the exact model operating in the Canadian corporate sphere. Although it is difficult to pinpoint the Canadian corporate governance model at this time, what is certain is that there exists a Canadian model that is distinct from the US model. For one, the absence of a federal securities regulator is a significant distinction. Hopefully, with more cohesion between regulatory and judicial authorities, the Canadian corporate governance framework will take shape in due time.

Results-wise, according to the SAHA World Corporate Governance Index 2018, Canada falls within group one of the ratings with a grade above 80.[203] The rating states that "the first group of countries have fully deserved to take part at the top of the index with their corporate governance infrastructures as well as their implementations."[204] This therefore indicates that the general perception is that Canada as well as other countries listed in group one not only have established efficient infrastructures but have also put in place mechanisms for implementation. Similarly, a look at Transparency International's Corruption Perception Index 2018 reveals that Canada ranks ninth ahead of the United Kingdom and the United States.

[203] SAHA, *supra* note 55.

[204] *Ibid*.

Also, the World Bank's 2018 Ease of Doing Business Index[205] places Canada in 22nd position out of 190 countries. Specifically, Canada is ranked 3rd in terms of starting a business and 11th for protection of minority investors. Overall, these indices show that although there are number of issues that are yet to be resolved in the Canadian corporate governance sphere, these issues do not impact the perceived efficiency of the current system.

[205] World Bank, *supra* note 132.

Chapter 4: Comparative Analysis of Corporate Governance Frameworks in Nigeria and Canada

4.1 Introduction

The previous chapter detailed the evolution of corporate governance frameworks in Nigeria and Canada and analyzed their respective governance models and scorecard. In this chapter, a comparative analysis detailing each country's approach to specific issues raised in the 2015 OECD principles of corporate governance will be undertaken. Essentially, the aim of this comparative study is to identify challenges within the Nigerian corporate governance framework and to determine if it is a matter of inadequacy of laws or one of enforcement. The end point will primarily involve highlighting key recommendations derived from the comparative analysis that can be adapted to enhance the Nigerian corporate governance framework.

4.2 Comparative Analysis: Nigeria versus Canada

Although both Nigeria and Canada operate a federal system of government, provincial governments in Canada have jurisdiction over property and civil rights within the province.[206] As such, companies can either be incorporated under the CBCA[207] or under corporate laws of the various provinces. For example, the law applicable to companies operating in British Columbia is the *British Columbia Business Corporations Act*.[208] In Nigeria, the federal government has exclusive powers over matters relating to the incorporation, regulation and winding up of bodies corporate (other than co-operative societies, local government councils

[206] This is pursuant to the *Constitution Act*, 1867, s. 92(13).

[207] RSC 1985, c. C-44.

[208] SBC 2002, c 57.

and bodies corporate established directly by any Law enacted by a House of Assembly of a State).[209] This therefore means that the incorporation, operation and regulation of companies is the exclusive preserve of the federal government and all companies must be incorporated and run in accordance with the extant federal corporate law—the CAMA.[210]

With respect to securities regulation, as discussed in the preceding chapter, there is no federal securities law or a federal securities regulator in Canada, rather provincial regulators monitor the capital market. In addition, corporate governance rules are set out in the National Policy 58-201[211] and public companies are required to disclose their corporate governance practices in line with National Instrument 58-101.[212] Companies listed on the stock exchange must also comply with relevant Stock Exchange Rules such as the Toronto Stock Exchange (TSX) Manual on Corporate Governance.[213] In the Nigerian context, the SEC is the federal regulator responsible for overseeing the capital market, and companies listed on the Nigerian Stock Exchange (NSE) are required to abide by the provisions of the *Investment and Securities Act* 2007 as well as the SEC Consolidated Rules and Regulations 2013.[214]

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[209] Part 1, Second Schedule of the 1999 Constitution of the Federal Republic of Nigeria (As Amended).

[210] CAP C20 LFN 2004.

[211] "58-201 Corporate Governance Guidelines", online: *British Columbia Securities Regulation* < https://www.bcsc.bc.ca/Securities_Law/Policies/Policy5/Group/?group=58%20201>.

[212] "58-101 Disclosure of Corporate Governance Practices", online: *British Columbia Securities Commission* <https://www.bcsc.bc.ca/Securities_Law/Policies/Policy5/Group/?group=58%20101>.

[213] "Toronto Stock Exchange - Company Manual", online: *Toronto Stock Exchange* < http://tmx.complinet.com/en/tsx_manual.html>.

[214] Further amendments have been made to the SEC Consolidated Rules since 2013, the latest being rules and amendments made on October 12, 2018. See "Rules & Codes", online: *The Securities and Exchange Commission, Nigeria* <http://sec.gov.ng/regulation/rules-codes/>.

On the subject of corporate governance codes, as explained in the previous chapter, over the years, various regulatory agencies in Nigeria have issued codes to guide corporate behavior in their respective industries.[215] In addition to sectoral codes, in January 2019, the FRCN issued the NCCG 2018. Unlike Nigeria, there is no provincial or national code of corporate governance prescribing corporate governance best practices in Canada.[216] Rather, best practices are recommended and driven by institutional shareholder groups such as the Canadian Coalition for Good Governance (CCGG),[217] Institutional Shareholder Services (ISS), the Institute of Corporate Directors, etc.[218] An in-depth analysis of the necessity or otherwise of corporate governance codes will be discussed later in this chapter.

From the preceding chapters, I also deduced the varying areas of focus in the two countries under consideration. On one hand, I observed that corporate governance in Nigeria is predominantly shaped by sectoral regulators, securities regulators, and the FRCN. Also, Nigeria's approach has been to issue corporate governance codes to prescribe best practices for companies and to put in place laws that enhance the ease of doing business in Nigeria. The resulting impact of multiple codes is the absence of a defined corporate governance approach. On the other hand, the Canadian focus has been to attempt to provide direction

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[215] This includes the National Communications Commission Code of Corporate Governance, PENCOM Code of Corporate Governance, NAICOM Code of Corporate Governance, the Code of Corporate Governance for Banks and Discount Houses in Nigeria and the SEC Code of Corporate Governance for Public Companies.

[216] Rita C Andreone & Chat Ortved, "Corporate Governance and Directors' Duties in Canada", (1 May 2018), online: *Thomson Reuters Practical law* <https://uk.practicallaw.thomsonreuters.com/2-502-2944?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1>.

[217] The CCGG describes itself as the pre-eminent corporate governance organization in Canada uniquely positioned to effect change as the voice of institutional shareholders that invest in Canadian public equities.

[218] MacDougall, Yalden & Valley, *supra* note 192.

on directors' fiduciary duties and corporate governance is shaped majorly by securities regulators and the courts.

4.3 Germane Corporate Governance Issues

This section analyzes how the Nigerian and Canadian corporate governance frameworks have addressed contemporary corporate governance issues that have been raised by the OECD.[219]

4.3.1 Corporate Governance and the Board[220]

The board of directors play an important role in corporate governance because they constitute the directing mind of the company.[221] In the Nigerian context, the NCCG 2018 recognizes the importance of the board to corporate governance. Principle 1 states that "a successful company is headed by an effective Board which is responsible for providing entrepreneurial and strategic leadership as well as promoting ethical culture and responsible corporate citizenship." The Code goes on to recommend that boards should have a board charter[222] setting out its responsibilities which could contain the following:

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[219] The corporate governance issues discussed here arise from the G20/OECD Principles of Corporate Governance 2015.

[220] Principle VI of the OECD Guidelines recognizes the importance the board plays in monitoring management and the importance of board accountability to the company and the shareholders.

[221] Ettore Croci, "The Board of Directors" in *The Board of Directors: Corporate Governance and the Effect on Firm Value*, 1st edition ed (New York, NY: Springer Nature Switzerland AG, 2018). Although there has been substantial debate in corporate governance literature about the effect of the board on firm value.

[222] Board charters are separate from a company's constating documents or memorandum and articles of association. A board charter is a specific document which guides the operation of the board.

a. guidelines ensuring that the board acts in the best interest of the company at all times,
b. establishing and maintaining the company's values and standards,
c. defining a specific schedule of matters reserved for board decision and matters that can be delegated to board committees,
d. providing guidance on information technology governance,
e. overseeing the internal audit function, ensuring establishment and implementation of a succession plan, etc.

Board charters are regarded as important governance documents that help spell out the board's mandate, vision, values, functions and serve as a point of reference for resolving disagreements.[223] Hitherto, the only code that required companies to have a board charter and which also provided suggested content for the board charter, was the Code of Corporate Governance for the Telecommunications Industry. By recommending that companies create a board charter in order to effectively apply Principle 1, the NCCG 2018 recognizes the importance of board charters to the proper governance of companies. The NCCG 2018 however fails to point out that the board charter should not be treated as a secret document but should be made available to shareholders and stakeholders alike. In the Canadian context, the public nature of the board mandate was expressly stated in Item two of the NI58-101 Disclosure of Corporate Governance Practices which requires companies to "disclose the text of the board's written mandate" and if the board does not have a written mandate,

[223] "The Board Charter: A Legacy from Today's Board to Future Boards", online: *Effective Governance* < http://www.effectivegovernance.com.au/wp-content/uploads/2016/08/eG-Board-Charter-Fact-Sheet_v0.3_18Aug16.pdf>. See also Gavin J Nicholson & Geoffrey C Kiel, "Breakthrough Board Performance: How to Harness Your Board's Intellectual Capital [1]" (2004) 4:1 Corporate Governance 5 at 13 where Nicholson and Kiel discuss the corporate governance charter model and how it can be utilized to achieve an effective board.

the company is required to “describe how the board delineates its roles and responsibilities”.[224]

In addition, both Nigeria and Canada recognize the importance of the board’s role in fostering good corporate governance practices. In Canada, the NP58-201 Corporate Governance Guidelines requires boards to “adopt a written mandate which explicitly acknowledges the board’s responsibility for the stewardship of the company including responsibility for adopting a strategic planning process, success planning process, communication policy and the issuer’s internal control systems, etc”.[225] The board mandate prescribed by the NP58-201 is therefore similar to the board charter prescribed by the NCCG 2018 and serves the same purpose. However, a particular point of deviation is that the NP58-201 recognizes that one of the board’s responsibilities is to satisfy itself as to the integrity of the Chief Executive Officer (the CEO) and other executive officers (to the extent possible) and to also ensure that the CEO and other executive officers create a culture of integrity throughout the organization. This is a key provision as it ensures that the board recognizes its duty to promote a culture of integrity by first and foremost satisfying itself that the CEO appointed to run the company is a person of integrity and is trustworthy. Given the Nigerian climate and the pervasive nature of corruption in different companies, a provision of this nature will work well to instill a sense of responsibility in the board of directors, thereby ensuring that they appoint trustworthy persons of integrity to run and manage the day to day affairs of the company.

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[224] NI58-101 Disclosure of Corporate Governance Practices.

[225] Justin Dharamdia, *Directors’ Responsibilities in Canada*, 6th ed (Osler, Hoskin & Harcourt llp and Institute of Corporate Directors, 2014).

Another interesting point is that the NP58-201 requires the written board mandate to spell out the "expectations and responsibilities of directors, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials."[226] This provision is material in that from the onset, it sets out the duties and responsibilities of directors and also spells out procedural issues relating to attendance at board meetings and the effect of non-attendance as well as expectations in respect of review of materials ahead of meetings. This key provision was not contemplated in the recommended practices proposed by the NCCG 2018 in respect of the board charter and would enrich the NCCG if added.

4.3.2 Role of the Chairman[227]

The chairman of the board plays a crucial role in the corporation. The primary duty of the chairman is to ensure that the company effectively sets and implements agreed strategies and decisions.[228] In the Nigerian context, principle 3 of the NCCG 2018 states that "the chairman is responsible for providing overall leadership of the company and the board, and eliciting the constructive participation of all directors to facilitate effective direction of the board."[229]. It further states that the board chairman should be a Non-Executive Director and not be involved in the day-to-day operations of the company. One notable practice recommended by NCCG 2018 is that the CEO or Managing Director (MD) or an Executive

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[226] NP58-201.

[227] The role of the chairman is also discussed in Principle VI of the OECD Guidelines.

[228] Institute of Directors, "The Role of the Chairman", (18 October 2018), online: < https://www.iod.com/news/news/articles/The-role-of-the-chairman>.

[229] *NCCG 2018.*

Director (ED)[230] "should not go on to be the chairman of the same company. If in very exceptional circumstances the board decides that a former MD/CEO or an ED should become chairman, a cool-off period of three years should be adopted."[231] This recommendation is crucial as it would help curb the practice of MDs/CEOs being groomed to take up the role of chairman, which often impedes board independence. However, the intended impact of this recommendation has been hindered by the proviso which empowers the board to appoint an MD/CEO as chairman in exceptional circumstances, without providing a basis for the exercise of this discretion by the board. This effectively confers the board with the absolute discretion to refuse to follow this recommended practice on the basis of what they may determine to fall within "exceptional circumstances."

Similarly, Canadian boards are not keen on appointing CEOs as board chairmen. The general practice for public corporations is to appoint an independent director as chairman as recommended by the NP58-201,[232]and "where this is not appropriate, an independent director will be appointed as lead director".[233] Public companies are also required to make disclosures concerning the independence of the board chairman or otherwise.[234]

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[230] An executive director is one who is actively involved in the company's daily business operations.

[231] *NCCG* 2018*, supra* note 229.

[232] S. 3.2 NP58-201 Corporate Governance Guidelines; Dharamdia, *supra* note 225.

[233] NP58-201.

[234] Item 1f Form 58-101F1 of the NI58-101 Disclosure of Corporate Governance Practices requires public companies to disclose whether or not the chair of the board is an independent director. If the board has a chair or lead director who is an independent director, the company must disclose the identity of the independent chair or lead director and describe his or her role and responsibilities. If the board has neither a chair that is independent nor a lead director that is independent, the company must describe what the board does to provide leadership for its independent directors.

There are two major distinctions between the Canadian and Nigerian prescriptions on the role of the chairman. The first is that while the NCCG 2018 simply requires that the chairman be a Non-Executive Director (NED), the NP58-201 requires that the chairman be independent. The independence of the chairman is germane and should be recognized as a key component of board governance.[235] This is because as the general overseer of the company's affairs, the chairman's actions can either make or mar a company's corporate governance structures, and ensuring that the chairman is free of conflict will lead to the former. It would therefore be useful for the NCCG 2018 to require that the chairman be an Independent Non-Executive Director (INED) rather than simply a NED. Essentially, an INED is an NED who is "free from such relationships or circumstances with the company, its management, or substantial shareholders that may, or appear to, impair his ability to make independent judgment".[236] The key is to put in place every possible measure to guarantee independence of the board and it starts by guaranteeing the independence of the chairman.[237] The second distinction is that in Canada, there is no explicit rule that prevents the MD from taking on the role of chairman. This effectively means that the Canadian focus is for the chairman to be independent rather than an executive or non-executive director.

[235] Jerilyn W Coles & William S Hesterly, "Independence of the Chairman and Board Composition: Firm Choices and Shareholder Value" (2000) 26:2 JM 195 at 211. See also *The Role of the Chairman as well as the Value of a Non-Executive Chairman* (Johannesburg: Deloitte Touche Tohmatsu Limited, 2014) at 2.

[236] *NCCG 2018*, Principle 7.1.

[237] Millstein Center for Corporate Governance and Performance, & Yale School of Management, *Chairing the Board: The Case for Independent Leadership in Corporate North America."*, Policy Briefing 4 (2009).

4.3.3 Board Structure and Composition[238]

Due to the important role played by the board in directing the company's affairs, it is important that the board be composed of persons who are willing and able to meet up with the responsibilities that come with the position of director.[239] It is also useful for the company to have a diverse board comprising persons from various works of life who can contribute their quota to the achievement of the company's strategic objectives.[240]

The NCCG 2018 recognizes the importance of board structure and composition in Principle 2 which states that "the effective discharge of the responsibilities of the board and its committees is assured by an appropriate balance of skills and diversity (including experience and gender) without compromising competence, independence and integrity". The NCCG 2018 further goes on to recommend that the board "should be of a sufficient size to effectively undertake and fulfil its business; to oversee, monitor, direct and control the company's activities and be relative to the scale and complexity of its operations."[241] The Code also suggests that the following factors be taken into consideration in deciding on board composition:

a. appropriate mix of knowledge, skills and experience, including the business, commercial and industry experience needed to govern the company;

[238] The issue of board structures is discussed in Principle VI of the OECD Guidelines.

[239] Muqaddas Khalid et al, "Board Composition and Size, Firm Ownership and Performance" (2019) 37:4 HSM 433.

[240] Stephanie J Creary et al, "When and Why Diversity Improves Your Board's Performance", *Harvard Business Review* (27 March 2019), online: <https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance>.

[241] *NCCG 2018*, Principle 2.1.

b. appropriate mix of Executive, Non-Executive and Independent Non-Executive members such that majority of the board are Non-Executive Directors. It is desirable that most of the Non-Executive Directors are independent;

c. need for a sufficient number of members that qualify to serve on the committees of the board;

d. need to secure quorum at meetings; and

e. diversity targets relating to the composition of the board.

It also recommends placing restrictions on the appointment of concurrent directors. This would require prospective directors to disclose their appointment on other company boards. In addition, the Code recommends that the chairman should not serve as chairman or member of any board committee and similarly, the MD/CEO or an ED should not serve as chairman of any board committee. The Code also recommends that the board have a majority of INEDs.

In Canada, the CBCA requires public companies to have a minimum of three directors, of which two must not be officers or employees of the company or any of its affiliates.[242] S. 3.1 of the NP58-201 specifically states that the board should have a majority of independent directors. S. 3.12 particularly states that board should consider the skills and competences the board possesses as a whole as well as the competences and skills of each existing director prior to appointing new directors. Item 1 of the Form 58-101F1 also requires companies to make disclosures concerning the independence or otherwise of members of the board. Disclosures as to whether or not a majority of directors are independent are also

[242] *CBCA*, s. 102(2).

required. If majority of directors are not independent, the company is required to "describe what the board of directors does to facilitate its exercise of independent judgement in carrying out its responsibilities."[243]

It therefore appears that both countries adopt the position that majority of board members should be independent directors and that disclosures concerning the independence or otherwise of the board be provided.

4.3.4 Board Diversity[244]

As previously stated, the board of directors play a crucial role in piloting a company's affairs. This explains why corporate governance specialists advocate for diversity on the board—bringing together persons with varying skillsets and perspectives, who altogether help the company make sound business decisions, leading to lower volatility and better performance.[245] Some authors have expressed this in terms of social (race, nationality, gender, age) and professional diversity, all of which enhances a rich diversity of perspectives and avoids groupthink.[246]

[243] Form 58-101F1. Companies are also required to disclose If a director is presently a director of any other issuer that is a reporting issuer (or the equivalent) in a jurisdiction or a foreign jurisdiction, and to identify both the director and the other issuer.

[244] Board diversity is discussed in Principle VI of the OECD Guidelines.

[245] Anthony Garcia, "Director Skills: Diversity of Thought and Experience in the Boardroom", (10 October 2018), online: *Harvard Law School Forum on Corporate Governance and Financial Regulation* < https://corpgov.law.harvard.edu/2018/10/10/director-skills-diversity-of-thought-and-experience-in-the-boardroom/>.

[246] Creary et al, *supra* note 240.

In Nigeria, Principle 2 of the NCCG 2018 mentioned previously, seeks to ensure that companies pay attention to issues relating to board diversity. The Code recommends the following practices for the composition of a well-rounded board:

a. The board should be of a sufficient size to effectively undertake and fulfil its business; to oversee, monitor, direct and control the company's activities and be relative to the scale and complexity of its operations.

b. The board should promote diversity in its membership across a variety of attributes relevant for promoting better decision-making and effective governance. These attributes include field of knowledge, skills and experience as well as age, culture and gender. The board should have a policy to govern this process and establish measurable objectives for achieving diversity in gender and other areas.

Given that the NCCG 2018 is principles-based rather than rules-based, the Code's provision relating to the number of directors to be appointed defers from other sectoral Codes. This is because many of such sectoral Codes not only require the appointment of a certain number of persons as directors, but also specify the ratio of executive directors to non-executive directors.[247] The new practice suggested by the NCCG 2018 gives companies the freedom to determine the number of directors to be appointed, based on the diverse range of skills needed on the board for the board to function effectively. The NCCG also takes a step further than the sectoral codes in distinguishing between a NED and an INED. The exact distinction between the two positions are explained in Principles 6 and 7 of the NCCG 2018 respectively.

[247] By way of illustration, the SEC Code of Corporate Governance for Public Companies stipulates that a board should not consist of less than 5 members, the NAICOM Code of Corporate Governance prescribes that a board have between 7 – 15 members with a 60:40 ratio for non-executive and executive directors. The Companies and Allied Matters Act also provides for the appointment of two directors at the minimum.

One crucial aspect of board diversity that is often talked about is female representation on corporate boards.[248] This is because despite the emancipation of women and the ratification of conventions such as the *Convention on the Elimination of All Forms of Discrimination Against Women,*[249] the number of women appointed to corporate boards remains rather dismal in many parts of the world.[250] An analytical study of over 7,000 companies in 60 countries shows that women hold only 15% of all board seats globally.[251] Although some measure of success has been attained with over three-quarters of boards globally having at least one woman,[252] much still needs to be done to achieve true diversity in the board room. For one, gender diversity is progressing ever so slowly and even though women are appointed to boards, they often have short tenures and are unlikely to hold powerful positions such as the position of chairman.[253] The issue of gender diversity in Nigeria requires more attention as statistics reveal that there are relatively few gender balanced boards in Nigeria.[254] A recent study carried out on the link between corporate board diversity and deposit money banks in Nigeria revealed that female directors account for just 17.5% of the total directors serving on

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[248] Carol Liao, "Power and the Gender Imperative in Corporate Law" in Beate Sjåfjell & Irene Lynch Fannon, eds, *Creating Corporate Sustainability: Gender as an Agent for Change* (Cambridge: Cambridge University Press, 2018) 282. See also Idoya Ferrero-Ferrero, M Ángeles Fernández-Izquierdo & M Jesús Muñoz-Torres, "Gender Diversity on Corporate Boards" in Beate Sjåfjell & Irene Lynch Fannon, eds, *Creating Corporate Sustainability: Gender as an Agent for Change* (Cambridge: Cambridge University Press, 2018) 138.

[249] "Convention on the Elimination of All Forms of Discrimination against Women", online: < https://www.un.org/womenwatch/daw/cedaw/>.

[250] Vivian Hunt et al, *Delivering through Diversity* (McKinsey&Company, 2018).

[251] Deloitte, *Women in the Boardroom: A Global Perspective (Fifth Edition)* (2017).

[252] Meggin Thwing Eastman, *Women on Boards: Progress Report 2017* (MSCI, December 2017) 4.

[253] Cynthia Soledad et al, *Global Board Diversity Tracker 2018: Who's Really on Board?* (Egon Zehnder).

[254] See *Women on Boards in Nigeria* (Washington, D.C: International Finance Corporation, 2019).

the boards of deposit money banks in Nigeria and male directors account for 82.5%.[255] The low number of women on boards has been attributed to the patriarchal culture that permeates the Nigerian society which prescribes that the primary role of women is to manage the home while men take up the role of bread winner.[256]

Diversity is equally a prominent issue in the Canadian corporate sphere.[257] *Comply or explain* diversity requirements have been required for issuers listed on the Toronto Stock Exchange since December 31, 2014.[258] Institutional investors have also been active in pushing for the entrenchment of the diversity principle on boards and regularly push against the appointment of all-male boards.[259] This has consequently led to a slight increase in the percentage of women who seat on corporate boards comparative to men. This development was identified in the Osler Corporate Governance Group's report on *Diversity Disclosure Practices 2018: Women in Leadership Roles at TSX Listed Companies report*.[260] According to the report, women hold only 16.4% of all board seats of companies that make disclosures and 24% of S&P/TSX 60. The report however also reveals that 68.8% of companies now have at least

[255] Ogboi Charles, Victor Opemipo Aderimiki & Enilolobo Oluwafemi Sunday, "Corporate Board Diversity and Performance of Deposit Money Banks in Nigeria" (2018) 8:1 Int'l J Human & Soc Sci 112 at 116.

[256] Enase Okonedo, in Franklin N Ngwu et al, eds, *Enhancing Board Effectiveness: Institutional, Regulatory, and Functional Perspectives for Developing and Emerging Markets*, 1st ed (Routledge, 2019) at 330.

[257] Amy Minsky, "Gender Quotas: Who Else Has Them and Does Canada Need Them?", (28 October 2016), online: *Global News* <https://globalnews.ca/news/3031051/gender-quotas-canada-who-else-has-them-does-we-need-them/>.

[258] MacDougall, Yalden & Valley, *supra* note 192.; National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101).

[259] *ARC Annual Report Card 2018* (Canadian Board Diversity Council, 2018).

[260] Andrew MacDougall et al, *2018 Diversity Disclosure Practices* (Osler, Hoskin & Harcourt llp, 2018). See also Canadian Securities Administrator, *Roundtable Discussion - Third Review of Women on Boards and in Executive Officer Positions* (Toronto, 2017).

one female director and 33.7% have at least two female directors on their boards. The report further reveals that 53.6% of companies have adopted a written board diversity policy.

In fact, institutional shareholders have also played an active role in promoting diversity on boards by revising proxy voting guidelines to withhold their vote if the company does not have a diversity policy in place or if there are no female directors on the board.[261] In addition, amendments to National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101) in 2014, requiring TSX listed companies to disclose steps and policies put in place to increase female representation on boards has also contributed to the gradual increase of women on boards as well as in senior management positions. However, studies conducted by the Canadian Board Diversity Council reveal that there hasn't been steady progress on the increase of board diversity. In the C-Suite of FP500 companies, there was a slight decrease in female representation between 2017 and 2018 at 19.6% to 19.5% respectively while 15% of such companies have no female representation.[262]

Beyond the inclusion of women on boards, further steps have been taken to encourage more inclusive boards. This is particularly in light of amendments to the CBCA made on May 1, 2018, which expands the scope of board diversity to go beyond gender diversity. According to the Act, public corporations are required to annually disclose the items prescribed by policy items 10 to 15 of the National Instrument 58-101 *a*s it relates to "designated groups". The term, "designated groups" has the same meaning as that used in the *Employment Equity*

[261] MacDougall, Yalden & Valley, *supra* note 192.

[262] *ARC*, *supra* note 259. In 2016, Navdeep Bains, the Canadian Minister of Innovation, Science and Economic Development, declared that the government will consider imposing gender targets in a few years if they do not see the progress they are looking for.

Act.[263] Accordingly, in addition to women, it includes "Aboriginal peoples, persons with disabilities and members of visible minorities."[264] Therefore, once the amendments come into force, public companies registered under the CBCA will be required to disclose information regarding the number of women, visible minorities, Aboriginal peoples and people with disabilities appointed as directors and senior managers and also state policies/steps put in place to comply with this policy.[265]

It appears that both Nigeria and Canada are actively struggling to improve board gender diversity. Canada however seems to be considering the possibility of gender diversity quotas and it may also be helpful for Nigeria to do same as evidence from Norway reveals the effectiveness of mandatory quotas in enhancing the representation of women on boards.[266] It would also be beneficial to borrow a page from the Canadian framework in respect of

[263] SC 1995, c 44.

[264] *An Act to amend the Canada Business Corporations Act*, the *Canada Cooperatives Act*, *the Canada Not-for-profit Corporations Act and the Competition Act SC 2018, c 8,* s. 172(1).

[265] These provisions on board diversity would however not come into force until the draft regulations made pursuant to the Bill are finalized and in effect.

[266] Minsky, *supra* note 257. However, recent discussions reveal that quotas may be implemented to improve diversity targets as a whole and not solely gender diversity targets. Some countries have successfully implemented gender diversity quotas. These quotas could be hard or soft quotas. By way of illustration, in 2003, Norway implemented a hard quota system which required public companies to have a mix of 40% of each gender on corporate boards by 2008. Failure to comply would have resulted in a series of penalties and even delisting. Soft quotas on the other hand, are more less guidelines that do not attract any penalty for non-compliance. Countries like Spain currently operate a soft quota system. See Melissa Bennardo, "How Canada Stacks Up on Women's Representation on Corporate Boards", (14 May 2019), online: *CBC* <https://www.cbc.ca/news/business/women-corporate-boards-globally-1.5131113>. Also, recently, in California, a landmark legislation requiring publicly traded companies with headquarters in California, to have at least one woman on their board of directors by the end of 2019 and two by 2021, has been enacted. This makes California the first US state to establish a gender diversity quota. See SB 826.

expanding board diversity requirements to go beyond gender diversity to include persons with disabilities.

4.3.5 Board Committees[267]

The company's strategic goals and objectives are directed and designed by the board of directors and the board carries out this function through delegating matters to well-structured committees designed to take advantage of the expertise of every director appointed to the board.[268] The functions of the board are primarily carried out through board committees.[269]

The importance of board committees is appreciated in Nigeria and well-recognized under Principle 11 of the NCCG which states thus: "To ensure efficiency and effectiveness, the Board delegates some of its functions, duties and responsibilities to well-structured committees, without abdicating its responsibilities." The NCCG 2018 also goes on to recommend a number of practices in relation to the organization of board committees, some of which include:

a. Only directors may be members of board committees, while members of senior management may be required to attend committee meetings.

b. The terms of reference and composition of such committees should be set out in the board-approved committee charter, which should be reviewed periodically.

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[267] Board committees are discussed in Principles V and VI of the OECD Guidelines.

[268] Kevin D Chen & Andy Wu, *The Structure of Board Committees* (2016).

[269] *Ibid*.

c. To facilitate adequate oversight, the board should establish committees responsible for nomination and governance, remuneration, audit and risk management.

The NCCG 2018 is emphatic about the composition of board committees being limited to directors although members of management may be required to attend (possibly for purposes of addressing or clarifying issues on the day to day operation of the company). It is understood that the essence of this recommended practice is to ensure the independence of board committees which in turn has significant impact on board independence as a whole. The recommended practice on the creation of a board-approved committee charter is also innovative. An approved charter for each committee will go a long way in ensuring that each committee is aware of its functions, mandate and power and can act accordingly.[270] The enumeration of key committees that should be established, namely—the nomination and governance committee, the remuneration committee[271] and the audit and risk management committee is also commendable. This ensures that all public companies and regulated private companies have these three distinct committees which are responsible for addressing crucial issues on remuneration of directors and senior management, assessing the financial position of the company at the year end and the appointment of directors. The specific inclusion of these committees in the Code will go a long way in ensuring that companies that had hitherto operated without these mandatory committees, will take steps to establish these committees.

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[270] Diligent Corporation, "What is a Board Committee Charter?", (11 January 2019), online: *Diligent* <https://insights.diligent.com/board-committee/what-is-a-board-committee-charter/>.

[271] The Canadian Coalition for Good Corporate Governance CCGG recommends that boards voluntarily add to each annual meeting agenda a shareholder advisory vote on the board's and company's reports on executive compensation contained in its annual proxy circular. See "Model Say on Pay for Issuers", (September 2010), online: <https://www.ccgg.ca/wp-content/uploads/2019/03/model_policy_on_say_on_pay.pdf >.

The Canadian context appears to reflect the same position as the NCCG 2018. Public Canadian companies are required to set up an audit committee which must consist of independent directors who are financially literate.[272] Disclosures concerning the exposure and experience of members of the audit committee are also required by NP58-101. Similarly, public companies are expected to establish a compensation committee (which determines compensation for the company's directors and officers) and a nominating committee (which oversees the process of nominating directors for election by shareholders) each composed entirely of independent directors.[273] Companies are also required to disclose the independence or otherwise of members of these committees and to provide an explanation for any deviation.[274] Canadian corporate governance provisions however do not provide for board committee charters. The inclusion of board committee charters in the NP58-201 would improve the efficiency of board committees in Canada.

4.3.6 Board Evaluation[275]

Board evaluation is a key part of corporate governance because it serves as a tool for the board to assess its performance over a period of time relative to the goals of the company.[276]

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[272]National Instrument 52-110 Audit Committees (NI52-110). Under corporate statutes, public companies are required to have an audit committee composed of at least three directors, a majority of whom must not be employees of the corporation or any of its affiliates. Also, Item 7 of Form 58-101F1 has also been revised to require issuers other than venture issuers to disclose whether or not a compensation consultant or advisor has, at any time since the beginning of the most recently completed financial year, been retained to assist in determining director and officer compensation.

[273] Dharamdia, *supra* note 225.

[274] NP58-201 Corporate Governance Guidelines and Practices.

[275] Board evaluations is discussed under Principle VI of the OECD Guidelines.

[276] *Improving Board Performance through Effective Evaluation* (Ernest &Young, 2018). Board evaluations have become a standard part of corporate governance since the issuance of the UK Cadbury report in

The assessment process enables the board to identify its strengths and weaknesses and to re-strategize (if need be) to effectively carry out its functions.[277] In simple terms, it serves as a "report card" which reflects shareholders and stakeholders' perception of the performance of the board over a given period of time.

Board evaluations are suggested under Principle 14 of the NCCG 2018 which encourages companies to carry out annual board evaluations to "assess how each director, board commitees and the board are committed to their roles, work together and continue to contribute effectively to the achievement of the company's objectives."[278] The Code also recommends the following practices:

a. The board should establish a system to undertake a formal and rigorous annual evaluation of its own performance, that of its committees, the chairman and individual directors. This process should be externally facilitated by an independent external consultant at least once in three years.

b. The evaluation system should include the criteria and key performance indicators and targets for the board, its committees, the chairman and each individual board member.

c. The evaluation of the board should consider the mix of skills, experience, objectivity, competence of members of the Board, its diversity (including gender), knowledge of the company and its strategic direction, attendance at meetings, how the board works together and other factors relevant to its effectiveness.

1992. See also *Global Board Evaluations: Practices and Trends* (Corporate Secretaries International Association, 2018).

[277] Taylor Griffin et al, "Board Evaluation and Boardroom Dynamics" (2017) Stanford Closer Look Series.

[278] *NCCG 2018,* Principle 14.

Hitherto, the 2014 SEC Code required boards to conduct an annual evaluation of their performance but did not expressly stipulate that the exercise should be conducted by independent consultants. This led to situations were a number of companies simply carried out an internal evaluation of their boards—which was done by the company secretary or other officer, and amounted to nothing more than a box-ticking exercise.[279] Now, the NCCG 2018 not only suggests that companies carry out annual board evaluations, but also expressly provides that such evaluations be carried out by an independent consultant.

Board evaluations are also required in Canada. The TSX NP58-201 Guidelines prescribe regular assessment of the board and its committees. Item 9 of the NI58-101 Disclosure of Corporate Governance Practices Forms 58-101F1 and 58-101F2 also requires companies to disclose whether or not the board, its committees and individual directors are regularly assessed with respect to their effectiveness and contribution and how such assessments are carried out. If assessments are not regularly conducted, the company is required to disclose how the company satisfies itself that the board, its committees, and its individual directors are performing effectively. Item 8 of NP58-101 also requires the board to identify and disclose other constituted standing committees other than the board and describe their functions. The Canadian provisions however do not explicitly require such assessments to be carried out by independent assessors and this means that assessments may be carried out by internal participants in the company. This therefore raises questions about the effectiveness of this approach.

[279] Nechi Ezeako, “Nigerian Directors and Board Effectiveness”, (3 October 2018), online: *Ethical Boardroom* <https://ethicalboardroom.com/nigerian-directors-and-board-effectiveness/>.

4.3.7 Board Relationship with Shareholders and Other Stakeholders[280]

The board's relationship with shareholders and stakeholders is an important aspect of corporate governance and has in fact been the subject of debate that has given rise to several different corporate governance approaches.[281] Principle 1 of the NCCG 2018 tends towards an enlightened shareholder approach. The said principle states thus:

> as a link between stakeholders and the company, the board is to exercise oversight and control to ensure that management acts in the best interest of the shareholders and other stakeholders while sustaining the prosperity of the company.

The literal interpretation of this is that the primary duty of the board is to safeguard the prosperity of the company and in order to achieve this, the interests of both stakeholders and shareholders must be considered. The challenge with this approach was the exact issue that came before the SCC in *BCE Inc. v. 1976 Debentureholders.*[282] In this case, the SCC discovered that a disparity between the interests of shareholders and the interests of stakeholders could arise at certain times. In arriving at a conclusion, the SCC stated that the duty of the board of directors is "first owed only to the corporation itself, not to the shareholders or any other group of stakeholders. Also, that in considering the best interests of the corporation, the board may need to consider the interests of stakeholders affected by

[280] The issue of the board's relationship with shareholders and stakeholders respectively is discussed in principles II and IV of the OECD Guidelines respectively.

[281] These theories include the agency theory, shareholder theory, stakeholder theory, enlightened shareholder theory, stewardship theory, organization as an organism theory, team production theory, amongst other emerging theories.

[282] [2008] 3. S.C.R. 560.

its decisions, as those stakeholders are entitled to be treated equitably and fairly."[283] This decision therefore appears to be in tandem with the team production theory[284] of corporate governance discussed in Chapter one. The challenge with this decision however is that the term, "best interest of the corporation" is quite vague because a corporation does not exist of itself, in isolation, even though we refer to it as an artificial person which has a separate distinct legal personality from its shareholders. To determine what the best interest of the corporation is at any given point in time, we would need to examine the objectives for which the corporation was incorporated. This examination will reveal that corporations are incorporated by shareholders or promoters to make profit. As such, the best interest approach may lead to situations where directors perceive the "best interest of the corporation" as the need to make profit and declare dividends, which ultimately reinforces the shareholder primacy approach to corporate governance.[285] It therefore appears that both Canada and Nigeria are yet to develop a well-rounded approach that effectively balances the interests of the company, its shareholders and stakeholders.

Another element of the board's relationship with shareholders and stakeholders is its communication policy. Principle 22 of the NCCG 2018 requires the board to establish a system of regular dialogue with shareholders and to balance their needs, interests and expectations with the objectives of the corporation. The Code recommends that the board develop a policy that ensures appropriate engagement with shareholders and that the policy

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[283] *Ibid.*

[284] Ben-Ishai, *supra* note 198. See also Meese, *supra* note 198.

[285] This view has been expressed by a number of corporate law practitioners in Canada. In their words, "the difference between best interests of the corporation and best interests of the shareholders, was largely indistinguishable in practice". See Liao, *supra* note 165 at 572.

should be hosted on the company's website. Notably, the Code recommends that the board "encourage institutional investors to positively influence the standard of corporate governance and promote value creation in companies in which they invest and to also monitor the company's conformance with the provisions of the Code and raise concerns as appropriate."[286] The inclusion of this recommended practice in the Code is innovative as it recognizes and acknowledges the role of institutional investors in shaping good corporate governance practices. The hope is that this provision will spur institutional shareholders in Nigeria to take actively increase their participation in shaping corporate governance practices.

In addition to communicating with shareholders, it is equally important for companies to effectively communicate with various stakeholders that are affected by the company's decisions. Principle 27 of the NCCG 2018 therefore recognizes that "communicating and interacting with stakeholders keeps them conversant with the activities of the corporation and assists them in making informed decisions." The Code recommends that the board adopt the following practices:

a. The board should adopt and implement a stakeholder management and communication policy.

b. The board should ensure that the reports and other communication issued to stakeholders are in clear and easily understood language and are posted on the company's web portal. This information may include description of structures of the board and management among others, frameworks, policies and other material information about the company.

[286] The SEC Code (2011) equally requires institutional shareholders and other shareholders with large holdings to seek to positively influence the standard of corporate governance in the companies in which they invest.

c. Communication with stakeholders and the general public should be governed by the principle of timely, accurate and continuous disclosure of material information on the activities of the company so as to give a balanced and fair view of the company, including its non-financial matters.

d. The board should establish an investors' portal on the company's website, where the communication policy as well as the company's annual reports for a minimum of five immediately preceding years and other relevant information about the company should be published and made accessible to the public in downloadable format.

These provisions are insightful as they spell out specific steps companies can take to improve communication with their stakeholders. It reinforces the need for the board to consider stakeholder interests while pursuing shareholder wealth maximization, and propels companies to actively engage stakeholders. Accordingly, putting these recommendations into practice will not only enhance communication between the company and its stakeholders, but will also promote transparency—which is a core principle of corporate governance.[287] The importance of communicating with shareholders is equally appreciated in the Canadian corporate sphere. S. 3.4(e) of the NP58-201 specifically requires the board to adopt a communication policy for the company and include same in its written board mandate. As such, most Canadian companies have put in place some form of communication policy to meet this requirement. Recent events however indicate that shareholders are not satisfied with the usual methods of communication and in fact often seek out opportunities to meet with directors in lieu of management.[288] Also, the CCGG has put in place an annual

[287] Organisation for Economic Co-operation and Development, *supra* note 7.

[288] MacDougall, Yalden & Valley, *supra* note 192.

program that brings together directors of over 50 companies to discuss key issues of concern to their respective investors.[289]

With respect to shareholder rights and protection, Principle 23 of the NCCG 2018 recommends that the board should ensure the "equitable treatment of shareholders and the protection of their statutory and general rights, particularly the interest of minority shareholders". In this regard, the Code suggests that the board should safeguard the rights of shareholders by ensuring that shareholders at annual general meetings preserve their effective powers to appoint and remove directors; and that all shareholders are treated fairly and equitably. The Code emphatically points out that "no shareholder, however large his/her shareholding or whether institutional or otherwise, should be given preferential treatment or superior access to information or other materials"; and that "minority shareholders should be adequately protected from abusive actions by controlling shareholders".[290] These provisions of the Code are relevant because it is not unusual for majority shareholders to "bully" minority shareholders, thereby hindering the effective exercise of their rights[291]. This principle recognizes the board's role in monitoring the power play between majority and minority shareholders to ensure that neither side is put at an undue disadvantage. Ensuring that minority shareholders are provided the same information as majority shareholders is therefore a worthwhile practice that should be adopted by Nigerian companies.

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[289] "Engagement Program", online: *Canadian Coalition for Good Governance* < https://www.ccgg.ca/engagement-program/>.

[290] The rules relating to minority protection are contained in s. 311 of the Companies and Allied Matters Act and essentially empower minority shareholders to file an action for relief where the affairs of the company are being conducted in an oppressive or unfairly prejudicial or unfairly discriminatory manner against members' interest or in disregard of public interest.

[291] F Hodge O'Neal, "Oppression of Minority Shareholders: Protecting Minority Rights" (1987) 35 Clev St L Rev 121 at 133.

In Canada however, beyond the corporate statutory provisions enshrining minority shareholder remedies, [292] there is no national policy or instrument that reinforces the need of the board to ensure the equitable treatment of shareholders. The inclusion of this in a corporate governance code or other values-based governance document (in addition to statutory provisions), is important as codes remind the board of key values that should be upheld. The equitable treatment of shareholders is an important value that should be reinforced in other ways besides statutes.

4.3.8 Shareholder Democracy and Activism[293]

Shareholder activism is "the use of ownership position to actively influence company policy and practice".[294] Shareholder activism has become a trend in different parts of the world with shareholders putting pressure on the board or management to take or not to take certain decisions, which in many cases leads to proxy fights.[295]

Shareholder activism has however not taken firm root in Nigeria. The opposite— shareholder apathy is the case. What happens in practice is that shareholder activism is seen as a tool for "populist rabble-rousing and an interruption to the organization of annual general

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[292] *CBCA*, s. 241 provides for the oppression remedy. The Oppression remedy gives a complainant the right to bring a court action against a corporation where conduct has occurred which is oppressive, unfairly prejudicial or which unfairly disregards the interests of a shareholder, creditor, director or officer. This is similar to ss 310 and 311 of the Companies and Allied Matters Act.

[293] Shareholder engagement is discussed in Principle III of the OECD Guidelines.

[294] Emma Sjöström, "Shareholder Activism for Corporate Social Responsibility: What Do We Know?" (2008) 16:3 Sust Dev 141 at 142.

[295] Paul Rose & Bernard S Sharfman, "Shareholder Activism as a Corrective Mechanism in Corporate Governance" (2015) 2014:5 BYU L Rev 1015 at 1028.

meetings"[296] rather than as a tool to promote corporate governance best practices. Studies also reveal that institutional shareholders "adopt a passive approach to shareholder activism". [297] The NCCG 2018 however now recommends that the board encourage institutional investors to take an active role in positively influencing the standard of corporate governance. Also, recent changes made to the CAM Bill requires every shareholder to disclose within seven days of becoming a member, the capacity in which the shares are owned, a corresponding duty is also placed on the company to pass along this information to the CAC. The effect of this provision is to unveil shadow shareholders or persons who hold shares in proxy/for the benefit of a third party in a bid to circumvent the provision of a statute (particularly the *Local Content Act*). [298]

In Canada on the other hand, shareholders are more engaged than ever. They are actively assessing the company's performance and equally pay attention to governance issues.[299] Dissatisfied shareholders do not hesitate to pressure companies to make significant changes such as replacing a CEO or in fact, sacking the board of directors.[300]However, the trend in

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[296] Ojeka Stephen Aanu, "Institutional Shareholder Engagement, Corporate Governance and Firms' Financial Performance in Nigeria: Does Any Relationship Exist?" (2016) 21:2 JIBC 1 at 3.

[297] Chinyere Uche, Emmanuel Adegbite & Michael John Jones, "Institutional Shareholder Activism in Nigeria" (2016) 16:4 Corporate Governance 680 at 690.

[298] The *Local Content Act* aims to ensure Nigerian participation in companies operating in Nigeria. For example, it mandates that 51% of shares of an oil and gas company be held by Nigerians.

[299] Hugo Margoc, "Shareholder Activism in Canada: A Deliberate Policy Choice" (2016) 31:2 BFLR 35.

[300] "Shareholder Activism", online: *Osler, Hoskin & Harcourt* <https://www.osler.com/en/expertise/corporate-governance/shareholder-activism>. Also, in May 2015, the CCGG issued a policy document titled "Enhanced Engagement and Proxy Access". The policy seeks to promote proxy access - which refers to the ability of shareholders to provide their input during the director nomination process, either by influencing who the nominees would be or by actually nominating directors. See CCGG, "Shareholder Involvement in the Director Nomination Process: Enhanced Engagement and Proxy Access", (May 2015), online: *CCGG* <https://www.ccgg.ca/wp-content/uploads/2019/03/Shareholder-Involvement-in-the-Director-Nomination-Process.pdf>.

shareholder involvement and governance in Canada seems to be moving away from "activism" towards "engagement". Shareholder engagement which ordinarily started out as a communication tool, has become a strategic means for management and the board to win shareholders' support for certain changes or strategic actions.[301] The trend is gaining momentum as in 2017, the number of proxy fights reduced considerably and a number of major companies also put in place shareholder engagement policies.[302]

This trend in Canada reveals that for effective governance purposes, if the board actively engages its shareholders, the need for activism and proxy fights may reduce.[303] In the long run, this will ensure that the company runs smoothly with the cooperation of all parties. It is therefore useful for Nigeria to look into this culture of shareholder engagement—which should go beyond active communication with shareholders but also include practices that involve shareholders in the day to day decision making process of the company.

4.3.9 Financial Reporting and Accountability[304]

Financial reporting and accountability is a major force upon which corporate governance is built.[305] Just as shareholders rely on management and the board of directors to run the company in a manner that is profitable, shareholders rely on auditors to double-check

[301] Tom Johnson & Abernathy MacGregor, "Shareholder Engagement: An Evolving Landscape", (9 March 2017), online: *Harvard Law School Forum on Corporate Governance and Financial Regulation* < https://corpgov.law.harvard.edu/2017/03/09/shareholder-engagement-an-evolving-landscape/>.

[302] Andreone & Ortved, *supra* note 216.

[303] *Ibid*.

[304] Financial reporting and accountability is discussed in Principle V of the OECD Guidelines.

[305] Renee M Jones, "Corporate Governance and Accountability" in Ronald Anderson & Kent Baker, eds, *Corporate Governance - Synthesis of Theory, Research, and Practice* (2010) 559.

financial statements prepared by the company to ensure that it reflects a "true and fair view"[306] of the company's financial position at any given point in time. The role of an external auditor is therefore significant because shareholders rely on the auditor's report on the financial statements and take it as conclusive proof of the financial position of the company for the period specified.[307] The failure of external auditors in the past to effectively perform this function has led to the collapse of many companies.[308]

Principle 20 of the NCCG 2018 recognizes that external auditors are appointed to provide an independent opinion on the company's financial statements and to re-assure stakeholders as to the reliability of such financial statements. The Code therefore suggests the following practices to safeguard the independence of external auditors:

> a. External audit firms may be retained for no longer than ten years continuously. External audit firms disengaged after ten years continuous service may not be considered for reappointment until seven years after their disengagement. Where an external auditor's aggregate or cumulative tenure has already exceeded ten years at the date of commencement of this Code, such auditor should cease to hold office as an auditor of the company at the Annual General Meeting to be held immediately after this Code comes into effect.
>
> b. An external auditor may provide to the company only such other services as are approved by the board on the recommendation of the committee responsible for audit and such as does not create a

[306] Anita Anand & Niamh Moloney, "Reform of the Audit Process and the Role of Shareholder Voice: Transatlantic Perspectives" (2004) 5:2 Eur Bus Org L Rev 223 at 235.

[307] Leyla Ghasemi, Javad Nazari & Isa Noorani Far, "The Effect of the Audit Report on the Relevance of Accounting Information" (2017) 6:1 EOJNSS 135 at 136.

[308] Stephen E Blythe, "The *In Pari Delicto* Defense for Auditors in Professional Negligence Cases: Imputation of Managers' Unlawful Acts to the Client Firm" (2015) 5:2 AEL193 at 193.

self-review threat in line with the provisions of international auditing standards.

c. In order to preserve independence, there should be a rotation of the audit engagement partner every five years.

d. In order to preserve independence, there should be an appropriate cooling off period spanning at least three years between the retirement of a partner from an audit firm and his appointment to the board of an audit client. Similarly, there should be a cooling off period before a company can engage any member of the audit team as a staff member in the financial reporting function.

As stated above, shareholders place heavy reliance on external auditors to reveal the true state of the company's affairs at any given point in time. This trust placed in the auditors underscores the need for external auditors to be independent. As such, adequate steps must be taken to guard against circumstances or situations that would comprise the external auditor's independence and impair their judgment/opinion.[309] The recommended practices put forward by the NCCG 2018 are therefore essential and should be adopted by companies. I however believe that the ten year period prescribed for the retention of a particular auditor is rather lengthy and should be reduced to a period of five years as ten years creates ample time for auditors to become slack in their duties. There is also some ambiguity in that the Code states that the audit engagement partner should be rotated every five years but does not define "audit engagement partner".

With respect to the constitution of the audit committee, s. 358(4) of the CAM Bill replaces the constitution of the audit committee from an equal number of directors and representatives of

[309] David Gwilliam & Oliver Marnet, "Auditor Independence" in *Wiley Encyclopedia of Management* (2015).

the shareholders to seven shareholders who are not directors. This is in line with good corporate governance practices and ensures that the directors, who are involved in the day to day activities of the company, do not influence the audit exercises.[310] S. 358(7) also provides for the qualification of audit committee members and requires that “persons with knowledge of accounting, law and internal processes and control be appointed to the audit committee.”

S. 359 of the CAM Bill is also a novel section which provides for certification of the auditor’s report by the MD and internal auditor of the company. It appears that this provision was inserted to promote good corporate governance practices and to ensure that MDs and internal auditors take responsibility for any report provided by external auditors. In so doing, this will encourage management to pay better attention to financial reports and also ensure that they are able to defend the report when called upon to do so. This sub section also imposes a fine of NGN300,000 or imprisonment for a term of 12 months (or both) on the managing director and internal auditor for failure to discharge this duty of certification. S. 360 also seeks to entrench good corporate governance practices as it prohibits a director or any officer or anyone acting under the director or officer’s direction from influencing, coercing or manipulating an external auditor in preparing the audit of the company. It also provides for a fine of NGN200,000 or imprisonment not exceeding two years or both for an offender.

In Canada, s. 2.1 of the Multilateral Instrument 52-110 Audit Committees requires reporting issuers other than those exempted under the section to establish an audit committee that

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[310] Organisation for Economic Co-operation and Development, *supra* note 7.

complies with the requirements of the Instrument and every issuer must require its external auditor to report directly to the audit committee.[311] S. 3.1 further requires the audit committee to be composed of a minimum of three directors who must all be independent. Members of the audit committee are also required to be financially literate although s. 3.8 permits the appointment of an audit committee member who is not financially literate provided that the member becomes financially literate within a reasonable period of time following their appointment. In addition to this, the Instrument requires reporting issuers to make disclosures regarding audit matters in its Annual Information Form (AIF) as contained in Form 52-110F1.[312]

Despite the extensive provisions discussed above, one key point that was not contemplated by the NCCG 2018 is the need for any director (of public companies) appointed to the audit committee to be an independent director. It is suggested that this be included in any future amendment to the NCCG 2018.

4.3.10 Sustainability & Corporate Social Responsibility

The terms, "sustainability" and "corporate social responsibility (CSR)" are terms that have developed over the years to refer to a "more humane, more ethical, more transparent way of doing business."[313] According to the International Financial Corporation, corporate social

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[311] MacDougall, Yalden & Valley, *supra* note 192. See also Dharamdia, *supra* note 225.

[312] Eric Turner, "Auditing and Assurance bulletin highlights disclosures in the audit of financial statements", (28 April 2016), online: *Chartered Professional Accountants Canada* < https://www.cpacanada.ca/en/business-and-accounting-resources/audit-and-assurance/blog/2016/april/financial-statement-disclosures-bulletin>.

[313] Marcel van Marrewijk, "Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion" (2003) 44:2/3 J Bus Ethics 95 at 95.

responsibility is "the commitment of businesses to contribute to sustainable economic development by working with employees, their families, the local community and the society at large to improve their lives in ways that are good for business and for development."[314]

Although CSR is generally considered a western term, it has existed in different forms in Nigeria as far back as the pre-colonial era. Traditionally, CSR in Nigeria took the form of communal kinship. In that, when establishing and running a business, the founder acts not only in the interest of the company, but also takes the interest of the family (which is not limited to the nuclear family but also includes extended family) into consideration.[315] Much of this way of this life has however been eroded by colonial rule, the aftermath of which resulted in a fusion of western and traditional practices in different parts of the country.[316] Prior to the NCCG 2018, CSR in Nigeria was thought of in terms of philanthropic activities and community development initiatives.[317] However, Principle 26 of the NCCG 2018 now requires companies to "pay adequate attention to sustainability issues including environment, social, occupational and community health and safety" issues. The Code recommends that the "board establish policies and practices regarding its social, ethical, safety, working conditions, health and environmental responsibilities as well as policies addressing corruption." This provision is a significant development in Nigeria as hitherto, CSR activities carried out by companies were

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[314] *Public Policy for Corporate Social Responsibility*, WBI Series on Corporate Responsibility, Accountability and Sustainable Competitiveness (World Bank Institute, International Financial Corporation, 2003).

[315] Kenneth M Amaeshi et al, "Corporate Social Responsibility in Nigeria: Western Mimicry or Indigenous Influences?" (2006) 24 J Corp Cit 83 at 89.

[316] *Ibid.*

[317] Essentially, CSR was regarded as a social practice where the corporation supports or initiates social causes so as to be regarded as a good corporate citizen. See Olanrewaju David, "An Assessment of the Impact of Corporate Social Responsibility on Nigerian Society: The Examples of Banking and Communication Industries" (2012) 1:1 Univers J Mark Bus Res 17 at 26.

solely philanthropic in nature, such as building schools and digging boreholes. With this principle included in the NCCG 2018, companies (particularly oil and gas multinational companies operating in Nigeria) will be minded to go beyond merely carrying out philanthropic activities to being mindful of how their business operations affect the environment in which they operate.[318] The beauty of this principle is that it reinforces the need for the board to take stakeholder interests into consideration when making decisions. This is not to say that corporations should cease philanthropic activities. Rather, the call is for companies to go beyond philanthropy to the core of CSR—which is sustainability.

In the Canadian context, the decision of the SCC in *BCE v. 1976 Debentureholders* reflects that boards are expected to consider the environment and other stakeholders in which the company functions when making decisions.[319] In the words of the Court, the board is to act in the corporation's best interest "viewed as a good corporate citizen" and "in a fair manner commensurate with their duties as a responsible corporate citizen"), CSR in the Canadian context is therefore geared towards sustainable business practices that take into consideration economic, social and governance initiatives.[320]

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[318] The activities of multinational oil companies operating in the Niger Delta and their environmental effects are well-known. See "Nigeria oil spill: Major new inquiry into oil spills in Niger Delta launched - CNN", online: <https://www.cnn.com/2019/03/26/africa/nigeria-oil-spill-inquiry-intl/index.html>.

[319] *BCE* supra, *note* 58.

[320] Penelope Simons, "Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses" (2015) Can Bus LJ 167 at 171. Many Canadian companies seek to achieve this by adopting the Global Reporting Initiative Sustainability Reporting Guideline, a product of the Global Reporting Initiative, a private non-profit organization established to help businesses and government report on sustainability issues.

Another important issue concerning CSR is that of regulation. CSR language has been mostly voluntary, but this no longer seems tenable in certain sectors.[321] For example, most companies (usually multi-national companies) in the extractive sector view CSR as a charitable act for which they are entitled to tax breaks whilst failing to take responsibility for the harm caused by their extractive activities in host communities.[322] The Canadian government has taken active steps to entrench a sense of responsibility in Canadian companies involved in extractive sectors abroad through its *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad* guideline.[323] Similarly, the Canadian government released the *CSR Implementation Guide for Canadian Business*[324] which provides practical advice on CSR to companies operating in varying sectors.

In Nigeria on the other hand, a Bill titled *"A Bill for an Act to Amend the Financial Reporting Council of Nigeria Act 2011 No 6 to Prescribe Social Corporate Responsibility Requirement by Companies and Other for Related Matters"* passed the second reading at the House of Representatives in July 2018.[325] By this Bill, the House of Representatives seeks to amongst

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[321] Amao, *supra* note 64.

[322] Ibrahim A Yusuf, "How Companies Use CSR to Evade Tax", *The Nation Newspaper* (7 April 2018), online: <https://thenationonlineng.net/companies-use-csr-evade-tax/>.

[323] Global Affairs Canada, "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad", online: *Global Affairs Canada* <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng >.

[324] Industry Canada, Corporate Social Responsibility (CSR): An Implementation Guide for Canadian Business (2014).

[325] Jacob Segun Olatunji, "Reps Pass bill for Companies to Adopt Corporate Social Responsibility", (2018), online: *Tribune Online* <https://tribuneonlineng.com/153855/>. Explanatory notes to the Corporate Social Responsibility Bill. See Corporate Social Responsibility Commission (Establishment, etc.) Bill, 2007, C1239–44, (Nigerian CSR Bill).

other things, compel companies to adopt CSR practices in their individual corporate policies. For example, s. 49(h) of the Bill mandates companies that earn an average of ₦50,000,000 in three successive years to set aside a certain percentage to fulfil CSR responsibility requirements.[326] However, the Bill has been criticized because the concept of CSR it seeks to legislate is solely that of CSR in philanthropic terms.[327]

It therefore appears that the Canadian CSR model is principles/values-based while Nigeria is moving towards a rules-based approach. The Canadian approach has been to establish a CSR strategy which seeks to imbue a sense of responsibility in Canadian businesses and to also encourage such businesses to run their affairs in line with Canadian values and principles. On the other hand, going by recent developments, the Nigerian approach seeks to lay out mandatory CSR requirements which do not appear to be based on any visible strategy to promote Nigerian values. It is therefore necessary to consider whether a values-based approach or a rules-based approach would yield better results for CSR in Nigeria.

4.3.11 Necessity of Corporate Governance Codes[328]

In addition to hard law in the form of Acts, Laws and Rules, the OECD advocates for companies to also put in place soft laws in the form of corporate governance codes which

[326] *Ibid.*

[327] Nojeem Amodu, "Regulation and Enforcement of Corporate Social Responsibility in Corporate Nigeria" (2017) 61:01 J Afr L 105 at 110.

[328] Corporate Governance Codes are discussed under Principle I of the OECD Guidelines.

contribute to the entirety of a company's corporate governance framework.[329] The rationale for this is predicated on the belief that corporate governance codes encourage the introduction of high-level corporate governance practices.

Nigeria has followed through on this recommendation and it appears that Nigeria places substantial value on corporate governance codes as a crucial part of its aim to improve corporate governance within the country. Nigeria has in fact made consistent efforts to establish a code that expresses international corporate governance best standards. This explains the multiple corporate governance codes that have been issued by the SEC and other sectoral regulators and now, the FRCN.

Canada on the other hand has not embraced the idea of a national code of corporate governance. Best practices for companies are limited to suggestions and recommendations made by institutional shareholder groups such as the CCGG and professional associations. The possibility of a federal corporate governance code may also be problematic given the differing roles played by respective provincial governments on one hand, and the federal government on the other, on issues relating to the administration of Canadian companies.[330] This divergence is further reflected in the absence of a national securities regulator.[331] As such, besides the National Policies (NP 58-201 and NP 58-101) and Instruments prescribed

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[329] OECD, "OECD Corporate Governance Factbook 2017" (2017) 144. See also Mojca Duh, "Corporate Governance Codes and Their Role in Improving Corporate Governance Practice" in Okechukwu Lawrence Emeagwali, ed, *Corporate Governance and Strategic Decision Making* (InTech, 2017).

[330] MacDougall, Yalden & Valley, *supra* note 192.

[331] The various rules put in place by the various stock exchanges makes it a herculean task for companies to understand and comply with the laid down corporate governance rules, guidelines and best practices.

by the TSX and other provincial securities regulators (which are akin to the SEC's code of corporate governance in Nigeria), there is no uniform corporate governance code that guides the behavior of companies operating in Canada.

4.3.12 Corporate Governance Reporting and Disclosure Standards[332]

Compliance with corporate governance laws, rules, regulations and codes is monitored through reporting and disclosure requirements.[333] Principle 28 of the NCCG 2018 requires boards to provide "full and comprehensive disclosure of all matters material to investors and stakeholders, and of matters set out in the Code". In addition, the Code specifically requires boards to "ensure that the company's annual report includes a corporate governance report that provides clear information on the company's governance structures, policies and practices as well as environmental and social risks and opportunities."[334] The corporate governance report should also disclose board composition, the board's plan for achieving gender diversity and progress on same, board appointment process; board, director and corporate governance evaluation outcomes, board committee composition, amongst other things. Companies are also required to provide statements disclosing "highlights of sustainability policies and programmes covering social issues such as corruption, community service, including environmental protection, serious diseases and matters of general environmental, social and governance (ESG) initiatives. The annual report is also expected

[332] Corporate governance reporting and disclosure standards is discussed under Principle V of the OECD Guidelines.

[333] Organisation for Economic Co-operation and Development, *supra* note 7.

[334] *NCCG 2018*, Principle 28.

to contain a statement by the board on the company's level of application of this Code arising from the results of its corporate governance evaluation."

Similar disclosure provisions are contained in Canada's NP58-101 Disclosure of Corporate Governance Practices which essentially mirror the recommended practices contained in the NCCG 2018. In Canada, public disclosures are made in a number of documents filed on the System for Electronic Document Analysis and Retrieval (SEDAR) and they include:[335]

a. Annual and quarterly financial statements and any related management discussion and analysis

b. An annual information form describing the corporation and its business; and

c. Information circulars in respect of shareholder meetings.

Furthermore, Canadian public companies are required to issue and file a press release immediately a material change which affects the value of the company's securities occurs.[336] Failure to file accordingly may lead to enforcement procedures filed by securities administrators. Also, as of April 1, 2018, TSX issuers are required to post their articles, other constating documents as well as board mandate and committee charters on their company website.[337]

Although it appears that the NCCG 2018 has put in place wider disclosure requirements compared to the NP58-101, there are a couple of key items for which the NP58-101 requires

[335] "Deloitte Corporate Governance - Continuous Disclosure", online: < https://www.corpgov.deloitte.ca/en-ca/Pages/CorporateReporting/ContinuousDisclosure.aspx>.

[336] MacDougall, Yalden & Valley, *supra* note 192.

[337] Dharamdia, *supra* note 225.

disclosure but are not required by the Code. For example, in addition to requiring position description for board committees, the NP58-101 also requires disclosure as to whether or not the board has developed written position descriptions for the chair, CEO as well as the chair of each board committee. The Code also fails to require disclosure concerning whether a board charter has been established as well as disclosure of its contents. Furthermore, although the NCCG 2018 requires disclosure regarding the composition of board committees, this level of disclosure is inadequate as the disclosure should be targeted at revealing whether the various core committees recommended to be set up by the Code (nomination & governance committee, audit and risk committee and remuneration committees) have indeed been set up. Disclosure of the existence of these committees is required in Canada pursuant to the NP58-101.

4.3.13 Technological Innovation and Corporate Governance[338]

The current wave of digital and technological innovation is one that cuts across all spheres of life and the field of corporate governance is not exempt. Being a product of the pre-technology driven era, CAMA did not contemplate the application of technological innovations to enhance corporate governance practices. This lacuna is now being sought to be filled by the CAM Bill. As discussed previously, the CAM Bill contains a number of provisions which embrace technological innovations. For example, s. 213 allows private companies to hold general meetings through electronic means. There are however certain loopholes that are yet to be plugged. For one, the CAM Bill is silent on whether board meetings can be held via electronic, teleconference or videoconference. Although, it is the norm for most companies to permit directors to participate in meetings via electronic, teleconference or

[338] Technological innovations are discussed under Principle II of the OECD Guidelines.   .

videoconference means, it would be ideal to have this practice backed up by the provisions of the law. Until this issue is specifically addressed, the validity of attendance through electronic means (for the purpose of forming quorum) would remain unsettled.

Also, the Bill does not provide for electronic voting. As such, the traditional method of voting by raising hands will continue even with the CAM Bill coming into force. Voting by show of hands is often cumbersome for companies with numerous shareholders who have to manually count hands raised in response to a motion put forward at general meetings. Providing for electronic voting would have been an ideal way to considerably lessen this burden. More importantly, as it would not require shareholders to be physically present at meetings, providing for electronic voting would have been a way to enhance shareholder democracy.

Also, the CAM Bill still retains the requirement that notices of meetings must be served either personally or by post. This omission is critical given that the world is now a global village and information is shared through various electronic means. Nigerian corporate law therefore needs to take this into consideration and consequently provide for the service of notices via electronic means. In addition to this, corporate lawyers and other practitioners were also disappointed to discover that, as is with CAMA, the CAM Bill is silent on the validity of consent for shorter notice for directors' meetings – which is common in practice and is not explicitly provided for under any law.[339]

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[339] *A Review of the Bill for an Act to Repeal the Companies And Allied Matters Act 1990 (Cap C20, LFN 2004) and Enact the Companies And Allied Matters Act, 2016* (KP Nominees Ltd, 2018).

In Canada, the CBCA does not specify the manner and form in which the board is to meet. For example, s. 114(1) states thus: “Unless the articles or by-laws otherwise provide, the directors may meet at any place and on such notice as the by-laws require.” This is buttressed by the provision of s. 114(9) which states:

> Subject to the by-laws, a director may, in accordance with the regulations, if any, and if all the directors of the corporation consent, participate in a meeting of directors or of a committee of directors by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting. A director participating in such a meeting by such means is deemed for the purposes of this Act to be present at that meeting.

The CBCA also does not stipulate the form of notice for board meetings, leaving it to the discretion of the company to set out same in its articles or by-laws. In the same vein, s. 132(5) of the CBCA states thus:

> If the directors or the shareholders of a corporation call a meeting of shareholders pursuant to this Act, those directors or shareholders, as the case may be, may determine that the meeting shall be held, in accordance with the regulations, if any, entirely by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting, if the by-laws so provide.

This section combined with s. 132(4) gives ample opportunity for meetings to be held electronically and for participants to also participate electronically. S. 141(3) of the CBCA also provides for electronic voting in addition to voting by show of hands. This section states that voting may be “by means of a telephonic, electronic or other communication facility, if the corporation makes available such a communication facility”. Sec 141(4) of the CBCA also enables persons participating electronically in meetings to vote through the use of electronic, telephonic or other communication facility the company has made available for that purpose.

Accordingly, by this provision, directors can determine the mode of conducting meetings as they deem fit—in line with the company's articles and by-laws. This approach gives the board the freedom to adapt to the continuous wave of technological innovations without statutory hindrance. The silence of the CAM Bill—which has been dubbed the most innovative law in Nigeria—on electronic meetings, electronic voting, voting while participating electronically and consent to shorter notice for board meetings, shows there is still room for improvement.

4.3.14 Mediating Corporate Governance Disputes[340]

Under CAMA, corporate governance disputes are resolved either by the CAC or the Federal High Court. S. 251 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) confers the Federal High Court with the exclusive jurisdiction to hear and determine disputes relating to CAMA and the operation of companies incorporated in Nigeria. The CAM Bill provides for the establishment of an Administrative Proceedings Committee (APC) which will act as a dispute resolution body. The mandate of the APC includes: resolving disputes that may arise from the operation of the Bill and its regulations, provide opportunity to be heard to persons who are alleged to have contravened the provisions of the Bill or its regulations; and impose administrative penalties for the contravention of the Bill or its regulations. Given this wide scope of powers vested in the APC, there is concern that the creation of the APC seeks to tamper with the constitutionally enshrined powers of the Federal High Court (as the

[340] Structures for mediating corporate governance disputes are discussed under Principle II of the OECD Guideline.

court of first instance) regarding matters relating to the administration of companies in Nigeria.[341] This is a legitimate concern even though s. 607(12) of the Bill states that appeals from the APC would lie to the Federal High Court.[342]

The establishment of the APC under the CAM Bill in Nigeria serves as an intermediary between the Registrar-General of the CAC and the Federal High Court. It is however important to acknowledge that the APC's establishment is borne out of the need to create a separate dispute resolution structure that would foster quick determination of corporate governance issues, as opposed to the already congested dockets of the Federal High Court. Despite this, the unintended consequence would simply amount to a delay in justice as appeals from the APC will eventually come before the Federal High Court. The power of the APC to adjudicate a case and also impose penalty without recourse to court may also be an overreach in light of the decision of the Federal High Court in *National Oil Spill Detection and Response Agency (NOSDRA) v. Mobil Producing Nigeria Unlimited Suit FHC/UY/CS/1623/2016* which is to the effect that only judicial bodies can impose fines and penalties.[343]

In Canada, s. 260 of the CBCA creates the role of Director to exercise the functions of the Director mentioned in the Act. However, appeals from decisions made by the Director are

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[341] KP Nominees Ltd, *supra* note 339.

[342] The establishment of the APC to hear disputes arising from the provisions of the Bill and the designation of the Federal High Court as an appellate court may however prove problematic as it appears to be in contravention of the combined constitutional provision of s. 251 (which deals with original jurisdiction of the Federal High Court) and s. 6(6)(b) of the Nigerian Constitution with deals with right of access to Court by an individual.

[343] The ruling of the Federal High Court has upheld by the Court of Appeal on March 22, 2018 in *NOSDRA v. Exxon Mobil (2018)* LPELR-44210(CA).

made to the respective courts where the CBCA applies.[344] There is therefore no intermediary between the courts and complainants.[345]

4.3.15 Corporate Governance Evaluations[346]

Corporate governance evaluations (which go beyond board, board committee and director evaluations) are increasingly becoming part of corporate governance practices in different parts of the world.[347] In Nigeria, principle 15 of the NCCG 2018 recognizes the need for corporate governance evaluations and it states thus, "institutionalizing a system for evaluating the company's corporate governance practices ensures that its governance standards, practices and processes are adequate and effective." The Code therefore recommends that the "board should ensure that an annual corporate governance evaluation is carried out". This evaluation is to be carried out by an independent consultant once every three years and such evaluations should assess the extent of the Code's application. A

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344 The term, "court" in the Province of Newfoundland and Labrador, refers to the Trial Division of the Supreme Court of the Province, in the Province of Ontario, the Superior Court of Justice, in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court of the Province, in the Provinces of Manitoba, Saskatchewan, Alberta and New Brunswick, the Court of Queen's Bench for the Province, in the Province of Quebec, the Superior Court of the Province, and the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice.

345 Similarly, in British Columbia, whilst issues relating to oppressive and prejudicial conduct and minority protection cases are brought before the Supreme Court, the Registrar of Companies is empowered to make decisions regarding company's compliance with the BCBCA. S. 406 of the BCBCA prescribes a period of 30 days (either from the day the notice of the decision to be appealed is provided to the appellant or actual notice to the appellant of the decision to be appealed) within which an appellant may appeal to the Supreme Court. As such, there is no intermediary between the Registrar and the Supreme Court.

346 The topic of corporate governance assessments/evaluations is raised in Principle V of the OECD Guideline.

347 Nicholas J Price, "How Good Is Your Corporate Governance? A Self-Assessment Checklist", (6 June 2017), online: *Diligent Insights* <https://insights.diligent.com/corporate-governance/how-good-is-your-corporate-governance-a-self-assessment-checklist/>.

summary of the evaluation report is also required to be included in the company's annual report and on the investors' portal of the company.

In addition to this, in 2014, the NSE and the Convention on Business Integrity (CBi) established a Corporate Governance Rating System (CGRS).[348] According to the NSE, "the CGRS is designed to rate companies listed on the NSE based on their corporate governance and anti-corruption culture, thereby improving the overall perception of and trust in Nigeria's capital markets and business practices."[349] During the launch of the CGRS in 2014, the Executive Director of CBi, Soji Apampa explained thus:

> The rating system is based on a holistic multi-stakeholder approach that uses a diverse information collection and verification approach, which relies not only on self-assessments of companies but also on experiences of stakeholders and experts. It is envisioned to be more transparent on rating procedures and rating governance than other Corporate Governance indices.

In arriving at a rating, the CGRS evaluates four key components—compliance with NSE rules and relevant corporate governance rules and codes, corporate integrity, certification of directors and confirmation of a company's integrity by expert shareholders. CBi also explains that the CGRS score is made up of scores "for corporate compliance assessment (50%), a Fiduciary Awareness Certification Testing (FACT) of directors (10%) and corporate integrity assessments based on feedback from stratified, random sample of stakeholders (20%) and

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[348] The Corporate Governance Rating System was launched in 2014 with a number of volunteer companies but was extended to listed companies in 2015.

[349] "NSE, CBi Launched Corporate Governance Rating System", online: < http://www.nse.com.ng/mediacenter/pressreleases/Pages/NSE-CBi-Launch-Corporate-Governance-Rating-System.aspx>.

an Expert Multi-Stakeholder Group (EMSG, 20%)".[350] In all, although the CGRS is not a foolproof method for evaluating the strength of a company's corporate governance framework, it provides some guidance to investors and the general public on the level of compliance.[351] This is the same view expressed by Oscar N. Onyema, CEO of the Nigerian Stock Exchange, as follows:

> as we make surefooted steps to globalise our market, the CGRS rating will bolster the confidence to invest in our market especially from international investors. Increasingly, our listed companies are meeting their compliance requirements and we will continue to protect investors in our market through a robust regulatory regime.

In Canada however, securities rules and policies do not require or recommend company corporate governance evaluations asides that required for the board, individual directors and board committees. There is also no corporate governance rating system in place. Investors and the general public therefore rely on the ratings of third-party organizations.

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[350] "Corporate Governance Ratings System (CGRS)", (20 April 2017), online: *CBi* <https://www.cbinigeria.com/collective-action-projects/corporate-governance-ratings-system-cgrs/>.As at January 2018, a total of 33 companies have passed the CGRS test and 435 directors have been certified. Although in November 2018, the Steering Board of the CGRS announced the suspension of Diamond Bank Plc, Continental Reinsurance Plc and NEM Insurance Plc's from the index.

[351] According to the NSE, "The NSE CG Index tracks the performance of CGRS rated companies using their market capitalization, free float and corporate governance rating scores. The Index is reviewed on a bi-annual basis at which point other companies that have become CGRS rated in the interim may be added to the Index or companies that have had their ratings suspended or withdrawn may be removed. The Index is expected to be an important tool for investors keen on investing in well governed companies as well as corporates eager to distinguish themselves on the ground of governance." "Rebalancing of NSE CG Index", online: <http://www.nse.com.ng/mediacenter/rebalancing-of-nse-cg-index>.

4.4 Summary of Recommendations for Nigeria

Based on the findings made in the course of this thesis, it appears that addressing the following will go a long way in improving the Nigerian corporate governance framework:

1. **Multiplicity of Corporate Governance Codes**:

The multiplicity of corporate governance codes in Nigeria without clear direction as to their hierarchy does not bode well for enforcement and adherence to the codes. There is therefore a need to clearly delineate the hierarchy of the sectoral codes, the SEC Code and the NCCG 2018.

2. **Board Charter:**

The significance of the board charter in directing the affairs of the board and the need to ensure that same is accessible to all shareholders and stakeholders alike should be adequately addressed in the NCCG.

3. **Role of the Board:**

It is equally important that the NCCG encourage the board to take responsibility for satisfying itself as to the integrity of the CEO and other executive officers (to the extent possible); and to also ensure that the CEO and other executive officers create a culture of integrity throughout the organization. It is also recommended that the NCCG specifically encourage boards to set out the duties and responsibilities of all directors and also spell out procedural issues relating to attendance at board meetings, the effect of non-attendance as well as expectations concerning review of materials ahead of meetings in the board charter.

4. **Board Structure and Composition:**

The NCCG should also specifically encourage boards to appoint INEDs rather than NEDs as chairman of the board as this will help to further safeguard the independence of the chairman. Also, mandatory board quotas may be needed to produce better results for diversity on Nigerian corporate boards.

5. **Shareholder Activism and Engagement:**

The Nigerian corporate governance system should promote proactive shareholder engagement as opposed to shareholder activism. Institutional investors and Shareholder Associations should also do more in carrying out their roles as promoters of corporate governance best practices.

6. **Audit:**

The 10-year engagement period provided for auditors should be reduced to five years so as to safeguard auditors' independence and not give room for collusion and complicity. It would be helpful to stipulate that any directors appointed to the audit committee of public companies be INEDs.

7. **Corporate Disclosures:**

Disclosure under the NCCG should be targeted at revealing whether the various core committees recommended to be set up by the Code (nomination & governance committee, audit and risk committee and renumeration committees) have indeed been set up.

8. **Technological Innovations and Ancillary Matters:**

Future amendments to the CAMA should validate holding of board meetings via electronic, teleconference or videoconference means; electronic voting during physical meetings, electronic voting while participating remotely and service of notices of meetings electronically. Future amendments should also validate consent to shorter notice for board meetings and general meetings.

4.5 Summary of Recommendations for Canada

As stated previously, the Canadian corporate governance framework will benefit from adopting the following recommended practices:

1. **Board Committee Charters:**

Encouraging board committees to establish charters or mandates which will improve the efficiency of board committees in Canada. The inclusion of this requirement in the NP58-201 will also go a long way in promoting this practice.

2. **Board Evaluations:**

Board evaluations are important tools for evaluating corporate governance and although the NP58-201 recognizes the importance of same, it does not specifically require that such assessments be carried out by independent assessors. This therefore gives room for the company or the board to rely solely on assessments carried out by internal participants like the Company Secretary or Legal Officer – which defeats the purpose of the assessment as it would not reflect a true or fair view of the board's performance.

3. **Corporate Governance Evaluations:**

Corporate governance evaluations and ratings are equally important. Requiring boards to conduct a holistic corporate governance evaluation in addition to board, director and committee evaluations and requiring companies to disclose the outcome of such evaluations would be beneficial to the Canadian corporate environment. Corporate governance ratings by provincial stock exchanges similar to the Nigerian Stock Exchange will also provide a useful tool for investors to readily assess the corporate governance compliance level of companies operating in the country.

4. **National Code of Corporate Governance:**

It would be useful to consider establishing either provincial or national code of corporate governance which would ensure that the CSA, respective stock exchanges and other corporate regulatory agencies are continuously in tune with international corporate best practices and are in a position to direct companies to adopt same. This would ensure that the development and entrenchment of corporate governance international best practices is not left solely to institutional investors like the CCGG. It is important that the Code adopt an outcomes-based approach as opposed to the rules-based approach reflected in the NP58-201.

Chapter 5: Conclusion

5.1 Summary

This thesis sought to identify the primary challenge with Nigeria's corporate governance framework and to draw out lessons from a comparative analysis of the Nigerian and Canadian frameworks which would be beneficial to the development of corporate governance in Nigeria. Chapter 1 provided background to this study by outlining the problem context and questions sought to be answered. Also, the comparative methodology employed and rationale for the choice of Canada as a comparative jurisdiction were explained.

In Chapter 2, I examined the evolution of corporate governance in Nigeria. I explored the history and evolution of Nigeria's corporate governance framework from the days of customary law, to the colonization era and post-colonial developments. The various laws that comprise the Nigerian corporate governance framework (in the form of the CAMA, the SEC Code of Corporate governance and the sectoral codes of corporate governance) were also discussed. Recent developments relating to the attempted issuance of the NCCG 2016, issuance of the NCCG 2018 and proposed amendments to the CAMA were equally discussed. Specific attention was paid to the NCCG 2018 which was issued by the FRCN in January 2019 and the CAM Bill 2018. An analysis of the NCCG 2018 revealed that the outcomes-based and *apply and explain* approach adopted under the King IV Report on Corporate Governance has been replicated in the Nigerian corporate setting. The Code seeks to avoid box-ticking exercises which result in companies making little or no effort towards implementing principles and recommended practices proposed by the Code. The Code has however been questioned in a number of quarters. One noticeable gap is that unlike its predecessor (the NCCG 2016), the NCCG 2018 was issued specifically in relation to the private sector. It is however hoped that a Code for the public and not-for profit sectors will be issued in the nearest future. There is also debate about the NCCG 2018's applicability to private companies in light of the Federal High Court's decision in *Eko Hotels.* In this case, the Court held that the FRCN does not have any regulatory jurisdiction over private companies—only over publicly quoted companies and public interest companies. I am however of the opinion that s. 77 of the FRCN Act does not completely exempt private companies. Rather, it exempts private companies that only routinely file returns with the CAC and the FIRS. This is because private companies such as banks which file returns to the Central Bank of Nigeria cannot be said to come under that provision and are in fact, "regulated private companies". Apart from this, both the NCCG 2018 and the CAM Bill make innovative changes to the Nigerian corporate governance framework.

In analyzing Nigeria's corporate governance model, it was observed that Nigeria does not strictly operate under the Anglo-American model as it obtains in the UK and in the US. This is due largely to the fact that as an emerging economy, Nigeria's focus is to enhance its economic development and actions taken in the corporate sphere are targeted at achieving economic growth and development. Also, the drive behind the CAM Bill is to enhance the ease of doing business in Nigeria and to consequently encourage foreign direct investments which will boost the country's GDP. This is also reflected in the spirit of the NCCG 2018 which was issued with the goal of promoting trade and investments. It can however be said that Nigeria's model draws inspiration from the Anglo-American and South African corporate governance models. This chapter also evaluated the Nigerian corporate governance scorecard through corporate governance ratings. The study revealed that Nigeria is not listed on the SAHA Rating revised World Corporate Governance Index for 2018 which points to the fact that Nigeria has a long way to go in establishing an effective corporate governance framework.

Similar to the preceding chapter, Chapter 3 studied the evolution of corporate governance in Canada over the years and provided some insight into the workings of corporate governance in Canada and the ongoing challenges. Various reforms in corporate and securities law regulation were discussed. I identified that Canada was one of the first commonwealth countries to cater to stakeholder interests. I also discussed challenges faced by the Court in protecting these interests in the prominent *Peoples* and *BCE* cases where the SCC held that directors owe a fiduciary duty to the company and not to any one group of persons. I equally discussed the business judgment rule employed by the courts in determining if a business decision was made in the best interest of a company and how it unwittingly leads to a situation where the court defers to the discretion of directors. The CBCA amendment made in June 2019, which codified the *BCE* decision as well as concerns that the amendment was incohesive were discussed. Concerning corporate governance reforms, we see that although a number of reforms have been undertaken over the years, the Canadian approach has been not to unduly regulate corporate law but rather leave it to corporate players, market forces and securities regulators to promote corporate governance.

The ongoing challenge with the establishment of a national securities regulator and a federal securities act was also discussed. The decision of the SCC confirming the constitutionality of the proposed cooperative regulatory system seems to be a ray of sunshine. As many scholars have pointed out, its success is largely dependent on cooperation and collaboration between the federal government on one hand and provincial and territorial governments on the other. I also identified that although it is often said that the Canadian system draws inspiration from the Anglo-American model of corporate governance, the Canadian securities regulation structure and the decision of the SCC in *Peoples* and *BCE* show that Canada's model is distinct, albeit not sufficiently clear. I also recognize that Canada ranks highly in indices measuring countries' corporate governance framework and implementation, as well as anti-corruption and ease of doing business indices.

Chapter 4 encapsulated the essence of this research study by undertaking a comparative analysis of the Nigerian and Canadian corporate governance frameworks. The comparative analysis revealed that although there is room for improvement, Nigeria has a viable framework which ought to enhance economic growth. Although this research study is primarily targeted at drawing out lessons and pointers for Nigeria based on results of the comparative analysis, findings reveal that there are also areas where Canada will benefit from borrowing a page or two from the Nigerian corporate governance framework.

5.2 Findings from the Comparative Analysis and Areas for Further Research

Overall, from the comparative analysis, it appears that Nigeria has a viable corporate governance framework. For one, the absence of a federal securities law and regulator in Canada reveals the challenges faced by businesses and investors in having to deal with multiple stock exchanges, even with the passport system in place. In Nigeria, the uniform corporate laws and regulations saves companies the burden of having to be familiar with the requirements of various stock exchanges. Also, Nigeria has over the years, made considerable effort to put in place corporate governance codes to serve as a guide in terms of encouraging international best practices. Although this has led to the multiplicity of corporate governance codes with no clear direction in terms of hierarchy of compliance, it signifies that regulators are proactively searching for ways to improve corporate governance in Nigeria. Canada on the other hand has adopted an industry approach to corporate governance best practices by leaving it to securities regulators and shareholder institutions such as the CCGG to put forward guidelines and best practices to be adopted by companies in which their members hold shares. Generally, the provisions of the NCCG 2018 and the CAM Bill are quite similar and in some cases, more comprehensive than their Canadian counterpart, however, there are a number of loopholes in the current framework which need to be plugged (which are discussed in the preceding section).

In the course of this thesis, I discovered that there is some ambiguity as to the exact corporate governance model applied in Nigeria. This is because on one hand, CAMA states that directors are to act in the best interest of the company and on the other hand, the NCCG 2018 requires directors to "act in the best interest of shareholders and other stakeholders whilst sustaining the prosperity of the company".[352] In practice, directors have interpreted the statutory duty to act in the company's best interest as the duty to maximize shareholder value. With the issuance of the NCCG 2018, directors may now adopt an enlightened shareholder approach which requires the consideration of both shareholder and stakeholder interests. The propriety of this is however unclear as it could be argued that the provisions of CAMA prevail over the principles contained in the Code. However, until the phrase "best interest of the company" is defined within the Nigerian context, directors have the discretion to interpret this duty as they will. I also observed that this same issue has also plagued the Canadian corporate governance framework, that is, in terms of defining what "best interest of the company" connotes. However, unlike Nigeria, there has been judicial (through the decision of the SCC in *BCE* and *Peoples* and now, statutory interpretation (through recent

[352] NCCG 2018

amendments to the CBCA) of this phrase in Canada. Despite these judicial and legislative efforts, it appears that Canada has still been unable to set out in practical terms, how the best interest of the corporation duty operates. It therefore seems that the "best interest of the corporation" phrase which is contained in both Nigerian and Canadian corporate law, and which is a product of both country's historical relationship with the UK, has caused confusion and uncertainty in both countries. As Aluju and Onele observe, "notably, the phrase 'in the best interests of the company' used in s. 279(3) CAMA, reproduced above, has permeated with legal uncertainty the jurisprudence of company law, both in Nigeria and other jurisdictions".[353] The main challenge with this phrase lies in ascertaining who the corporation is. This is because even though corporations are separate legal entities, corporations do not have identities of their own and often take on the identity of one of its constituent parts. Considering that unlike natural persons, a company does not have a "brain" of its own, it has to rely on an external group (directors) to make decisions concerning how its constituent parts function. Therefore, directors are the "mind" and "brain" of the company. Accordingly, it stands to reason that any theory aimed at promoting the interest of the company by viewing it as a whole rather than its constituent parts, invariably adopts a director primacy approach, which gives directors the discretion to decide whose interest will prevail at any given point in time.[354] Given the confusion that still permeates this issue both in Canada and Nigeria, it may be necessary for both countries to depart form the English law best interest provision, and clearly answer the question as to whom directors owe fiduciary duties.

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[353] Jonathan Aluju & Joseph Onele, "An Appraisal of the Duties of Directors in a Public Company in Nigeria" (2017) 8:1 Grav R Bus & Prop L 52 at 53.

[354] Ben-Ishai, *supra* note 198 at 302.

Overall, although there is room for improvement, the current framework is viable and ought to produce positive outcomes that contribute to Nigeria's development. The lack of substantial positive result suggests that the challenge faced is not one of adequacy of laws and possibly of implementation or enforcement. The implementation of corporate governance rules and principles in Nigeria is inhibited by a number of factors. Corruption is one of such factors.[355] Transparency International defines corruption as "the abuse of entrusted power for private gain. It can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs."[356] Although corruption is a universal problem, it is a deep-rooted vice in developing economies than in developed economies. This is evidenced by the fact that the top 20 countries in the 2018 Corruption Perception Index generated by Transparency International are developed countries.[357] According to this ranking, these countries are believed to have reduced corruption levels. On the converse, the last 37 countries with scores between 10 and 28 are developing countries. In particular, Nigeria ranks 144th out of 180 countries and this shows that corruption is a serious challenge faced in Nigeria.[358] Transparency International's Corruption Perception Index therefore suggests that corruption is inextricably linked to a country's economic performance.

[355] Emmanuel Adegbite, "Corporate Governance Regulation in Nigeria" (2012) 12:2 Corporate Governance 257 at 269. See also Okike, *supra* note 122 at 173 and Michelle I Caron, Aysun Ficici & Christopher L Richter, "The Influence of Corruption on Corporate Governance Standards: Shared Characteristics of Rapidly Developing Economies" (2012) 2:1 EMAJ 21 at 23.

[356] Transparency International, "What is Corruption?", online: <https://www.transparency.org/what-is-corruption>.

[357] Transparency International, *supra* note 133. The purpose of the Corruption Perception Index is to rank 180 countries and territories by their perceived levels of public sector corruption according to experts and business people. In doing so, it uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean.

[358] *Ibid*. See Hossein Gholami & Habeeb Abdulrauf Salihu, "Combating Corruption in Nigeria: The Emergence of Whistleblowing Policy" (2019) 26:1 JFC 131 at 131.

Accordingly, the resultant effect of deeply-rooted corruption is poor governance, which in turn hinders the effective implementation and enforcement of laws.[359] More so, the incidental operating costs incurred in ensuring legal compliance is higher than the costs that go with tolerating corrupt practices.[360] As such, there is a tendency to believe that it is easier and more cost effective to pay bribes and engage in other corrupt practices than to comply with corporate legislations or corporate governance codes. Studies however show that companies that pay bribes often waste more time and money when negotiating bribes with government officials than companies that don't pay bribes.[361] In all, scholars have suggested that putting in place effective corporate governance structures will go a long way in combatting corruption.[362] Therefore, it will be useful for Nigeria to perceive corporate governance as a possible tool to tackle corruption. In so doing, deliberate legislative and regulatory effort will be put into developing corporate governance frameworks with the aim of tackling corruption, amongst other things.

[359] However, political scientists have proposed the "efficient grease theory" to argue that corruption is beneficial in developing countries because it increases efficiency. See Joel S Hellman et al, *Measuring Governance, Corruption, and State Capture: How Firms and Bureaucrats Shape the Business Environment in Transition Economies* (The World Bank, 1999). Other scholars however point out that corruption affects economic growth and development. See Daniel Kaufmann & Shang-Jin Wei, 1999. "Does "Grease Money" Speed Up the Wheels of Commerce?" NBER Working Papers 7093, National Bureau of Economic Research, Inc.

[360] The decision on whether or not to give bribes is based on a cost-benefit approach which measures the gains against what stands to be lost if the bribe is given or not given. See Aksel Sundström, "Why Do People Pay Bribes? A Survey Experiment with Resource Users" (2019) 100:3 Soc Sci Q 725 at 727.

[361] Philip M Nichols, "The Business Case for Complying with Bribery Laws" (2012) 49:2 Am Bus LJ 1 at 9.

[362] Adegbite, *supra* note 355. See also Michelle I Caron, Aysun Ficici & Christopher L Richter, "The Influence of Corruption on Corporate Governance Standards: Shared Characteristics of Rapidly Developing Economies" (2012) 2:1 EMAJ Mark J 21.

Also, enforcement proves challenging considering that shareholder and investors find it difficult to pursue legal action and obtain timely remedy from law Courts—which is a function of congested courts and ineffective judiciary.[363] Nigeria particularly faces this challenge given that the judicial system is weak, overburdened and bedeviled by corruption.[364] As such, Nigeria needs to critically reform her judicial system to allow for effective and timely determination of cases. Regulatorily agencies have also not lived up to their responsibility. For instance, the CAC has not effectively discharged its duties to monitor and supervise business operations in Nigeria. According to the 2004 World Bank Report on the Observance of Standards and Codes (ROSC):

> The CAMA empowers the Registrar of Companies at the Corporate Affairs Commission to regulate compliance with its financial reporting presentation requirements. There is however no capacity at the Corporate Affairs Commission to effectively fulfill this function. It is a legal requirement to file a copy of the audited financial statements and directors' report with the Commission. There is however no rigorous enforcement of timely filing. Financial statements of non-listed public and private companies are not readily available. It seems most companies simply do not comply with the filing requirements, and sanctions are not applied. There are significant weaknesses in the enforcement mechanism, which is accentuated by a degree of corruption and poor recordkeeping by the Corporate Affairs Commission.[365]

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[363] Leila Atwi, Assem Safieddine & Sheridan Titman, "Investor Protection and Governance in the Valuation of Emerging Markets Investments" (2017) 29:3 JACF 89.

[364] Vasudev Das, "Judicial Corruption: The Case of Nigeria" (2018) 25:4 JFC 926.

[365] *Report on the Observance of Codes and Standards*, 35168 (Nigeria: World Bank, 2004) Available at <http://documents.worldbank.org/curated/en/109681468288617735/pdf/351680UNI0Accounting0rosc1aa1nga.pdf.>

Sadly, although this report was issued 15 years ago, its veracity still remains today. The CAC has so far, not lived up to its responsibility to promote corporate governance in Nigeria and this has a consequent effect on corporate governance enforcement. Okike points out that there is a need to strengthen CAC's monitoring role and to prescribe stiffer sanctions for non-compliance with corporate law requirements.[366] In the same vein, the SEC, which was established to protect investors has not been as effective as it should be.[367] The SEC has however been more effective than the CAC in sanctioning market participants. For example, a list of companies facing enforcement action for offences ranging from unauthorized sale of shares belonging to clients, unethical capital market conduct, non-rendition of quarterly returns, for which varying sanctions including suspension and revocation of license were meted out, is contained on the SEC webpage.[368] However, not much is being done in terms of "monitoring compliance with financial reporting requirements".[369] This observation was also made in the World Bank ROSC which stated that "SEC enforcement is weak, and administrative sanctions and civil penalties are not adequate to deter non-compliance."[370] This weak institutional framework contributes to the inefficiency of the Nigerian corporate governance framework. As Adegbite puts it, "the Nigerian weak institutional context makes corporate law enforcement and self-regulatory initiatives remain in idealism".[371]

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[366] Okike, *supra* note 122 at 176.

[367] *Ibid*.

[368] "Suspensions and Penalties", (19 October 2015), online: *The Securities and Exchange Commission, Nigeria* <https://sec.gov.ng/suspensions-and-penalties/>.

[369] Okike, *supra* note 122 at 177.

[370] World Bank, *supra* note 365.

[371] Emmanuel Adegbite, "Good Corporate Governance in Nigeria: Antecedents, Propositions and Peculiarities" (2015) 24:2 Int'l Bus Rev 319 at 319.

The enforcement challenge takes a complex dimension when we consider the multiple corporate governance codes that have been issued over the years. As Osemeke and Adegbite point out, the existence of multiple conflicting codes leads to “reduced compliance by firms and ineffective enforceability by regulatory agencies”.[372] By way of illustration, a publicly-held telecommunication company in Nigeria will be unsure which Code to abide by amongst the SEC Code for Public companies, the NCC Code of Corporate Governance and the NCCG 2018. Adegbite had urged the FRCN to take note of the challenges with the existence of multiple sectoral codes and recommended the issuance of a combined mandatory code.[373] This suggestion appears to have been considered by the FRCN given the issuance of the NCCG 2018 which seeks to put forward a singular national approach to corporate governance. However, as discussed earlier in Chapter 2, the FRCN’s failure to categorically establish the relationship between existing sectoral codes and the NCCG 2018 only has the effect of making an already bad situation worse. Thus, rather than having a unified combined code, the NCCG 2018 exists in addition to the sectoral codes and the question of precedence has been left unanswered. A ray of sunshine that should however be noted is the rise of private sector driven initiatives such as the Society of Corporate Governance Nigeria[374] and the Institute of Corporate Governance Nigeria[375] which aim to

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[372] Osemeke & Adegbite, *supra* note 25 at 431. See also J Kirkbride & S Letza, “Regulation, Governance and Regulatory Collibration: Achieving an ‘Holistic’ Approach” (2004) 12:1 Corporate Governance 85.

[373] Osemeke & Adegbite, *supra* note 25 at 443.

[374]“Who We Are”, online: *The Society for Corporate Governance Nigeria* < https://corpgovnigeria.org/>.

[375] “Who We Are”, online: *Institute of Corporate Governance Nigeria* < http://icgng.org/>.

promote the development of corporate governance in Nigeria through advocacy and research.[376]

Overall, although Nigeria's corporate governance laws and codes are viable, the major factors militating against its effectiveness are the issues of corruption, implementation and enforcement. There is a need for regulatory agencies such as the CAC and SEC to actively put measures in place to monitor and enforce existing laws and codes. There is equally a need to reduce the attention being given towards the issuance of codes. If the energy employed towards developing and issuing codes is channeled towards addressing issues of corruption, inefficiency in the judicial system, and creating strong regulatory agencies, Nigeria's corporate governance framework will achieve the desired goal of enhancing economic growth.

[376] Adegbite, *supra* note 355 at 268. See also Fabian Ajogwu, *Corporate Governance in Nigeria: Law & Practice* (Lagos: Centre for Commercial Law Development, 2007).

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