“GIRLS, WHO RUN THE WORLD?” NOT YET:

An Analysis of the Underrepresentation of Women on Boards in Canada and the Underlying Theory of the Regulation Thereof

DIANA C. NICHOLLS

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Osgoode Hall Law School

York University

Toronto Ontario

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Abstract

This thesis provides an in-depth analysis of the underlying theories of the regulation of the underrepresentation of women on boards. In particular, it focuses on the Canadian board gender diversity policy found in National Instrument 58-101F1. The theories justifying regulation of this issue are typically categorized into business case rationales and normative rationales. Through an analysis of the regulatory journey of the Canadian policy, it is argued that while securities regulators claim that the policy contained in NI 58-101F1 was rooted in business case rationales, it in fact arose from normative concerns. Not only that, but because of the policy's weakness, it does not achieve its stated objective which is to increase female participation on reporting issuer boards.

It is further argued that neither the business case nor the normative case have been accepted by those on Canadian public boards. A deep analysis of these theories, their pitfalls, and the possibility to combine the two, reveals that it may be time to amend the Canadian diversity policy even if this means the acceptance by the regulator and the business community of one, both or neither of the business or normative cases.

The final chapter presents a range of regulatory options which are more likely to enhance women's participation on public boards than the current policy. Which of these options and what exact form regulation should take are questions this thesis leaves up to the securities regulators.

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Introduction

Boardroom diversity has become one of the hottest topics in corporate governance in recent years. It has sparked global notice and is in the news across the world daily.[1] Despite all this attention, boards of large, publicly traded firms in Canada still remain heavily under-diversified. Women for instance represent just 15% of members on these boards.[2] In 2014 the Canadian Securities Administrators (CSA) implemented a gender diversity disclosure policy aimed at increasing female participation on reporting issuer boards.[3] The policy though has had little impact. The looming question is what, if anything, should be done to rectify the issue of underrepresentation of women on boards in Canada?

This thesis will begin with a review of the literature regarding women's underrepresentation on boards. There will be a focus on the underlying rationales which are most typically used to justify regulation aimed at increasing the number of women on boards. These rationales fall into

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[1] Afdhel Aziz, "The Power Of Purpose: Why Companies Need 'Knowledge + Network' To Drive Diversity And Inclusion", online: *Forbes* <https://www.forbes.com/sites/afdhelaziz/2019/02/14/the-power-of-purpose-why-companies-need-knowledge-network-to-drive-diversity-and-inclusion/>; "Canada lags behind the U.S. on putting women in corporate boardrooms | CBC News", (28 March 2019), online: <https://www.cbc.ca/news/business/canada-board-gender-diversity-1.5074233>; Michelle Davis, "JPMorgan to Name Record Number of Female Managing Directors", (24 April 2019), online: <https://www.bloomberg.com/news/articles/2019-04-24/jpmorgan-said-to-name-record-number-of-female-managing-directors>; Velluvar, "Malaysian Banks Lead Southeast Asian Peers for Board Diversity - Bloomberg", online: <https://www.bloomberg.com/news/articles/2019-06-17/malaysian-banks-lead-southeast-asian-peers-for-board-diversity>; "Asian Companies With More Women on Boards Deliver Better Results", *Bloomberg.com* (27 June 2019), online: <https://www.bloomberg.com/news/articles/2019-06-27/asian-companies-with-more-women-on-boards-deliver-better-results>; Ventures Africa, "The AFRICA CEO FORUM launches its diversity charter to strengthen female leadership in Africa", (20 June 2019), online: *Ventures Africa* <http://venturesafrica.com/the-africa-ceo-forum-launches-its-diversity-charter-to-strengthen-female-leadership-in-africa/>; "Mastercard AGM to feature human rights and gender pay votes", (10 May 2019), online: *Corporate Secretary* <https://www.corporatesecretary.com/articles/shareholders/31601/mastercard-agm-feature-human-rights-and-gender-pay-votes>; Lexology, "ASX 200 reaches 30% women directors | Lexology", online: <https://www.lexology.com/library/detail.aspx?g=957f7cc4-b882-4fbb-9abd-b195e1073354>.

[2] CSA Multilateral Staff Notice 58-310 *Report on Fourth Staff Review of Disclosure regarding Women on Boards and in Executive Officer Positions*, OSC CSA Notice (27 September, 2018) ["CSA Multilateral Staff Notice 58-310"]at 1.

[3] National Instrument 58-101 *Disclosure of Corporate Governance Practices* OSC NI 58-101F1 [NI 58-101F1].

two broad categories: the business case and the normative case. Both have several iterations, but neither has been successfully integrated into Canadian corporate governance rhetoric. The sluggish progress demonstrates that business leaders have actually accepted neither the normative nor the business case.

In Chapter 2, the origin of the CSA gender diversity policy in Canada will be examined. An argument will be put forward that the amendments to National Instrument 58-101F1[4] first arose from social justice concerns. Further, after considering international board gender diversity policies and how these fared, the Canadian securities regulators selected a model that they knew would be unlikely to achieve its stated objective.

Thirdly, a deeper analysis will be provided of both the business and normative rationales in Chapters 3 and 4 respectively. The business case has been formulated in many ways, yet none has successfully persuaded Canadian public issuers to diversify at the board level. Critical mass and risk aversion will be analysed in great depth in order to show what may be missing from the business case. Critical mass theory, while very popular in the literature dealing with women on boards, has not been convincingly demonstrated empirically because there have yet to be enough women on boards to test this theory. Male and female risk aversion and its possible connection with systemic risk will be critically analysed. An argument will be presented that gender diversity on boards may contribute to the reduction of systemic risk. The securities regulators, given that their mandate includes promoting the reduction of systemic risk, may be required to examine board gender diversity from this perspective.

[4] *Ibid.*

The normative case will subsequently be examined. It may be necessary to view the board as other than a wealth maximizer to sustain the normative case. However, even accepting the shareholder primacy norm, including in its most extreme form in US corporate law, directors are still entitled to pursue board diversity efforts. It will also be argued that it may be possible to reformulate the business case and to combine same with the normative case.

Finally, a look at regulatory options will follow in Chapter 5. It will be argued that, at the very least, NI 58-101F1 should be amended to contain a stricter comply-or-explain policy, or alternatively, that even stronger regulatory intervention may be necessary and justifiable. If it is true that the federal government, the provincial governments, and the securities regulators wish to see the needle move, issuers may need a push in the right direction.

1 Chapter 1 “Déjà Vu”: Literature Review

1.1 “FORMATION”: THE BOARD

Scholars have yet to agree about the board’s importance in relation to a firm’s overall functioning.[5] Thus the question arises as to whether the composition of the board matters if the board is not determinative of corporate performance but only window dressing. The impact of increasing board diversity (and by extension regulation aimed at increasing board gender diversity) depends upon the board’s influence itself.[6] Dhir offers some justification for beginning with the board when discussing the underrepresentation of women in the upper echelons of corporate Canada and regulation of this phenomenon. First, he notes that corporate law in Canada provides directors with a great deal of power and responsibility, placing the board at the top of the corporate hierarchy.[7] The *Canada Business Corporations Act* (*CBCA*) as well as the provincial statutes require board members to be of a certain age, financial standing, mental capacity, and for a quarter of the directors to be resident Canadians.[8] Furthermore directors are responsible for extremely important aspects of corporate oversight, some of which they are prohibited from delegating to management, including voting on mergers and acquisitions, approving financial statements and bylaws, and issuing dividends.[9] The board is responsible for monitoring management and

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[5] Kimberly Krawiec, John Conley & Lissa Broome, “A Difficult Conversation: Corporate Directors on Race and Gender” (2014) Pace International Law Review 416 at 23; Aaron A Dhir, *Challenging Boardroom Homogeneity* (2015) at 28, 29 & 165; Akshaya Kamalnath, “The Value of Board Gender Diversity vis-a-vis the Role of the Board in the Modern Company” (2015) SSRN Electronic Journal, online: <http://www.ssrn.com/abstract=2608301> at 99.
[6] Dhir, *supra* note 5 at 165.
[7] *Ibid* at 26. See also James A Fanto, Lawrence M Solan & John M Darley, “Justifying Board Diversity Board Diversity and Corporate Performance: Filling in the Gaps” (2010) 89 NC L Rev 901 at 906; Sonja S Carlson, “Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards Student Scholarship” (2012) 11 Seattle J Soc Just [i] at 338.
[8] *Canada Business Corporations Act* RSC, 1985, c-C44, sections 105(1), 105(3), and 106(3) [“CBCA”]; Ontario Business Corporations Act RSO, 1990 c B16, sections 116(1), 127, and 133. See Dhir *supra* note 5 at 30. See also, Kamalnath, *supra* note 5 at 93.
[9] Dhir, *supra* note 5 at 31.

approving the actions thereof. It is also there to advise executives and to provide important external networks and signals to the public.[10]

There is a theory that once boards diversify, other levels of the corporation may in turn see greater diversity. For instance, a Canadian Conference Board study found that corporations with more women on their boards in 1995, had 30% more women in executive roles by 2001 as compared to corporations with all-male boards in 1995.[11] A study conducted using data from the MSCI All World's Index published in 2016, found similar results, namely that those corporations with three or more female directors had a higher average percentage of women in senior management.[12] Matsa & Miller also found that each 10 percentage point increase in women on boards increased the likelihood of having women among the top five executives in the next year by 0.9 percentage points.[13] Tinsley and Purmal more recently found that as female representation on boards increases, females are much more likely to be appointed as CEOs of large, US companies.[14] Thus, there is evidence of what Matsa and Miller term "gender spillover" from the board to the executives.[15]

Directors are often blamed in the wake of corporate scandals and failings, usually for not doing enough.[16] Thus, it can be argued that boards (especially those of public companies) play a

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[10] Fanto, Solan & Darley, *supra* note 7 at 909. For a discussion of how effective, or ineffective, these signals might be, see Lissa L Broome & Kimberly D Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, SSRN Scholarly Paper ID 1132884 (Rochester, NY: Social Science Research Network, 2008).
[11] David Brown, Debra L Brown & Vanessa Anastasopoulos, *Women on boards: not just the right thing ... but the "bright" thing* (Ottawa, ON: Conference Board of Canada, 2002) at 8. See also, Carlson, *supra* note 7 at 384.
[12] Meggin Thwing Eastman, Damion Rallis & Gaia Mazzucchelli, "The Tipping Point: Women on Boards and Financial Performance" (2016) 23 at 9–10.
[13] David A Matsa & Amalia R Miller, "Chipping away at the Glass Ceiling: Gender Spillovers in Corporate Leadership" (2011) 101:3 The American Economic Review 635 at 637.
[14] Catherine H Tinsley & Kate Purmal, "Research: Board Experience Is Helping More Women Get CEO Jobs", *Harvard Business Review* (29 July 2019), online: <https://hbr.org/2019/07/research-board-experience-is-helping-more-women-get-ceo-jobs>.
[15] Matsa & Miller, *supra* note 13 at 638.
[16] For example see the TSX-published report in the 1990s entitled "Where Were the Directors?" See National Policy 58-201: *Proposed National Policy 58-201 Effective Corporate Governance* (2004) ["NP 58-201"]. A specific

critical role in corporate governance and the capital markets.[17] So questions of their composition are of the utmost importance in the realm of securities, corporate governance, and the regulation of each of these.

However, other scholars view the board's role as superfluous. On this view, the board's role is largely to sign off on the actions of management. Executives hold the true power. Directors do not have any impact on a company's performance and so the board's composition should make little difference either to individual corporate performance or to capital markets generally.[18] The argument is that since boards do very little, diversifying them makes little sense. The counter to this argument of course is, if boards do so little, what is the disadvantage of them being diverse?

In sum, in seeking to improve diversity within Canadian public corporations, the board is at least a logical place to start. First, because statutorily, it is the center of the corporation. Second, if it is accepted that change in the boardroom leads to change throughout companies, then regulation of diversity on boards should have a broad impact. Thus it seems that the board "offers a contained and sensible place to begin diversification initiatives".[19]

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example is the case of Bre-X, one of the most notorious Canadian corporate scandals in history. A small Alberta mining company which allegedly struck gold in Indonesia's stock exploded in the mid-1990s. It turned out that the projections being publicly disclosed were a result of tampering with core samples. Once these fraudulent disclosures were brought to light, Bre-X's stock plummeted. This scandal ended in criminal trials for the company's directors and a great deal of speculation as to how much they did or did not know and why they were not able to prevent the massive fraud. For a full description see Christopher C Nicholls, *The Bre-X Hoax: A South East Asian Bubble*, 32 Can. Bus. L.J. 173 (1999). See also Fanto, Solan & Darley, *supra* note 7 at 912; Kamalnath, *supra* note 5 at 95.

[17] Angela Foster, "A quest to increase women in corporate board leadership: comparing the law in Norway and the U.S." (2017) 26:2 Washington International Law Journal, online: <http://link.galegroup.com/apps/doc/A494500603/LT?sid=googlescholar> at 382.

[18] Krawiec, Conley & Broome, *supra* note 5 at 423; Dhir, *supra* note 5 at 29; Kamalnath, *supra* note 5 at 99.

[19] Dhir, *supra* note 5 at 29.

1.2 "Flaws and All": Underlying Theories of Regulation of the Underrepresentation of Women on Boards

"[T]he way regulation gets framed as a problem shapes the solutions that get conceived and adopted, as well as their prospects for success… Advocates of new regulatory initiatives should think carefully about how to frame the problem of regulation and whether the reforms proposed are responsive to the problems identified."[20] In order to understand how the underrepresentation of women on boards is or should be regulated, it is important first to understand how the problem to be regulated is perceived. The arguments used by proponents of regulation aimed at increasing representation of women on corporate boards fall into two main categories. There are those who conceive of the underrepresentation of women on boards as a financial or instrumental issue, whereby corporations (and their shareholders) are missing out on the business benefits female directors bring. Alternatively, there are those who conceive of female underrepresentation on corporate boards as a social justice issue. "Should boards diversify to rectify inequality or rather, to serve corporate needs?"[21] For those who view this issue as a business-based problem, stronger securities regulation is justified in order to benefit the market and better protect investors. For those who view the problem as one of social justice, regulation is justified using normative arguments. Business case rationales tend to be appealing both to businesses and securities regulators. Academics more recently have noted the weaknesses of the business case and have cautioned against its use in favour of a normative-based justification for change.[22] Both rationales have been heavily criticized and are steeped in controversy.

[20] Jodi L Short, "The Paranoid Style in Regulatory Reform" (2012) 63 Hastings Law Journal 62 at 680–681.
[21] Darren Rosenblum, "When Does Sex Diversity on Boards Benefit Firms" (2018) 20 U Pa J Bus L 429 at 437.
[22] David A Carter et al, "The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance: Board Diversity and Financial Performance" (2010) 18:5 Corporate Governance: An International Review 396 at 412; Deborah L Rhode & Amanda K Packel, "Diversity on Corporate Boards: How Much Difference Does Difference Make" (2014) 39 Del J Corp L 377 at 400; Lisa M Fairfax, "Board Diversity Revisited: New

1.2.1 The Business Case

The business case is complex. Over time regulators and scholars alike have put forward many iterations of this rationale to justify or criticize regulation of the underrepresentation of women on corporate boards. First, there is the straightforward version of the business case which states simply that increased gender diversity enhances financial performance.[23] Second is the idea that greater board diversity will lead to improved corporate governance, a result which may not necessarily enhance financial performance, at least in the short term.[24] A third iteration is that by enhancing gender diversity on corporate boards, a corporation consequently must be accessing a wider talent pool. In turn access to a greater talent pool should lead to better business outcomes.[25] These iterations along with criticisms of each will be described in detail.

1.2.1.2 Financial Performance

The last three decades have seen a wealth of studies examining the relationship between boardroom gender diversity and financial performance. These studies have used a variety of

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Rationale, Same Old Story Board Diversity and Corporate Performance: Filling in the Gaps" (2010) 89 NC L Rev 855 at 879.

[23] Aaron Dhir, "Toward a Race and Gender-Conscious Conception o f the Firm: Canadian Corporate Governance, Law and Diversity" (2010) 35:569 Queen's Law Journal, online: <https://nextcanada.westlaw.com/Document/I2f63d114791c11df9b8c850332338889/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad62d34000001669c20faad71e406b5%3FNav%3DCAN_JOURNALS%26fragmentIdentifier%3DI2f63d114791c11df9b8c850332338889%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=33736f6821d3fea2f208b0977f01527e&list=CAN_JOURNALS&rank=3&sessionScopeId=bb12fe98e3624689adc50eaf9da6e8b242a12ee233f5276122d4df598d2ab7e1&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29> at 593; Rhode & Packel, *supra* note 20 at 382–383; Catalyst, "Why Diversity and Inclusion Matter: Financial Performance", (31 July 2018), online: *Catalyst* <https://www.catalyst.org/knowledge/why-diversity-and-inclusion-matter-financial-performance>; Fairfax, *supra* note 20 at 1860; Geneva R Fountain, "The Case for the Business Care Rationale" (2016) 15 Fla St U Bus Rev 81 at 83; Fawn Lee, "Show Me the Money: Using the Business Case Rationale to Justify Gender Targets in the EU European Union Law Issue: Note" (2013) 36 Fordham Int'l LJ 1471 at 1481; David Carter et al, *The Diversity of Corporate Board Committees and Firm Financial Performance*, SSRN Scholarly Paper ID 972763 (Rochester, NY: Social Science Research Network, 2007) at 4.

[24] Rhode & Packel, *supra* note 22 at 393.

[25] Carter et al, *supra* note 23 at 10; Dhir, *supra* note 5 at 42; Niclas L Erhardt, James D Werbel & Charles B Shrader, "Board of Director Diversity and Firm Financial Performance" (2003) 11:2 Corporate Governance 102 at 12; Rosenblum, *supra* note 21 at 441.

metrics to measure financial performance, including Tobin's Q,[26] Return on Assets (ROA),[27] Return on Sales (ROS),[28] Return on Equity (ROE),[29] and Return on Investment or Invested Capital (ROI/ROIC).[30] Financial performance studies have given rise to varying results. Some have demonstrated a positive relationship between boardroom gender diversity and financial performance, while others have shown either no relationship or in some cases a negative relationship. Interestingly, those demonstrating a positive relationship significantly outnumber those which demonstrate a negative relationship.

a) Studies Showing a Positive Relationship in Chronological Order

A significant number of studies spanning multiple decades have found a positive relationship between increased gender diversity and improved financial performance using a variety of financial performance metrics. In the 1990s, Erhardt et al in a study of 127 large, publicly traded American companies between 1993 and 1998, found that there was a positive relationship between board diversity and ROA as well as ROI.[31] This led the authors to conclude that diversity may be connected to enhanced monitoring of management.[32] Enron,[33] they argued, is a typical example

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[26] Tobin's Q is defined as the ratio comparing a firm's value with the cost of replacing its assets, Christopher C. Nicholls, *Corporate Finance and Canadian Law, 2nd ed* (Toronto: Carswell, 2013) at 144; see also James Tobin and William C Brainard, "Asset Markets and the Cost of Capital", Cowles Foundation Paper 440, 238 (1977) (reprinted from Private Values and Public Policy) for the original discussion of what is now called Tobin's Q, online at: http://cowles.econ.yale.edu/P/cp/p04a/p0440.pdf.

[27] Return on Assets is an accounting measure which reveals how much revenue can be generated from assets. It is calculated by dividing total earnings by total assets, see Fountain, *supra* note 23 at 86.

[28] Return on Sales is an accounting measure determined by dividing the pre-tax profit by revenue, see Nancy M. Carter & Harvey M. Wagner, "The Bottom Line: Corporate Performance and Women's Representation on Boards (2004-2008) (2011) *Catalyst*, online: <https://www.catalyst.org/system/files/the_bottom_line_corporate_performance_and_women%27s_representation_on_boards_%282004-2008%29.pdf>.

[29] Return on Equity is an accounting measure determined by dividing total income by equity, or shares, see Fountain, *supra* note 23 at 86.

[30] Return on Investment or Return on Invested Capital is another measure of firm performance calculated by dividing net income by invested capital see Carter & Wagner, *supra* note 28.

[31] Erhardt, Werbel & Shrader, *supra* note 25 at 16.

[32] *Ibid* at 18.

[33] *Ibid* at 19. Enron is one of the largest corporate scandals in US history. The energy company was one of the largest, seemingly successful companies in the United States in the late 1990s. However, Enron filed for bankruptcy

of the problems associated with homogenous boards.[34] Campbell and Minguez-Vera observed that the percentage of women on public Spanish boards was positively and significantly related to Tobin's Q.[35] Campbell and Minguez's data set consisted of observations of firms listed in Madrid from 1995-2000. They also concluded that the impact of firm value on the percentage of women was insignificant.[36] Using data collected from 1998-2002, Carter et al found evidence of a causal relationship between board gender diversity and financial performance as measured by Tobin's Q.[37] Nguyen and Faff came to a similar conclusion in their study which used data from large Australian publicly traded corporations from 2000-2001. Their results indicated that, on average, if two firms are the same in every way except that one has female directors and one does not, the former's Tobin's Q will be higher than the latter's.[38] Further, as the number of female directors increases, so will Tobin's Q. Thus, Tobin's Q is positively related to both the incidence of female directors and the proportion of them on the board. They conclude that women appear to "play an essential role in maintaining the effectiveness of a board of directors."[39] Later, Conyon and He, using data from over 3,000 US public companies form 2007-2014, found a positive relationship

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in 2001 and it came to light that behind the scenes the executives were misappropriating funds and self-dealing while fraudulently reporting success to shareholders. For a detailed description see John R Kroger, "Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective" (2005) 76 U Colo L Rev 57; Kristin N Johnson, "Banking on Diversity: Does Gender Diversity Improve Financial Firms Risk Oversight" (2017) 70 SMU L Rev 327 at 346–347;See JC Coffee, "Understanding Enron: 'It's about the gatekeepers, stupid'" (2002) 57 Business Lawyer, The 1403 for an argument that Enron was actually a failure on the part of various gatekeepers, rather than on the part of the board.

[34] Erhardt, Werbel & Shrader, *supra* note 25 at 19.

[35] Kevin Campbell & Antonio Mínguez-Vera, "Gender Diversity in the Boardroom and Firm Financial Performance" (2008) 83:3 Journal of Business Ethics 435 at 444.

[36] *Ibid* at 445.

[37] Carter et al, *supra* note 23 at 26. The authors were hesitant to definitively conclude that the relationship was causal because they could not say for certain that there was not a third variable impacting both gender diversity and Tobin's Q.

[38] Hoa Nguyen & Robert Faff, "Impact of Board Size and Diversity on Firm Value: Australian Evidence" (2007) 4:2 Corporate Ownership and Control, online: <http://virtusinterpress.org/IMPACT-OF-BOARD-SIZE-AND-BOARD.html> at 28.

[39] *Ibid.*

between gender diversity on boards and Tobin's Q.[40] Schwartz-Ziv's 2013 study demonstrated that board gender diversity, particularly where a critical mass[41] of female directors is present, was positively correlated with ROE and profit margins.[42] A few years after this, Eastman, Rallis and Mazzuchelli's study, which used data from 2011 to 2016 of company boards from the MSCI All Country World Index, similarly concluded that companies with a critical mass of women on boards far outperformed those with all male boards using ROE as a measurement of firm performance.[43] Credit Suisse's 2016 report, based on data concerning 27,000 senior managers at over 3,000 corporations world-wide, found a strong link between more women in senior management and higher ROE as well as more conservative balance sheets.[44] Finally, a McKinsey Report of 2018, whose authors collected data from 1,007 companies across 12 countries, concluded that corporations with greater board diversity were more profitable than those with less diverse boards.[45] In summary, a great number of empirical studies spanning many years and jurisdictions,

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[40] Martin J Conyon & Lerong He, "Firm performance and boardroom gender diversity: A quantile regression approach" (2017) 79 Journal of Business Research 198 at 203.

[41] The original theory of critical mass was expressed by Rosabeth Moss Kanter. Her theory of critical mass is that women represented at token levels within a group will either feel that they must over-achieve, or feel compelled to make themselves invisible. "The token must often choose between trying to limit visibility- and being overlooked- or taking advantage of the publicity- and being labeled a "troublemaker"." Rosabeth Moss Kanter, *Men and women of the corporation* (New York: Basic Books, 1977) at 221. Either way, token women will feel socially alienated and this may affect the impact of gender diversity. Critical mass, its definition and application to women on boards will be discussed in greater detail in Chapter 3.

[42] Miriam Schwartz-Ziv, *Does the Gender of Directors Matter?*, SSRN Scholarly Paper ID 2257867 (Rochester, NY: Social Science Research Network, 2013) at 22.

[43] Eastman, Rallis & Mazzucchelli, *supra* note 12.

[44] Julia Dawson, Richard Kersley & Stefano Natella, "The Credit Suisse Gender 3000: Women in Senior Management" 52, online at *Credit Suisse Research Institute* <https://glg.it/assets/docs/csri-gender-3000.pdf> at 2 and 12. Although this study focused on the relationship between female managers and ROE, the authors note that firms led by females tend to promote other women to leadership positions. Further, female executives further the pipeline of board-ready women.

[45] Vivian Hunt et al, "Delivering through Diversity" McKinsey & Company, (January 2018), online at *McKinsey & Company* <https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.ashx>.

using several financial performance metrics, have shown a strong positive relationship between greater board gender diversity and better financial performance.

b) Studies Revealing No or Negative Relationship in Chronological Order

Despite the significant evidence suggesting that board gender diversity is positively related to financial performance, there are a number of studies which indicate that this is not the case. Some such studies reveal no relationship between board gender diversity and firm financial performance and others find board gender diversity to be negatively related to financial performance. Adams and Ferreira, for instance, collected data from 1996-2003 from 1,939 firms of differing sizes.[46] Their results suggested that diversity was positively related to firm financial performance when the company had weaker governance policies, but negatively related to financial performance when the corporation had strong governance and monitoring policies in place.[47] This, they concluded, is consistent with the idea that female directors tend to be stronger monitors of management. These results, according to the authors, also support the idea that if a board is already performing its monitoring function well, adding more females could lead to a breakdown in communication between management and the board, thus hurting the firm's overall value.[48] Conyon and He, as cited above, found that increased board gender diversity was significantly, negatively related to ROA.[49] They found that gender diversity seems to have a much more positive impact on firms already performing well and a negative impact on lower performing firms. The authors' explanation for this is that female board members' value is less likely to be properly

[46] Renée B Adams & Daniel Ferreira, "Women in the boardroom and their impact on governance and performance" (2009) 94:2 Journal of Financial Economics 291 at 295.
[47] *Ibid* at 308.
[48] *Ibid* at 304.
[49] Conyon & He, *supra* note 40 at 201.

realized in lower performing firms focused on the threat posed by poor performance.[50] In a subsequent study published in 2010, but using data from 1998-2002, Carter et al concluded that gender diversity had no impact on firm performance.[51] Although their data did show in some regressions that gender diversity was positively related to ROA[52], overall, they reported no evidence that higher numbers of female directors led to better financial performance.[53] Dobbin and Jung, analysing data from Fortune 500 companies during firm years 1997-2006, concluded that increased numbers of female directors negatively affected stock value as measured by Tobin's Q and had no impact on profits as measured by ROA.[54] This conclusion was based on the authors' observations that non-blockholding institutional investors tended to reduce their holdings in corporations who added women to their boards,[55] but that the new female directors had no impact on board processes affecting ROA.[56] Using data from 2007-2009, Ahern and Dittmar observed a negative relationship between increased board gender diversity and firm performance.[57] This study examined the impact of a quota law implemented in Norway in 2003 which became mandatory in 2006, requiring public companies to have 40% female directors on their boards.[58] Ahern and Dittmar's results indicated that following the mandatory quota law, increased gender diversity led to a downturn in the Norwegian market and was negatively related to Tobin's Q.[59] These results,

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[50] *Ibid* at 208.
[51] Carter et al, *supra* note 22.
[52] *Ibid* at 408.
[53] *Ibid* at 411.
[54] F Dobbin & J Jung, "Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?" (2011) 89:3 North Carolina Law Review 809 at 830.
[55] *Ibid* at 834.
[56] *Ibid* at 837.
[57] Kenneth R Ahern & Amy K Dittmar, "The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation" (2012) 127:1 The Quarterly Journal of Economics 137.
[58] Dhir, *supra* note 5 at 105.
[59] Ahern & Dittmar, *supra* note 57 at 140.

they note, may be explained by the fact that younger, less experienced directors were selected in order to comply with the quota, although there could be another explanation as well.[60]

Importantly, a number of these studies were conducted at the same time and with similar data as those showing a positive relationship between board gender diversity and firm financial performance.

c) Criticism of the Financial Performance Case

Many have criticized the business case as it relates to financial performance metrics because the empirical evidence is not conclusive. As Branson puts it: "Most knowledgeable scholars, those who do business and corporate finance rather than race and gender subjects, deny (and many lament their finding) that any correlation exists **…** empirical work on the subject conclusively finds that no correlation can be found between the composition of boards of directors and the value or profitability of publicly held corporations".[61]

First, as demonstrated above, there is conflicting empirical evidence as to the relationship between board gender diversity and financial performance.[62] Even within individual studies themselves results vary depending on which financial metric is used. For instance, Conyon and He although they found a positive relationship between board gender diversity and Tobin's Q, they

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[60] *Ibid* at 141–142.

[61] Douglas M Branson, *No seat at the table: how corporate governance and law keep women out of the boardroom*, Critical America (New York: New York University Press, 2007) at 176.

[62] See Rhode & Packel, *supra* note 22 at 382–393, wherein they review the literature on the financial performance case and conclude that the results are not convincing one way or the other; Fountain, *supra* note 23 at 87–90, wherein she remarks that even across similar time periods and using similar data, empirical evidence is still inconsistent when it comes to the relationship between board gender diversity and financial performance; Fanto, Solan & Darley, *supra* note 7 at 918; Kim Willey, "'Bringing Canadian Women on Board': A Behavioural Economics Perspective on Whether Public Reporting of Gender Diversity Will Alter the Male-Dominated Composition of Canadian Public Company Boards and Senior Management" (2017) 29:1 Canadian Journal of Women and the Law, online: <https://www.utpjournals.press/doi/abs/10.3138/cjwl.29.1.182> at 184.

also found a negative relationship between board gender diversity and ROA.[63] Even when the results seem to indicate a positive relationship between gender diversity and financial performance, this relationship in almost every case is correlative and not causal,[64] with the possible exception of Carter et al's 2003 study.[65] These conflicting results pose a serious problem for proponents of board gender diversity as well as the regulators who rely on the financial performance case to justify diversity regimes.

Another common criticism of the above studies is their methodological shortcomings.[66] Scholars note that many of the studies in this area are based on small sample sizes, over brief periods of time.[67] Dobbin and Jung propound that studies showing positive relationships often use cross-sectional data and do not account for reverse causality. In other words, is a positive relationship demonstrated because firms who are already performing well financially nominate female directors more frequently or the reverse? When other forms of data are used, and reverse causality is accounted for, these authors claim, no or a negative relationship is more often shown.[68] However, these methodological shortcomings appear in studies showing a positive, negative or no relationship. For instance, Ahern and Dittmar's study was based on cross-sectional data[69] and a negative relationship between board gender diversity and firm financial performance was found.[70] Schwartz-Ziv also points out that Ahern and Dittmar's study was examining board gender diversity which had been enforced "in one fell swoop", rather than gradually.[71] At most, Dobbin and Jung's

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[63] Conyon & He, *supra* note 40 at 203.
[64] Fairfax, *supra* note 22 at 863.
[65] And even in the case of this study, as previously mentioned, the authors were wary of concluding that there was a causal link because of the possibility of endogeneity.
[66] Rhode & Packel, *supra* note 22 at 390–393; Dobbin & Jung, *supra* note 54 at 813; Fountain, *supra* note 23 at 87.
[67] Rhode & Packel, *supra* note 22 at 391; Rosenblum, *supra* note 21 at 433.
[68] Dobbin & Jung, *supra* note 54 at 818.
[69] Ahern & Dittmar, *supra* note 57 at 147.
[70] *Ibid* at 140.
[71] Schwartz-Ziv, *supra* note 42 at 8.

criticism shows we may not truly understand the relationship, not that there is necessarily no or a negative relationship. As yet, no one has conducted a study of long term stock performance, deemed the "gold standard" of financial performance, as it relates to board gender diversity. [72]

Other critics remark that studies showing positive relationships typically encounter problems of endogeneity.[73] That is, even where a positive relationship is shown, it may be that it is not increased gender diversity leading to better financial performance, but perhaps another factor altogether is behind both of these enhancements.[74] Reverse causality, as described briefly above, is another endogeneity problem which emerges in a number of gender diversity empirical studies. Where a positive relationship is found between gender board diversity and financial performance, if reverse causality is present, it is really the enhanced financial performance that leads to greater gender diversity, not the other way around.[75] The prevalence of endogeneity is a common criticism of the financial performance studies; however, several of the above mentioned works do in fact either account for, or address, problems of endogeneity, including reverse causality.[76] Interestingly, Campbell and Minguez specifically controlled for reverse causality and found that the correlation running between enhanced female board representation and Tobin's Q did not run the other way.[77]

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[72] Rhode & Packel, *supra* note 22 at 391, citing Joseph A. Grundfest, *Diversity on Corporate Boards: When Difference Makes a Difference* (Sept. 10, 2009) *available* at https://bdti.or.jp/en/blog/en/video-stanfords-joe-grundfest-on-diversity-on-corporate-boards/.

[73] Dobbin & Jung, *supra* note 54 at 818; Adams & Ferreira, *supra* note 46 at 293; Carter et al, *supra* note 22 at 403.

[74] Adams & Ferreira, *supra* note 46 at 295.

[75] Dobbin & Jung, *supra* note 54 at 819 where the authors state that it seems from the empirical evidence "firms that are having good runs are more likely to appoint women". See also Willey, *supra* note 62 at 191.

[76] Conyon & He, *supra* note 40 at 208; GSF Bruno, A Ciavarella & N Linciano, "Boardroom Gender Diversity and Performance of Listed Companies in Italy: A Natural Experiment", (8 November 2018), online: *Oxford Law Faculty* <https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/boardroom-gender-diversity-and-performance-listed-companies-italy> at 26; Schwartz-Ziv, *supra* note 42 at 19; Nguyen & Faff, *supra* note 38 at 26.

[77] Campbell & Mínguez-Vera, *supra* note 35 at 445.

The available evidence as it relates to gender diversity of directors and firm financial performance, while mixed, seems to indicate a positive relationship. This is by no means a complete picture of the business case as it now stands.

1.2.1.3 Governance Case

A second iteration of the business case is what will be called the "governance case". Greater gender diversity, it is posited, leads to enhanced corporate governance by virtue of better decision making and improved monitoring of management. Further, the public will take notice of this improved governance and this will lead to reputational benefits. The link to financial performance may not be immediate or direct. However, on this view, gender diverse boards will indirectly benefit the corporation's bottom line in the long run. This rationale stems from both theory and empirical research.

a) Improved Decision-making

According to empirical evidence, diverse groups tend to solve problems more effectively than homogenous groups.[78] This may be because heterogeneous groups are less likely to fall into what is termed "groupthink". Groupthink is defined by Janis as a phenomenon where members of a group fail to consider alternatives because they place the agreement of the group above constructive dissent.[79]

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[78] Hunt et al, *supra* note 42 at 23. See also Mariateresa Torchia, Andrea Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, SSRN Scholarly Paper ID 1858347 (Rochester, NY: Social Science Research Network, 2011) at 305 where the authors describe the support in the literature that heterogeneous groups solve problems in more creative ways than homogenous groups.

[79] Irving Lester Janis, *Groupthink: psychological studies of policy decisions and fiascoes*, 2nd ed.-- ed (Boston: Houghton Mifflin, 1982) at 9. See also Fanto, Solan & Darley, *supra* note 7 at 913; Maureen I Muller-Kahle & Krista B Lewellyn, "Did Board Configuration Matter? The Case of US Subprime Lenders" (2011) 19:5 Corporate Governance: An International Review 405 at 406; Fountain, *supra* note 23 at 91–93; Dhir, *supra* note 5 at 125; Dobbin & Jung, *supra* note 54 at 4–7; Johnson, *supra* note 33 at 352.

Scholars attribute the disaster that was Enron to this phenomenon. Enron's board was homogeneous, and so some scholars believe that the poor decisions, fraud, and eventual financial ruin was a result of groupthink.[80] Because female directors are typically outsiders, who are not part of the "in-group", they are believed to foster constructive dissent.[81] In Adams and Ferreira's sample, 84.07% of female directors were independent.[82] Constructive dissent is viewed as vital to a successful boardroom. According to Sonnenfield, the most well-run corporations are those with "extremely contentious boards that regard dissent as an obligation."[83]

It has also been reported that female directors encourage better attendance at meetings.[84] Not only are women directors less likely than their male counterparts to have attendance problems, when they are present in greater numbers, the male directors' attendance problems tend to shrink.[85] Attendance at board meetings is one of the most crucial ways a director fulfills her or his fiduciary duties[86] and is thought to be a measure of overall board functioning.[87] While at the meetings, female directors tend to foster a more collaborative discussion[88] where they ask questions of

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[80] Erhardt, Werbel & Shrader, *supra* note 25 at 19.

[81] Dhir, *supra* note 23 at 592; Carter et al, *supra* note 23 at 9; Akshaya Kamalnath, "The Corporate Governance Case for Board Gender Diversity: Evidence from Delaware Cases" (2018) SSRN Electronic Journal, online: <https://www.ssrn.com/abstract=3128272> at 5; Rosenblum, *supra* note 21 at 452; Kent Greenfield, "The Third Way Berle V: Capital Markets, the Corporation, and the Asian Century: Governance, Accountability, and the Future of Corporate Law: The Fifth Annual Symposium of the Adolf A. Berle, Jr. Center on Corporations, Law & Society" (2013) 37 Seattle U L Rev 749 at 766–767.

[82] Adams & Ferreira, *supra* note 46 at 294. In this study, "Directors are classified as independent if they have no business relation with the firm, are not related or interlocked with management, and are not current or former employees," see Adams & Ferreira, *supra* note 46 at 293.

[83] Jeffrey A Sonnenfield, *What Makes Great Boards Great*, Harvard Business Review, 7 (2002). A concern that once women are no longer represented in token amounts on a board is that they will no longer foster constructive dissent because their perspectives will no longer be fresh. A counter argument to this point is that so long as female directors remain for the most part independent, they should as a group and individually, continue to foster constructive dissent. See Dhir, *supra* note 5 at 158–159.

[84] Adams & Ferreira, *supra* note 46 at 296.

[85] *Ibid* at 298.

[86] *Ibid* at 295.

[87] Carter et al, *supra* note 22 at 18.

[88] Dhir, *supra* note 5 at 122. Collaboration does not mean that constructive dissent, as mentioned in the previous paragraph, disappears. Rather, collaboration seems to mean that everyone on the board, men and women alike, feel confident voicing their opinions.

management that would not otherwise be asked by male directors.[89] These questions may be ones that men do not feel comfortable asking because they tend to be "more afraid to show that they might not know everything … to show that they're not experts on everything."[90] Hence, along these lines, by increasing gender diversity the overall functioning of the board decision making process should improve.

b) Improved Monitoring of Management

Not only are female directors believed to lead to constructive dissent and enhanced problem solving, but by virtue of their independence, female directors are also thought to decrease agency costs. Agency theory was originally proposed by Jensen and Meckling in the mid-seventies.[91] It has had great traction in the corporate governance realm. Tingle goes so far as to say that agency theory has become conflated with corporate governance itself.[92] According to this theory, because ownership and control of a corporation are separated, managers (the agents of the shareholders) may be tempted to act in their own self-interest when their interests do not align with those of the principals. Any costs resulting from this relationship that would not exist in an owner-managed firm are deemed "agency costs". The board therefore, is charged with monitoring the agents to ensure that they act in the principals' best interests.[93] A board risks being beholden to management

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[89] *Ibid* at 120; Carlson, *supra* note 7 at 345.

[90] Dhir, *supra* note 5 at 120.

[91] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure* 3 J. Finan. Econ. 305 (1976).

[92] Bryce Tingle, "What Is Corporate Governance? Can We Measure It? Can Investment Fiduciaries Rely on It?" (2018) 43:223 Queen's LJ, online: <https://nextcanada.westlaw.com/Document/Ie5d24a0a6a2811e8a5b2e3d9e23d7429/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad62d2e000001662bbc99f886c3ce02%3FNav%3DCAN_JOURNALS%26fragmentIdentifier%3DIe5d24a0a6a2811e8a5b2e3d9e23d7429%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=22897c5858f825d722499100011fbb9b&list=CAN_JOURNALS&rank=5&sessionScopeId=ac9d6a39816779565321c2fbc5bf0a33673621e90e1be28eba0c31a93226a1be&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29> at 229.

[93] Dhir, *supra* note 5 at 27.

if its members are themselves high level executives or if they are otherwise associated with management. Because female directors tend to be more independent, they are both in theory and according to empirical data, better monitors of management,[94] and should therefore reduce agency costs.[95]

Female directors also tend to be over-represented on audit committees.[96] This may be another reason why female directors are associated with tougher monitoring. In addition, it has been found that more diverse boards tend to be engaged in less litigation and instances of fraud.[97] If female directors tend to be tougher monitors and are more likely to be involved in the decisions relating to financial reporting of the firm, then it would follow that there would be fewer instances of fraud and less litigation surrounding fraud and directorial misrepresentation in corporations with more gender diverse boards.

c) Corporate Reputation

Corporate reputation clearly affects share price. At present, investors and the public generally do seem to be concerned with the issue of women on boards. This issue is in the news daily.[98]

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[94] *Ibid* at 149.
[95] Nguyen & Faff, *supra* note 38 at 24. Agency theory and its short comings will be discussed in greater detail in Chapter 4.
[96] Carter et al, *supra* note 22 at 21; Adams & Ferreira, *supra* note 46 at 300.
[97] Kamalnath, *supra* note 81 at 17. See also Mary Jane Lenard et. al., Female Business Leaders and the Incidence of Fraud Litigation 43(1)Managerial Finance 59 – 75 (2017); Douglas Cumming, T. Y. Leung and Oliver Rui, Gender diversity and securities fraud 58(5) Acad Manage J 1572 (2015). For more on the relationship between female board members and reduction of fraud, see Chapter 3, section 3.2.2.2.
[98] Michael Blanding, "Everyone Knows Innovation is Essential to Business Success—Except Board Directors", (3 January 2019), online: *HBS Working Knowledge* <http://hbswk.hbs.edu/item/everyone-knows-innovation-is-essential-to-business-success-and-mdash-except-board-directors>; Toni G. Wolfman, "Viewpoint: In 2019, resolve to have more women on public boards", online: *Boston Business Journal* <https://www.bizjournals.com/boston/news/2019/01/03/viewpoint-in-2019-resolve-to-have-more-women-on.html>; Anjelica Tan, "Corporate diversity is just another misguided policy from Democrats", (6 January 2019), online: *The Hill* <https://thehill.com/opinion/civil-rights/424064-corporate-diversity-is-just-another-misguided-policy-from-democrats>; Susan E. Reed, "Perspective | Corporate boards are diversifying. The C-suite isn't.", online: *Washington Post* <https://www.washingtonpost.com/outlook/corporate-boards-are-diversifying-the-c-suite-isnt/2019/01/04/c45c3328-0f02-11e9-8938-5898adc28fa2_story.html>; Elizabeth Olson, "Slow Gains for Women and Minorities on Boards of Big U.S. Firms, Study Says", *The New York Times* (17 January 2019), online:

Securities regulators in 2014 received comments about the proposed diversity policy in great numbers from stakeholders supporting diversity regulation.[99] By failing to diversify, corporations will suffer reputational losses because the investing public sees diversity as an important corporate governance issue. Not only will their reputation be damaged in this way, but additionally, less diverse corporations are typically subject to more discrimination litigation, thus resulting in financial loss as well as further damage to their reputation.[100]

Corporations may also miss out on opportunities if they do not have diverse management and do not view diversity as a priority. For instance, CIBC recently launched a prospectus offering for a fund only available to those corporations which, among other things, have at least 30% female directors or executive officers, or which had signed the Catalyst 2022 Accord.[101]

Lastly, even if one does not accept that corporations suffer reputational damage by failing to diversify, they could still become the subject of institutional shareholder activism. Larry Fink in 2018 wrote a letter to the CEOs of those companies in which BlackRock had shareholdings. This letter stated that BlackRock views diversity as better for business and diverse boards as "better

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<https://www.nytimes.com/2019/01/15/business/women-minorities-corporate-boards.html>; Greg Ryan, "Mass. lawmaker Jason Lewis to file bill this week requiring women on corporate boards", online: *Boston Business Journal* <https://www.bizjournals.com/boston/news/2019/01/17/mass-lawmaker-to-file-bill-this-week-requiring.html>.

[99] Proposed OSC Amendments to Form 58-101F1 *Corporate Governance Disclosure of National Instrument 58-101 Disclosure of Corporate Governance Practices* : *Proposed Disclosure Requirements Regarding the Representation of Women on Boards and in Senior Management*, OSC NI 58-101F1 (16 January 2014) ["Proposed Amendments"].

[100] Janis Sarra, "Class Act: Considering Race and Gender in the Corporate Boardroom" 79 St John's L Rev 41 at 1122. This litigation, Sarra notes, unlike in the US, is less costly in Canada where human rights statutes are comprehensive statutes and so these types of claims may be viewed as the cost of doing business.

[101] Alexandra Posadzki , "CIBC to launch Canada's first Women in Leadership Bond for institutional investors - The Globe and Mail", (11 September, 2018) online: <https://www.theglobeandmail.com/business/streetwise/article-cibc-to-launch-canadas-first-women-in-leadership-bond-for/>; The Catalyst 2022 Accord is a "pledge to accelerate the advancement of women in business through these actions: 1.Increase the average percentage of women on boards and women in executive positions in corporate Canada to 30% or greater by 2022. 2. Share key metrics with Catalyst for annual benchmarking of our collective progress", see "Catalyst Accord 2022: Accelerating the Advancement of Women", (8 November 2012), online: *Catalyst* <https://www.catalyst.org/catalyst-accord-2022>. More generally, this funding is not available to those companies whose main business is in alcohol, tobacco, or who have been involved in a scandal see Alexandra Posadski, "CIBC removes fossil-fuels restriction for its Women in Leadership bond - The Globe and Mail", online: <https://www.theglobeandmail.com/business/streetwise/article-cibc-removes-fossil-fuels-restriction-for-its-women-in-leadership-bond/>.

able to identify opportunities that promote long-term growth."[102] The Canada Pension Plan Investment Board recently established a policy in which it will vote against the chair of the nominating committee if the board itself has no female members.[103] Following the implementation of this policy, in 2018 the CPPIB voted at 22 Canadian company shareholder meetings for corporations in which it held investments and which had no female directors.[104] Six of these votes included a vote against the nominating chair and seven included a vote against the whole of the nominating committee.[105] ISS and Glass Lewis have also adopted a voting guideline which states that they will recommend voting against the chair of the nominating committee of an issuer that does not have a formal written diversity policy and does not have a woman on its board.[106]

d) Criticism of the Governance Case

The governance case has not gone without criticism. Just as the financial performance metrics studies led to mixed results, the empirical evidence upon which the governance case is based, is also mixed.[107] The theoretical basis for these mixed results is as follows. First, more constructive dissent may mean that decision making and problem solving takes much longer and is much more

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[102] "Larry Fink's Letter to CEOs", online: *BlackRock* <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> ["Larry Fink's Letter"].

[103] "Canada Pension Plan Investment Board to Increase Board Diversity Advocacy", Canada Pension Plan Investment Board, online: <http://www.cppib.com/en/public-media/headlines/2018/cppib-increase-board-diversity-advocacy/>.

[104] "How CPPIB is advocating for more women on boards", Canada Pension Plan Investment Board, online: <http://www.cppib.com/en/public-media/headlines/2018/how-cppib-advocating-more-women-boards/>.

[105] "Canadian Pension Steps Up Gender Board Diversity Advocacy | Chief Investment Officer", Chief Ivestment Officer (27 December 2018) online: <https://www.ai-cio.com/news/canadian-pension-steps-gender-board-diversity-advocacy/>.

[106] Martin Lion, "Policy Guidelines", online: *Glass Lewis* <https://www.glasslewis.com/guidelines/>; "ISS and Glass Lewis Update Proxy Voting Guidelines for 2019; ISS Updates Qualityscore an Issues Preliminary Compensation FAQS", online: *The National Law Review* <https://www.natlawreview.com/article/iss-and-glass-lewis-update-proxy-voting-guidelines-2019-iss-updates-qualityscore>. Yet another example of a private initiative (although not by an institutional investor) was taken by Heidrick & Struggles, a global executive search firm. They have prioritized diversity and 52% of their board placements in the last year have been diverse candidates, see Heidrick & Struggles, "Heidrick & Struggles Takes Action with Board Diversity Pledge Globally", online: <https://www.prnewswire.com/news-releases/heidrick--struggles-takes-action-with-board-diversity-pledge-globally-300744059.html>.

[107] Rhode & Packel, *supra* note 22 at 397.

difficult.[108] However, in Dhir's qualitative study, director participants reported that although consensuses took longer to reach, they did not view this as a bad thing. The board is not charged with making decisions quickly, they said. "[W] hat's the success of a board meeting? Is it that it closes at a scheduled time? Or is it that you made a good decision?"[109] Others noted that any inefficiencies due to tougher questions asked of management were likely the result of management's unpreparedness to answer.[110]

While female directors are usually more independent and so are better monitors of management, this might not always be positive for a corporation's bottom line. According to Adams and Ferreira, enhanced monitoring for businesses with previously poor monitoring is typically good for financial performance. Conversely, for those companies who already have tougher monitoring, "overmonitoring" can hinder communication between management and the board and actually negatively impact financial performance.[111] Coffee raises an important point regarding agency theory as well. Presently, corporate managers are compensated in ways that "encourage them to maximize share value and that align their interests much more closely with those of the shareholders than with any other constituency".[112] Thus having more executives on the board who are not independent (and who happen to be more often male) may not lead to costly agency externalities and may indeed be good for shareholder interests.

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[108] Carter et al, *supra* note 22 at 400; Greenfield, *supra* note 81 at 767.
[109] Dhir, *supra* note 5 at 137.
[110] *Ibid.*
[111] Adams & Ferreira, *supra* note 46 at 306. Over-monitoring is never explicitly defined by Adams and Ferreira, but the authors seem to imply that there is a maximum amount of monitoring which is good for a corporation (what the threshold is, is not clear) and anything in excess of this amount is "over-monitoring".
[112] John C Coffee & Darius Palia, "The Impact of Hedge Fund Activism: Evidence and Implications", online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496518> at 51.

The empirical evidence does not support the idea that more independent directors are necessarily better for business either.[113] More generally, empirical evidence has not definitively determined whether Environmental, Social and Governance (ESG) rankings or corporate governance best practices (including CEO and chair separation) are better for firm performance or not.[114] "[S]tudies of overall firm performance have found no convincing evidence that firms with majority independent boards perform better than firms without such boards."[115] Dalton's results, for instance, suggest that board composition had nearly no impact on firm performance.[116] If it is true that board composition has no effect on financial performance though, then one would expect that all of the metrics studies above would show no relationship between board gender diversity and firm performance. As Ahern and Dittmar point out, because a relationship is found (whether negative or positive) this indicates that board composition (and the board's actions in general) is likely related to firm performance.[117] It must be noted that Dalton's study did not test the impact of board gender diversity on corporate performance, and so the results are not inconsistent with Ahern and Dittmar's statement.

Finally, while shareholder activists may be pushing for greater board diversity, scholars still debate whether shareholder activism is beneficial for the long term success of corporations. In fact the debate surrounding shareholder activism is extremely divisive both in the business

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[113] Dan R Dalton et al, "Meta-analytic reviews of board composition, leadership structure, and financial performance" (1998) 19:3 Strategic Management Journal 269 at 271; Rhode & Packel, *supra* note 22.
[114] Tingle, *supra* note 92 at 248; Dalton et al, *supra* note 113 at 272; Sonnenfield, *supra* note 83.
[115] Sanjai Bhagat & Bernard Black, "The Uncertain Relationship Between Board Composition and Firm Performance', 54 BUS. LAW. 921 (1999) at 922.
[116] Dalton et al, *supra* note 113 at 278.
[117] Ahern & Dittmar, *supra* note 57 at 139.

community and the academic realm.[118] These institutional efforts and the controversy surrounding them will be analyzed further in Chapter 4.

1.2.1.4 Talent Case

> "At Catalyst, we encourage companies to go beyond the traditional business case by focusing on diversity and inclusion as talent issues, rather than as the 'bottom line.'"
>
> - Catalyst, The Bottom Line: Corporate Performance and Women's Representation on Boards (2004-2008) [119]

In ignoring a large portion of the labour force, boards are failing to capitalize on a large pool of talent.[120] This third version of the business case has been around for just as long as the other iterations, but has become more popular recently, perhaps because of the mixed empirical support for the other cases. The "talent" business case is supported by the number of female graduates from high level university and professional degrees. Women represent between 30% and 40% of MBA graduates at the top business schools in the US.[121] Women have been graduating from university in larger numbers than men for years in Canada.[122] Eastman et al's study found that, globally, large companies with at least three female directors had almost double the average proportion of females in senior management.[123] Thus, the authors conclude, greater numbers of women on boards leads to female talent being utilized at other levels. Their results

[118] While this debate is for the most part beyond the scope of this paper, see for example Coffee & Palia, *supra* note 112; and Mark J. Roe, "Stock Market Short-Termism's Impact", ECGI Working Paper Series in Law Working Paper No 426/2018.
[119] Carter & Wagner, *supra* note 28.
[120] Carter et al, *supra* note 23 at 10; Adams & Ferreira, *supra* note 46 at 292; Torchia, Calabrò & Huse, *supra* note 78 at 299; Carlson, *supra* note 7 at 342; Kamalnath, *supra* note 5 at 99–100.
[121] Dawson, Kersely and Natella, *supra* note 44 at 17.
[122] Catalyst, "Women in the Workforce: Canada", (7 September 2017), online: *Catalyst* <https://www.catalyst.org/knowledge/women-workforce-canada>.
[123] Eastman, Rallis & Mazzucchelli, *supra* note 12 at 9–10.

that companies with more women in senior management perform better financially supports the hypothesis that gender diverse corporations access the available talent more successfully.[124]

An analogy has been drawn between the women on board case and the upturn in the economy in the 1960s.[125] Once employers began accessing the talent of women and people of colour in the 60s, there was an economic boom. Gompers and Kovvali predict that corporations would realize a similar benefit if they were to fully capitalize on the available talent of females on boards.[126]

Professor Dhir refers to another facet of this argument, namely, that Canada has lost talented women to other countries who prioritized diversity and who recognized their value.[127] Thus, if boards continue to consider male nominees exclusively (or almost exclusively), Canada may continue to lose talented women to other nations.

Lastly, extending the talent pool does not necessitate excluding those from the traditional pool; it is simply a way to bring different perspectives to the table.[128] It can also be a way to bring gender balance to boards in industries where women are rare at every organizational level.[129] In sum, the financial benefit is less direct than other business case rationales.

a) Criticism of the Talent Case

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[124] *Ibid* at 8.
[125] Paul Gompers & Silpa Kovvali, "The Other Diversity Dividend", *Harvard Business Review* (1 July 2018), online: <https://hbr.org/2018/07/the-other-diversity-dividend>.
[126] *Ibid*. This was in the specific case of venture capitalist funding, but the argument remains the same for female board members.
[127] Dhir, *supra* note 5 at 279.
[128] *Ibid* at 43.
[129] *Ibid* at 44.

The "pool problem" is a large hurdle proponents of the talent case must contend with. This is a pervasive argument used by opponents of stronger board diversity regulation.[130] To be qualified for board membership usually means that one has had executive experience, with an emphasis on CEO experience.[131] Thus, advocates of the pool problem reason, because fewer females have executive experience and certainly fewer females have CEO experience, there is a dearth of qualified females to be considered for directorships.[132]

Scholars have pointed to various problems with this line of argument. First, the pool problem may be the result of an inaccurate view of the Canadian labour market.[133] Second, it may be exaggerated as the reason for the lack of boardroom diversity.[134] Finally, as Catalyst puts it, it may be a myth altogether.[135] Further, it is possible that female nominees are held to a stricter standard than their male counterparts.[136] Nearly half of male directors on Fortune 500 boards do not have CEO experience.[137] Hence, it is clear that CEO experience is by no means a pre-requisite for directorships. While it is true that there are fewer female senior executives than males, research demonstrates that women in upper management have the same ambitions to move up as their male counterparts.[138] Furthermore, directors are typically hired because of executive experience and

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[130] Foster, *supra* note 17 at 390.
[131] Dhir, *supra* note 5 at 40; Fountain, *supra* note 23 at 90; Fairfax, *supra* note 22 at 871; Sarra, *supra* note 100 at 1131.
[132] Dhir, *supra* note 5 at 40; Fountain, *supra* note 23 at 90; Fairfax, *supra* note 22 at 871; Sarra, *supra* note 100 at 1131; Carlson, *supra* note 7 at 356.
[133] Dhir, *supra* note 23 at 577.
[134] Fairfax, *supra* note 22 at 880.
[135] Catalyst, "The 'Think Director, Think CEO' Myth: Fortune 500 Companies | Catalyst", online: <https://www.catalyst.org/knowledge/think-director-think-ceo-myth-fortune-500-companies>.
[136] *Ibid*; Dhir, *supra* note 5 at 392. See also Willey, *supra* note 62 at 194–196 wherein she discusses the bias found towards both men and women when applying for jobs which are stereotypically considered male or female occupations. If a director is thought to be a stereotypically male job, then it is possible that the characteristic of being male could be thought of as one of the qualifications of this position. Thus female applicants will be unconsciously prejudiced.
[137] Catalyst, *supra* note 135.
[138] Dhir, *supra* note 5 at 391.

often executives are hired because they have had boardroom experience. This problem therefore may be viciously circular in nature.[139]

A number of solutions to the pool problem are offered in the literature. For instance, boards could implement internship programs to give aspiring women an opportunity to gain experience on a board, without being full-fledged members with the sway and liability that attaches to this.[140] Alternatively, boards could extend the pool from within which they search for candidates. Erhardt et al cite a reverse pool problem during the late 1990s where there was a lack of qualified males to fill board seats.[141] It is not clear that this is still a problem but if it is, this would actually necessitate expanding searches beyond the typical "talent pool".

1.2.1.5 Conclusion

The scholarly debate surrounding the business case is still very much alive. Although greater numbers of women have been appointed to boards in recent years, they still remain severely underrepresented.[142] Scholars point to various reasons why the business case has had such little impact on boardroom diversity, despite its political appeal. It could be, some speculate, because of the mixed empirical results which the business case relies upon.[143] Some remain entirely unconvinced of any relationship between board gender diversity and financial performance as well as corporate governance. "If there was some link between board diversity and firm performance, we would see some differential in trading values. We do not...I also fail to see how cultural, religious, or gender based perspectives differ on, for instance, how to structure a debt offering or

[139] *Ibid* at 40.
[140] Sarra, *supra* note 100 at 1136.
[141] Erhardt, Werbel & Shrader, *supra* note 25 at 12.
[142] Women as mentioned currently occupy 15% of board seats in Canada. See CSA Multilateral Staff Notice 58-310, *supra* note 2 at 1. See also Douglas M Branson, "Too Much Talk, Too Little Action: The Corporate Side of Gender Diversity Governance" (2019) 1 Hastings Women's LJ 27.
[143] Fairfax, *supra* note 22 at 869.

divest an operating subsidiary," one critic of board diversity regulation has said. [144] Still, the glacial pace of change remains a mystery even if a clear relationship has not been established. As Fairfax notes, other corporate governance best practices, such as the importance of director independence, were met with little to no resistance despite the mixed empirical results regarding their relationship with firm performance.[145]

Others scholars warn against reliance on the business case for fear that gender diversity efforts will become conditional on share price and that it may cheapen the social justice case.[146] Finally, scholars point to the business case being "inextricably linked with the moral or social case for board diversity because moral and social rationales are embedded in the so-called business case".[147] Perhaps this linkage is why many remain unconvinced of the business case.

1.2.2 The Normative Case

The normative case has fewer iterations than the business case. In general, it is the idea that stronger regulation aimed at increasing the number of women on boards is justified because this is the right thing to do.[148] Other nuances include the fact that historically women have been disadvantaged. Stronger regulation promoting female advancement is a way to rectify historical injustices.[149] Normative rationales and social justice goals do seem to underlie most board diversification initiatives. McKinsey in its 2016 report recognized this, and stated that "social justice … is typically the initial impetus behind these [diversity] efforts…"[150] Thus, even for those who support the business case rationale, it is widely accepted that the normative case is usually

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[144] J W Verret, "Diversity for Corporate Boards", (23 December 2009), online: *Truth on the Market* <https://truthonthemarket.com/2009/12/23/diversity-for-corporate-boards/>.
[145] Fairfax, *supra* note 22 at 878. This seeming inconsistency will be examined further in Chapter 3.
[146] Dhir, *supra* note 5 at 66; Fanto, Solan & Darley, *supra* note 7 at 930.
[147] Fairfax, *supra* note 22 at 879.
[148] Dhir, *supra* note 5 at 58; Rosenblum, *supra* note 21 at 439.
[149] Dhir, *supra* note 5 at 58.
[150] Hunt et al, *supra* note 45.

the spark which ignites diversity developments. Further, some authors argue that the normative case is more persuasive than business case arguments.[151]

However, just as "there is no "pure" business case for board diversity",[152] there may be no pure normative case currently either. To regulate the inner workings of corporate boards with purely normative rationales has so far proved difficult, if not impossible, for Canadian securities regulators. The Ontario Securities Commissions' mandate is to "provide protection to investors from unfair, improper or fraudulent practices; to foster fair and efficient capital markets and confidence in capital markets; and to contribute to the stability of the financial system and reduction of systemic risk."[153] The regulators, therefore, do not seem to have a statutory mandate or authority to implement a regulation which would damage the capital markets, or even to implement one which is not promoting the above mandate. Despite a certain amount of "slippage" between the business case and the normative case,[154] which will be described and discussed in greater detail in the proceeding chapters, securities commissions must justify any regulation of this issue, in part at least, with business case rationales.

1.2.2.1 Criticism of the Normative Case

a) Merit

The normative case (provided it can stand alone) does not take into account what impact regulation has on corporate performance, or its greater potential impact on the capital markets. Following the normative case to its logical end suggests that mandatory quotas are the appropriate

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[151] Rhode & Packel, *supra* note 22 at 379.
[152] Fairfax, *supra* note 22 at 879.
[153] *Securities Act*, RSO 1990, c S 5, section 1.1 ["*Securities Act"*].
[154] Rosenblum, *supra* note 21 at 437.

solution to the underrepresentation of women on corporate boards, irrespective of the impact of such quotas on firm performance.

However, even ignoring financial performance arguments, critics still point to some real concerns with mandatory quotas. For instance, TD has referred to quotas as the "antithesis of merit".[155] The House of Lords European Union Committee in 2012 stated that affirmative action "would risk fostering the perception – though entirely incorrect – that women on boards were not there by merit."[156] There is first the risk that women will be included on boards solely because they are women, regardless of their relative experience or directorial ability. The data from Norway suggests that this is a possible risk. Ahern & Dittmar's study found that there was a downturn in the market after the mandatory quota regulation was implemented. As corporations scrambled to meet the regulation's requirements, at the risk of dissolution, the authors speculate that board members with less experience were appointed.[157] "People should not have to wonder, 'Was I hired simply to check a box?'"[158]There is also a risk that women appointed after the quota's implementation chosen entirely based on merit could still be viewed as having been appointed merely because they were women. Thus, there is a worry among critics of quotas that women appointed after quotas are implemented will be stigmatized.[159] In Dhir's study, although participants feared and expected that there would be stigma surrounding female directors nominated as a result of the Norwegian quota, after its implementation, board members found that

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[155] TD Economics, "Special Report: Get on Board Corporate Canada: Greater transparency needed for gender diversity on Canadian boards", TD (March 7, 2013) online at <https://www.td.com/document/PDF/economics/special/GetOnBoardCorporateCanada.pdf>.
[156] House of Lords European Union Committee, "Women on Boards Report" (9 November 2012) at 27, online: UK Parliament < https://publications.parliament.uk/pa/ld201213/ldselect/ldeucom/58/58.pdf >.
[157] Ahern & Dittmar, *supra* note 57 at 144.
[158] Tan, *supra* note 98.
[159] Dhir, *supra* note 5 at 142.

there was little to no stigma for those female directors.[160] In fact, participants found that women, who they never would have otherwise heard of, who were impressively intelligent and competent, were appointed instead.[161] Hence, an argument could be made that this type of regulation appropriately addresses systemic barriers and actually opens the door to deserving women who would, if not for quotas, go unnoticed.[162]

b) Free Choice

Following from the merit criticism is the free choice criticism: perhaps there are not enough women to fill board seats based on merit because women make different career choices from men. As Epstein asserts, women's choices should not be questioned in order to achieve a social goal.[163] There are studies which show that women do not gravitate towards competition as frequently as men, despite performing just as well as men in competitive situations.[164] If one considers attempts to move up in the corporate hierarchy to management positions and eventually board seats gravitating towards competitive situations, one would assume that there was evidence that women attempt this less than men. There is, though, evidence to suggest that it is not for lack of ambition that women leave management jobs. Instead, women report feeling under-valued and as if they have limited choices in their careers.[165] Furthermore, there is actually very little evidence to suggest women leave their jobs in large numbers after having children. Survey data demonstrates that despite common perception, women in middle and top management roles have the same

[160] *Ibid* at 143.
[161] *Ibid* at 116.
[162] See Chapter 4 for a discussion of the 'crisis of the mediocre man' and an argument that boards may not be composed of those who truly deserve directorships in the first place.
[163] Richard A Epstein, "Is Women's Empowerment a Bureaucratic Imperative?" Hoover Institution, online: <https://www.hoover.org/research/womens-empowerment-bureaucratic-imperative>.
[164] Dhir, *supra* note 5 at 45.
[165] *Ibid* at 46.

aspirations as men in the same positions.[166] They are also amenable in the same way as their male colleagues to compromise parts of their private lives in order to achieve their career goals.[167] Thus the free choice argument may be based on speculation and gender stereotyping rather than on empirical evidence.

c) The Market Should Decide

In comparing the US approach with that of Europe, Epstein said:

> Women are, in ever-larger numbers, graduating from universities with advanced degrees in business and management. As they move up the ranks, their presence on boards may well increase, wholly without quotas…. Firms have every incentive to pick the best board members, male or female… So what is the difference between the Wall Street Journal and the EU's approach? Simple. The former uses voluntary action and enlists high-profile leaders to make its case, while the latter uses coercion in a ham-handed effort to achieve some narrow and counterproductive initiative toward the same general end.[168]

Critics of the normative case argue that the market should be left to correct the underrepresentation problem itself. There is no need for government interference because public companies already have all the motivation they need to hire the best directors.[169] Discrimination is a market inefficiency, one which will be righted over time.[170]

For proponents of stronger regulation, though, market based arguments disregard reality. Some describe the glacial pace of diversity in the boardroom as a persistent market failure.[171] Dhir

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[166] Foster, *supra* note 17 at 391.
[167] Sandrine Devillard, Sandra Sancier-Sultan & Charlotte Werner, "Moving mind-sets on gender diversity | McKinsey", online: <https://www.mckinsey.com/business-functions/organization/our-insights/moving-mind-sets-on-gender-diversity-mckinsey-global-survey-results>.
[168] Epstein *supra* note 163.
[169] *Ibid.* See also Anita Indira Anand, "An Analysis of Enabling vs. Mandatory Corporate Governance Structures Post-Sarbanes-Oxley" (2006) 31 Del J Corp L 229 for an argument that firms have incentives to adopt best practices without mandatory regime being necessary.
[170] Gary S Becker, *The economics of discrimination*, 2nd Ed. ed, Economics Research Studies of the Economics Research Center of the University of Chicago (Chicago, IL: The University of Chicago Press, 1971); Fountain, *supra* note 23 at 94–95; Richard Allen Epstein, *Forbidden grounds: the case against employment discrimination laws* (Cambridge, Mass: Harvard University Press, 1992) at 9.
[171] Market Failure: See TD Economics, "Get on Board Corporate Canada" (7 March 2013) at 1, online: < http://www.td.com/document/PDF/economics/special/GetOnBoardCorporateCanada.pdf >. More generally, J Robert Brown Jr, "Women on the Board and Market Failure (Part 2)" (25 March 2010), online: The Race to the

describes one participant's description of Norway's quota law in the following way: "It was almost as if she was grudgingly accepting that the free market principles she held so dearly had disappointed her – and that the quota was a necessary correction of market failure."[172] During a senate debate, one which will be analysed in greater detail in Chapter 2, Senator Ruth pointed out that while it is true that women are graduating at higher rates than men, leadership roles remain almost exclusively held by men. As she put it, "I observe, of course, that these numbers suggest as the pool of men shrinks overall they maintain leadership positions…"[173] We are not seeing increasing graduation rates among women affect the top positions in corporate Canada.

Pamela Jeffrey at the OSC's roundtable dedicated to discussing the regulation of women on boards stated, "we will not be anywhere close to gender parity until 2097 at this pace of change here between half a percent and a percent a year. So 2097, we're all dead, and our children are dead, and our grandchildren. So let's get on with [it]."[174] Although the rate of change has improved since 2013, it will still take approximately 50 more years to reach gender parity on Canadian public boards, and this is assuming that as board seats become available 50% will be filled by women, a higher female fill rate than there currently is.[175] Thus, like free choice arguments, market based arguments may not have much evidence to support them.

Bottom < www.theracetothebottom.org/independent-directors/women-on-the-board-and-market-failure-part-2.html >;Anita Anand & Krupa Kotecha, "Canada's approach to board diversity needs a rethink", (22 March 2017), online: <https://www.theglobeandmail.com/report-on-business/rob-commentary/canadas-approach-to-board-diversity-needs-a-rethink/article34386450/>.

[172] Dhir, *supra* note 5 at 117.

[173] *Debates of the Senate*, 40th Parl, 3rd Sess, No 29 (13 May 2010) at 563 (Hon Nancy Ruth) ["Senate Debate May 2010"].

[174] Ontario Securities Commission, *Transcript: Roundtable Discussion Re Women on Boards and Senior Management*, (October 23, 2013), *available at* http://www.osc.gov.on.ca/en/SecuritiesLaw_oth_20131016_58-401_transcript.htm ["Rountable 2013"].

[175] Ontario Securities Commission, *Transcript: Roundtable on the Third Annual Review of Women on Boards and Senior Management*, (November 3, 2017), *available at* http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20171103_transcript-wob-roundtable.pdf ["Roundtable 2017"].

d) Role of Board is to Maximize Shareholder Wealth

Although some criticisms of the normative case may not be well supported in the literature, the board's assumed role as a shareholder wealth maximizer is a persuasive argument against stronger regulation. Perhaps the reason why the business case is so politically attractive is because it appeals to those who see the board's role as maximizing shareholder wealth. If the directors' function is almost exclusively to enhance wealth, then a transformation of the board's composition should only be undertaken if it would advance this goal. Hence, if gender diverse boards are not beneficial to shareholders, then diversity initiatives do not align with directors' duties. Defining the board's role this way is much more prevalent in the United States. Generally speaking, a director's fiduciary duties in the US are assumed to be both to the corporation and its shareholders. There is a line of Delaware case law known as the *Revlon* series of cases which makes it clear that when a break-up or change of control transaction is inevitable, the board's fiduciary duty is to sell the company to the highest bidder.[176] *Revlon* has been interpreted and referred to in Canada.[177] However, the Canadian Supreme Court in *BCE* clarified that the directors' duties are to the corporation itself at all times.[178] This fits with the statutory duties found in the federal and provincial corporate legislation.[179] On the other hand, while supporting a stakeholder-friendly model of corporate governance (rather than a purely shareholder-centric model), the Supreme Court, in the context of a *Revlon*-type situation upheld a decision made by the directors which had

[176] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del.1986). The Delaware Chancery court held that considering stakeholders' interests who are not stockholders is inappropriate if a change of control transaction is inevitable. Once this threshold is reached, the role of directors shifts to auctioneers and they must maximize shareholder wealth. The *Revlon* duty was interpreted and narrowed in *Paramount Communications In. v Time Inc.*, 571 A.2d 1140 at 1150 (Del.1989). The *Revlon* duty in *Time*, was held not to apply if a change of control transaction is inevitable, but where the control will still be widely dispersed and there will be no controlling shareholder.

[177] See Christopher C Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control*, 2nd ed. ed, 229-232 (2012). See page 229-239 for detailed account of how *Revlon* has been interpreted by Canadian courts.

[178] *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 36["*BCE*"].

[179] CBCA, *supra* note 8, section 122; OBCA, *supra* note 8, section 134.

the effect of favouring the shareholders of the corporation over the debentureholders.[180] Thus, it seems even in Canada the directors are more than welcome to favour the shareholders, even if they are permitted to consider "the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions."[181]

Very recently, section 122 of the *CBCA* was amended to include a subsection, essentially codifying the *BCE* decision, though with some modifications. Section 122(1.1) now specifically allows directors and officers, when acting with a view to the best interest of the corporation, to consider a list of various factors including the interests of employees, pensioners, consumers, the environment and the long-term interests of the corporation itself.[182]

Thus, while it can be argued that Canadian corporations have a duty to the broader community and, as the Supreme Court of Canada has said, to be "good corporate citizen[s]"[183], business corporations are nevertheless formed and operated in order to make profits. Despite upholding a stakeholder-centric model, the court will not penalize a board that acting honestly and in good faith prioritizes profit and shareholder wealth.[184]

1.2.2.2 Normative Case Conclusion

Like the business case, the normative case may not have garnered support in the business world because of the serious problems its proponents must contend with. It is difficult to rely on solely normative arguments when justifying regulation, especially mandatory quotas, because

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[180] *BCE*, *supra* note 178.
[181] *Ibid* at para 40.
[182] See 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 Parliament, 2019 (assented to 21 June 2019) at s 141.
[183] *BCE*, *supra* note 178 at para 66.
[184] See also Leo E Jr Strine, "Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit Essay" (2012) 47 Wake Forest L Rev 135. Chapter 4 will include a much more in-depth discussion and argument regarding the role of the board and its relation to shareholders, stakeholders, and the public.

what is being regulated is the private sector, namely for-profit corporations. The normative case may also need to be updated if it is to gain traction. This will be discussed further in Chapter 4.

2 Chapter 2: "Pretty Hurts": The Canadian Diversity Policy: A Normative Initiative Masked by Business Case Rationales That Has not Achieved Its Stated Objective

At the time of the original board gender diversity regulatory intervention in Canada, women represented half of the population, half of the labour force, the majority of university graduates,[185] and only 11% of board seats of publicly traded corporations.[186] In the wake of the 2008 financial crisis, corporate governance was pushed to the political forefront. The United States employed stringent legislative reforms including the Dodd Frank Act.[187] The Securities and Exchange Commission (SEC) in the US implemented a diversity disclosure regime at this time as well.[188] Canadian legislators and regulators, in their usual way, took notice of the American securities regulation initiative. The issue of women on boards in Canada began to gain political traction. Senator Hervieux-Payette, beginning in 2009, sponsored bill after bill attempting to pass federal legislation aimed at increasing women's participation on corporate boards.[189] In her speech to the Senate in support of the first of these bills, Senator Hervieux-Payette made specific reference to the financial crisis and how increasing women's representation on boards may help the Canadian economy in its recovery.[190] By 2012, the federal government announced in the Economic Action Plan that it would be creating an advisory council composed of private and public sector figures

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[185] Dhir, *supra* note 5 at 39.
[186] *Disclosure Requirements Regarding Women on Boards and in Senior Management*, OSC Staff Consultation Paper:58-401 (30, July 2013)[Consultation Paper] at 2.
[187] Dodd-Frank Wall Street Reform and Consumer Protection Act PL 111-203, July 21, 2010, 124 Stat 1376 ["Dodd-Frank At"]. Its object is stated as "An Act to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."
[188] SEC, Proxy Disclosure Enhancements, Securities Act Release No 33–9089 (16 December 2009) at 4–5 ["Final Rule"].
[189] *Debates of the Senate*, 41st Parl, 2nd Sess, No 149 (1 May, 2014) at 1430 (Hon Celine Hervieux-Payette)["Senate Debate May 2014"].
[190] *Debates of the Senate*, 40th Parl, 2nd Sess, No 42 (4 June, 2009) at 1011-1012 (Hon Celine Hervieux-Payette) ["Senate Debate June 2009"].

to "promote the participation of women on corporate boards".[191] The advisory council in its report dated March 29, 2012, advised that the federal government should work with provincial governments to develop a national approach to increasing female participation on boards.[192]

Later, in 2013, the Ontario government encouraged securities regulators to prioritize regulation aimed at increasing the number of women on boards. After a consultation and comment period, Canadian securities regulators in 2014 amended National Instrument 58-101: Disclosure of Corporate Governance Practices to include a policy, the objective of which was to enhance female participation on reporting issuers' boards and in executive officer positions.[193] This work will focus on this instrument as it relates to women on boards. Since the amendment of this national instrument, Canadian public boards have seen glacial movement towards gender parity. Currently, women occupy 15% of Canadian public board seats.[194] It is estimated that even if women fill 50% of upcoming available board seats, it will take 50 more years for reporting issuers' boards to reach gender parity. This projection also assumes a higher female fill-rate than there currently is. In reality, women in Canada fill approximately 26% of newly available board seats.[195] Perhaps this progress (or lack thereof) is because of the regulatory confusion about what the true goal of the regime should be. Or perhaps there was and still is confusion about the conception of the problem itself and why regulation is necessary.

This chapter first will provide the history of NI 58-101F1's amendments in order to show that the diversity disclosure policy originated out of a concern for fairness, rather than for business

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[191] Canada, ed, *Jobs Growth and Long-Term Prosperity: Economic Action Plan 2012* ([Ottawa: Public Works and Government Services Canada], 2012) at 144 ["Economic Action Plan"].

[192] Canada, Report by the Government of Canada's Advisory Council for Promoting Women on Boards, *Good for Business: A Plan to Promote the Participation of More Women on Canadian Boards* (Ottawa: Status of Women, 2012) at 17 ["Advisory Council Report"].

[193] NI 58-101F1, *supra* note 3.

[194] CSA Multilateral Staff Notice 58-310, *supra* note 2 at 1.

[195] Roundtable 2017, *supra* note 175 at 7.

case reasons. Its true objective therefore is to enhance equality, rather than simply to protect investors and better business. Following this, an argument will be made that, even if we accept the stated objective of the diversity disclosure regime—that is to enhance female participation on public boards in order to better business—the Canadian regulators did not implement a policy that would accomplish this goal. Despite being well aware of the plethora of regulatory options available to them and the respective impact of these options, the OSC selected a very weak means of intervention. The reason for this selection seems to be that while the regulators were required by the provincial government to address the board diversity issue, they did not want to face potential backlash from the business community.

2.1 "Independent Woman" and The Normative Seed Which Sprouted the Diversity Policy

The Canadian diversity policy undoubtedly arose from social justice concerns about the underrepresentation of women on boards. These concerns were identified long before amendments to NI 58-101F1 were implemented. One can see that social justice was at the core of various attempts by Senator Hervieux-Payette, predating the NI 51-101 amendments, to pass federal legislation which would have introduced mandatory gender quotas on public corporate boards.

2.1.1 Senator Hervieux-Payette's Efforts

2.1.1.1 Bill S-238

In 2009, Senator Hervieux-Payette sponsored the first of four substantially identical bills, each of which had the objective of increasing women's representation on corporate boards in Canada. Bill S-238 was the first of these, introduced in the wake of the financial crisis and during

the period that the US SEC was implementing its diversity disclosure policy and formulating regulations to implement certain provisions of the Dodd-Frank Act. This bill proposed (among other things) to amend the *CBCA* to include a provision mandating that distributing corporations[196] have boards comprised of at least 40% men and 40% women.[197] The preamble of this bill lists a number of reasons why women should be fairly represented on corporate boards. The first is that they are, as consumers and members of the business community, important economic participants. The second is that there are many women in Canada who have the qualifications and the right experience to be directors.[198] Aside from asserting that there is no pool problem, the preamble states that women deserve to be represented fairly because they are active participants in the economy. It is thus for normative or fairness concerns, rather than for possible business benefits women may bring to firms once on boards, that they deserve a seat at the table.[199]

In her speech to the Senate, Senator Hervieux-Payette offered a number of justifications for the bill. First, she argued that the market is not going to correct the problem of women's underrepresentation on corporate boards, so government intervention is necessary.[200] She cites various empirical studies in support of the business case to show that women add financial value to corporations.[201] She then employs a talent-based business case in support of the proposed mandatory quota, citing Statistics Canada data. Specifically, she notes that women have since 1994

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[196] Bill S-238, *An Act to establish gender parity on the board of directors or certain corporations, financial institutions and parent Crown corporations*, 2nd Sess, 40th Parl, 2009, cl 2. A "distributing corporation" is defined in section 2 of the Canada Business Corporations Regulations, 2001 (SOR/2001-512) as a reporting issuer (see *Securities Act*, supra note 153 at s1.1), or a corporation who has filed a prospectus in Canada or outside, a corporation which has publicly traded shares, or one which is involved in an amalgamation with a distributing corporation.
[197] Bill S-238, *supra* note 196, cl 2.
[198] *Ibid* at preamble.
[199] See *Ibid* at preamble. The third reason cited in the preamble is that women are equal democratic participants and so deserve to be represented in Crown Corporations. The amendments that these bills would have effected relating to the Crown Corporations Act are beyond the scope of this thesis however.
[200] Senate Debate June 2009, *supra* note 190 at 1010.
[201] *Ibid* at 1011.

graduated in greater numbers than men from every level of education except the doctoral level. And even at the doctoral level, females represented 43% of graduates in 2006.[202] Thus, corporate boards are under-utilizing the talent represented by this highly educated segment of the population.

Despite these invocations of both normative and business case justifications, Senator Hervieux-Payette's comments about the financial crisis reveal Bill S-238's true origin. She drew attention to this crisis and the fact that perhaps with more women on boards such a "moral failing" may not have occurred. "There may be no quick fix to the current financial crisis," she said, "but a sure-fire, long-term resolution is to advance more women into leadership positions and provide the right environment for new perspectives to be heard."[203]

2.1.1.2 Bill S-206[204]

After Bill S-238, which did not make it past its second Senate reading, Senator Hervieux-Payette sponsored Bill S-206 which was substantively the same as Bill S-238. The long title, preamble and relevant sections of Bill S-206 are identical to that of Bill S-238. Senator Hervieux-Payette provided almost the same remarks in support of this bill as she did for Bill S-238. Two other senators also contributed to the debate this time.

First, Senator Frum provided a fairly weak argument opposing Bill S-206. Her argument opened with some figures based on a misunderstanding of mathematics, leading into a misunderstanding of the bill, and ended with what is essentially support for the objectives of the bill presented as opposition. Senator Frum proclaimed that women on boards have made enormous strides in recent years. In 1994, she noted, women represented 4% of directors in Canada. In 2008,

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[202] *Ibid* at 1012.
[203] *Ibid* at 1012.
[204] Bill S-206, *An Act to establish gender parity on the board of directors or certain corporations, financial institutions and parent Crown corporations*, 3rd Sess, 40th Parl, 2010.

21% of newly appointed directors were women. This, she asserted, constituted a 425% increase.[205] Of course this is inaccurate. The fact that 21% of newly appointed directors were women has no bearing on the total percentage of female directors across Canada. All that it means is that in one year 21% of new board seats were filled by women and that 79% were filled by men. Only if women directors by 2008 constituted 21% of *all* directors could one claim that the total percentage of women directors represented a 425% increase from 1994. In fact, according to a report published by Catalyst, in 2011 women represented 10.3% of board seats on publicly traded boards in Canada. This percentage had remained constant since 2009.[206] The increased percentage claimed by Senator Frum is in error.

After lauding the *CBCA* and the flexibility it allows corporations in structuring themselves, Frum stated that Bill S-206 would add a "harmful layer of intervention". It should be up to the corporate shareholders and management to decide for themselves who is on the board, not the legislature.[207] This is a fair point given the considerable degree of discretion and flexibility directors are given under corporate law in exercising their fiduciary duties[208] and the statutory

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[205] *Debates of the Senate*, 40th Parl, 3rd Sess, No 17 (28 April 2010) at 413 (Hon Linda Frum)["Senate Debate April 2010"].
[206] Catalyst, "Report: 2011 Catalyst Census: Financial Post 500 Women Board Directors", online: *Catalyst* <https://www.catalyst.org/research/2011-catalyst-census-financial-post-500-women-board-directors/>.
[207] Senate Debate April 2010, *supra* note 205 at 413.
[208] At common law directors' decisions if made in good faith are typically not interfered with by the court. This is what is known as the business judgement rule. The Supreme Court in *BCE* provided a summary of the rule in stating: "deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders". See *BCE*, *supra* note 154 at para 99. Directors, elected for their expertise and experience are thought to have more knowledge and know-how to make business decisions than judges. Accordingly, a high threshold must be met in order for the court not to apply the business judgement rule. See also *Maple Leaf Foods Inc. v Schneider Corp.,* [1998]OJ No 4142 at para 36. The court in determining whether the business judgement rule should apply "looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision is taken within a range of reasonableness, the court ought not to substitute its opinion for that of the Board…As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision." For a more detailed account of this rule see Diana Nicholls, "No Representation Without Valuation: Bidder and Target Directors' Duties under Canada's New Take-over Bid Regime: Re Hecla Mining Company" (2017) 59:3 Canadian Business Law Journal 359 at 365–366.

rights to elect directors provided to shareholders.[209] However, she goes on to add that the YWCA and the Canadian Nurses Association, which have almost entirely female boards, would be in violation of the proposed law, commenting that surely this was not the law's intention.[210] These corporations are of course not public companies and so would not have been in violation of Bill S-206.[211]

Senator Frum concluded her argument with a market-based critique of the proposed quotas. She said that firms were at the time already becoming more diverse and that they were fully aware that "the wider your net, the more talent you will catch".[212] They do not need to be told or forced to diversify. If given time, she suggested, the free market should correct the underrepresentation problem. Instead, what Parliament should be concerned with is the education gap between men and women. Men are graduating at lower and lower rates from high school and university. It is possible, she observed, that years down the road men may be poorly represented at the highest corporate levels.[213] This last point Sentaor Frum presented as an argument against Bill S-206. Yet, as Senator Poulin explains, this argument actually supports the bill.[214] If the concern is that men may be underrepresented on corporate boards in years to come, implementing a quota which requires at least 40% representation of both men and women would protect men from being in the position of underrepresentation which women are in today.[215]

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[209] CBCA, *supra* note 8 at s 106(3).
[210] Senate Debate April 2010, *supra* note 205 at 414.
[211] *Ibid.* Indeed, the YWCA and the Canadian Nurses Association are not even for profit corporations and are both incorporated under the Canada Not-for-profit Corporations Act S.C. 2009, c. 23. See YWCA, "Who We Are", online at < https://ywcacanada.ca/who-are-we/structure/> and Canadian Nurses Association, Bylaw No. 1, online at <https://www.cna-aiic.ca/-/media/cna/page-content/pdf-en/cna-bylaws_e.pdf>.
[212] Senate Debate April 2010, *supra* note 205 at 414.
[213] *Ibid* at 413.
[214] *Ibid* at 417.
[215] See Chapter 4 for more on why quotas protect both men and women from underrepresentation.

Later, in the following sitting, Senator Ruth provided her normative, social justice based support for Bill S-206. These remarks, taken together with the bill's preamble and its roots in the catastrophe that was the financial crisis, represent the true justification of the mandatory quotas. Senator Ruth puts forward an argument against letting the market decide. The status quo favours those in power, she says, and power is never going to be given up willingly. She compares Bill S-206 to employment equity efforts. She states that it would be "foolish" to conclude that employment equity has led to the advancement of women in token amounts or that those who benefited from employment equity would not have advanced except for this special treatment.[216] In other words, those who merited advancement would have moved up with or without employment equity legislation. Senator Ruth's argument on this point appears to be contradictory in the sense that while she appears to be in favour of employment equity legislation, if the justification for employment equity is that those whom it helps would have advanced anyway because of their merits, why do we need employment equity legislation? An interview in Dhir's qualitative study of Norwegian directors includes stronger reasoning. Quotas benefit those who although certainly merit advancement, would not advance were it not for quotas.[217]

Senator Ruth goes on to point out that despite the educational gap between men and women and the shrinking pool of men, men still hold the majority of leadership roles. Thus, time passing alone will not fix the underrepresentation of women problem.[218]

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[216] *Debates of the Senate*, 40th Parl, 3rd Sess, No 29 at 562. *Debates of the Senate*, 40th Parl, 3rd Sess, No 29 (13 May 2010) at 413 (Hon Nancy Ruth)["Senate Debate May 2010"].
[217] Dhir, *supra* note 5 at 116.
[218] Senate Debate April 2010, *supra* note 205 at 563.

2.1.1.3 Bill S-217

Bill S-206 progressed no further than its second reading in the Senate. In 2014, Senator Hervieux-Payette sponsored Bill S-217 "An Act to modernize the composition of the boards of directors of certain corporations, financial institutions and parent Crown corporations, and in particular to ensure the balanced representation of women and men on those boards".[219] This bill did not make it through the Senate either. If it were to have been successful, like the other bills above, the *CBCA* would have been amended to include a section mandating that distributing corporations have at least 40% of each gender represented on their boards.[220]

Her remarks in the Senate debate about Bill S-217, which were similar to those she provided for the previous bills, illustrate the underlying purpose of the bill. Senator Hervieux-Payette asserts that the bill's goal is "first to give 52 per cent of the Canadian population the same access to economic decision-making positions as men and, second, to provide for more diverse and therefore more effective decision-making."[221] These comments demonstrate the fact that at its core the bill has a social justice purpose, with a secondary economic purpose.

Senator Hervieux-Payette touches on almost every aspect of both the normative and business cases. She justifies the quotas[222] with the business case as it relates to the financial

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[219] Bill S-217, *An Act to Modernize the Composition of the Boards of Directors of Certain Corporations, Financial Institutions and Parent Crown Corporations, and in Particular to Ensure the Balanced Representation of Women and Men on Those Boards*., 2nd Sess, 41st Parl, 2014 (first reading 26 March, 2014) ["Bill S-217"]. She also sponsored Bill S-212, *An Act to Modernize the Composition of the Boards of Directors of Certain Corporations, Financial Institutions and Parent Crown Corporations, and in Particular to Ensure the Balanced Representation of Women and Men on Those Boards*, 2nd Sess, 41st Parl, 2013 (first reading 16 October, 2013), which was dropped after its first reading in Senate.

[220]Bill S-217, *supra* note 219 at cl 2.

[221] Senate Debate May 2014, *supra* note 189 at 1430.

[222] Senator Hervieux-Payette refuses to admit that her bills would implement quotas, but as Senator Frum points out, a requirement that a board be composed of 40% females and 40% males is of course mandating quotas. See *Debates of the Senate*, 40th Parl, 3rd Sess, No 29 at 562. *Debates of the Senate*, 41st Parl, 2nd Sess, No 75 (19 June 2014) at 2021 (Hon Linda Frum)["Senate Debate June 2014"]

performance studies described in Chapter 1. She also proposes a state legitimacy argument.[223] This has not been widely used by proponents of stronger regulation in North America.[224] The theory behind the state legitimacy justification is that, just as it is unacceptable in a democratic state to bar women from voting, so too is it unacceptable in a democratic economy to exclude women from business decision-making roles.[225] There is no justification for using only half of the skills of the Canadian population.[226]

Senator Hervieux-Payette then proposes another normatively based justification. She concludes by noting that no matter what the economic argument, this should not distract from the fact that equality is a powerful enough reason to add more women to corporate leadership positions. There have not been, she notes, similar financial performance studies conducted to see whether men positively impact companies' performance and this, she adds, is not equal treatment.[227] One weakness of this critique is that the studies that have been conducted are to determine if a change in law or policy is necessary or desirable. Since men are already over-represented on boards, relative to their numbers in the general population, what would the purpose of such a study on their effectiveness be? Either the conclusion would be that men do add value (in which case no policy change would be indicated to be necessary) or it would demonstrate that

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[223] Senate Debate May 2014, *supra* note 189 at 1431.

[224] J C Suk, "Gender parity and state legitimacy: From public office to corporate boards" (2012) 10:2 International Journal of Constitutional Law 449 at 450.

[225] This argument is similar to the one described by Suk which is more popular in Europe. Countries such as France and Norway, Suk argues, prioritize gender balance in democratic bodies and have for years. These states have mandatory quotas for elected officials as a result of a change in rhetoric in the late 1990s and early 2000s. People stopped justifying affirmative action with women's advancement arguments and began adopting state legitimacy arguments. The state cannot be legitimate if it does not represent half of the population. This same argument began to be used in the corporate setting as well. However, as Suk describes, corporations in Norway and France participate actively in the states' democracies. Public economic policy is shaped through negotiation with corporations. This is a recognized practice. Thus, because of their interaction with state actors and known influence in public policy, in order for the state to be legitimate, it is important for corporations to be legitimate. See Suk, *supra* note 224 at 455 and 459-461. Canada does not have such a system and so perhaps this is why the state legitimacy argument has yet to become popular here.

[226] Senate Debate May 2014, *supra* note 189 at 1431.

[227] *Ibid* at 1433.

they do not add value, which would indicate that the real question that must be asked is whether women add value such that a change in policy is required.

In response to Senator Hervieux-Payette's endorsement, Senator Frum once again offered a critique of the bill and what it would mean for Canada. Frum's argument can be categorized as a "the market should decide" critique of quotas. She points out that the sanctions for non-compliance with the quotas in Bill S-217 would be severe. Frum remarks that the bill does not address the true barriers to diversity, those being a lack of mentorship and networking for women in business. The private sector, she continues, is the bedrock of Canadian society.[228] Canadians more and more are understanding that a lack of women's participation is holding Canada back from reaching its full potential. Over the past 15 years, Frum asserts, there has been a dramatic increase of women participating on corporate boards. We are headed in the right direction. Public companies are choosing to increase diversity not because of legislation, but because it is right. Frum also acknowledges the OSC's efforts to implement a diversity policy.[229] It is perhaps in part because of Frum's remarks and criticism of the bill that Bill S-217 was unsuccessful and another federal bill like it was not brought forward again.

2.2 "SURVIVOR": SHIFT FROM FEDERAL GOVERNMENT TO PROVINCIAL SECURITIES REGULATORS

While Bill S-217 was before the Senate, securities regulators were asked to look at implementing a gender diversity policy for corporate boards of reporting issuers. The focus for

[228] Senate Debate June 2014, *supra* note 222 at 2021.
[229] *Ibid* at 2022.

each of the senate bills discussed above was a concern for women's rights and equality. Thus the federal government had been considering for a number of years whether the normative case primarily (combined with business case justifications) was enough to justify quotas. Each effort to implement quotas at the federal level was unsuccessful. So perhaps this is why the federal government looked to the provinces, who in turn sought an alternative regulatory body and a new form of regulation.

At the same time as Bill S-217 was working its way through the House of Commons and eventually permanently stalling in the Senate, the province of Ontario was encouraging the Ontario Securities Commission to examine the issue of women on boards. As mentioned, the Economic Action Plan of 2012 established an advisory council to examine this issue.[230] The advisory council's report recommended that the federal government "should actively encourage and work with provincial and territorial governments, on an ongoing basis, with a view to ensuring a coordinated pan-Canadian approach to increasing women on boards."[231] Thus this issue became a provincial matter.

In 2013 the Ontario government included a statement in its annual budget that it "strongly support[ed]" board gender diversity and that the government would work alongside the Ontario Securities Commission (OSC) to increase the number of women on corporate boards.[232] In July of the same year, the OSC issued a Consultation Paper,[233] held a roundtable,[234] and requested comments from stakeholders to determine what form regulation of this issue would take.[235] The

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[230] Economic Action Plan, *supra* note 191 at 144.
[231] Advisory Council Report, *supra* note 1922 at 17.
[232] Ontario, Ministry of Finance & Charles Sousa, *A Prosperous & Fair Ontario: Budget papers : 2013 Ontario Budget.* (Toronto: Ministry of Finance, 2013) at 291 ["Ontario Budget"].
[233] Consultation Paper, *supra* note 186.
[234] Roundtable 2013, *supra* note 174.
[235] Proposed Amendments, *supra* note 99.

OSC in its report to the Minister of Finance and Minister Responsible for Women's Issues, summarized the feedback it had received from various stakeholders. Many stakeholders, the report stated, were in favour of a comply-or-explain regime. The majority of the stakeholders surveyed recognized the value of diverse boards and thought that it was time to take action.[236]

This initiative beginning first with the federal government, then becoming a provincial project, arose out of a concern for social justice. The OSC's mandate though requires that it, above all, protect investors and promote fairness and efficiency in the capital markets.[237] Thus, it does not appear to have a mandate, or perhaps the jurisdiction, to implement a policy with a purely socially conscious aim.[238]

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[236] Proposed Amendments, *supra* note 99.

[237] In addition, since 2017, the OSC must also contribute to the stability of the financial system and the reduction of systemic risk. See *Securities Act*, *supra* note 153 at s 1.1.

[238] An exception to this is arguably environmental disclosure requirements. Similarly to the diversity disclosure policy, 2010 amendments to the environmental reporting requirements, arose first from a resolution passed by the Ontario Legislature in 2009, calling upon the OSC to undergo a consultation process on Environmental Social and Governance (ESG) best practices, see OSC Notice 51-717, 32 OSCB 10459, December 18, 2009. One of the Consultation Papers issued in this process provides several reasons for the need to update the ESG best practices in Canada. Among these reasons is that enhanced ESG disclosure is useful to investors when they are making decisions, see Ontario Securities Commission, "OSC Corporate Sustainability Reporting Initiative, Report to the Minister of Finance, available online at < https://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20091218_51-717_mof-rpt.pdf>. A review of international developments was also included in this Consultation Paper with specific reference to the United Nations Principles for Responsible Investment. The signatories of these principles endorse a statement which concludes with: "We also recognise that applying these Principles may better align investors with broader objectives of society", see OSC's Report to Minister of Finance page 12. Although the objective of ESG securities disclosure requirements in Canada put forward by the OSC is that this information is material to investors, it is arguable that social justice concerns have also animated the environmental reporting regime. However, there are those who argue that environmental reporting is fundamentally material information. While the details of this debate are beyond the scope of this paper, see Aaron A Dhir, "Shadows and Light: Addressing Information Asymmetries through Enhanced Social Disclosure in Canadian Securities Law" (2009) 47:3 Canadian Business Law Journal 435 for a persuasive argument as to the materiality and importance of sustainability reporting in Canada.

2.3 "HONESTY": THE POLICY, THE OSC'S JUSTIFICATION FOR IMPLEMENTATION, AND WHY IT WAS REALLY IMPLEMENTED

2.3.1 The Policy

The disclosure regime in NI 58-101F1 is what is referred to as a comply-or-explain policy.[239] A reporting issuer[240] must first disclose if it does or does not have a policy regarding representation of women on its board of directors.[241] If it has such a policy, it must also disclose what measures are taken to effectively implement the policy and the progress in achieving the policy's objectives. If the issuer has no such policy, it must explain the reason why it does not.[242] Secondly, reporting issuers must disclose whether or not they consider the representation and identification of women during their director nominating process. If an issuer does not consider the representation and identification of women in this process, it must disclose the reason it does not.[243] Thirdly, the issuer must describe whether (and if not, why not) it has set targets concerning the representation of women on its board and what progress has been made toward reaching said targets.[244] Lastly, the reporting issuer must disclose the number and percentage of women on its board at the time of disclosure.[245]

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[239] Comply-or-explain is a form of regulation in which corporations making a disclosure must comply with stated best practices or requirements or explain why they did not comply. See Willey, *supra* note 62 at 193.

[240]See *Securities Act*, *supra* note 153 at section 1.1. An issuer is defined by the *Ontario Securities Act* as "a person or company who has outstanding, issues or proposes to issue, a security". A reporting issuer is, among other things, an issuer whose shares are publicly traded. Henceforth, publicly traded corporation and reporting issuer will be used interchangeably unless otherwise specified.

[241] The issuer must also disclose its policy as it relates to women in executive officer positions. This work's focus is on the regime as it relates to women on boards.

[242] NI 58-101F1, *supra* note 3 at item 11.

[243] *Ibid* at item 12.

[244] *Ibid* at item 13.

[245] *Ibid* at item 15.

On May 1, 2018, Bill C-25 received Royal Assent. This bill, coming into force in 2020, will add section 172.1 to the *CBCA*.[246] These amendments require that directors of prescribed corporations provide shareholders with all of the information which NI 58-101F1 items 10-15 requires they disclose. Additionally, this bill replaces "women" with "designated groups" as defined by the *Employment Equity Act*.[247] These amendments are certainly an example of stronger regulation of board diversity generally, but in terms of board gender diversity they do not impose any new regulatory requirements for reporting issuers.

2.3.2 The OSC's Justification for Implementation

The OSC, in justifying the amendments to NI 58-101F1, focused on the business case. The Commission was open about the fact that the policy is designed to increase women's participation on boards.[248] The OSC's justification for this is that women participating on boards is better for business, and disclosure about women's participation benefits investors. In addition, The Minister for Women's Issues and the OSC itself identified social benefits which may arise out of the policy's implementation.[249] The Consultation Paper quoted the Minister for the Status of Women[250] as follows: "[B]oard diversity is not about quotas or tokenism. Board diversity is about better corporate decisions, better responses to market demographics, and better financial performance. It is also about the future, and having more women in key leadership positions to

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[246] Canada Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act*, 1st Sess, 42nd Parliament, 2018 (assented to 1 May 2018).

[247] Bill C-25, Proposed Regulations, Industry Canada Government of Canada, "Bill C-25 proposed regulations", online: <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs07273.html>. "Designated groups" must include but are not limited to women, visible minorities, Aboriginal peoples and people with disabilities, see "Green Light for CBCA Amendments on Board Diversity, Director Elections and Online Meeting Materials", online: *Stikeman Elliott* <https://www.stikeman.com/en-ca/kh/canadian-ma-law/Green-Light-for-CBCA-Amendments-on-Board-Diversity-Director-Elections-and-Online-Meeting-Materials>.

[248] See Proposed Amendments, *supra* note 99 at 2.

[249] See Consultation Paper, *supra* note 186 at 5.

[250] The Minister for the Status of Women is a federal cabinet minister. The Minister for Women's issues is an Ontarian provincial cabinet minister.

serve as role models for young women and girls".[251] This quote demonstrates at least three rationales behind the regulation aimed at promoting gender parity on corporate boards. Those are: better financial performance, better decision making, and a normative or social justice rationale. These represent a few of the rationales used by proponents of board gender diversity to justify stronger regulation of this issue. The stated objective of the policy itself, according to the OSC's Report, was that it was, "intended to encourage more effective boards and better corporate decision making by requiring greater transparency for investors and other stakeholders regarding the representation of women on boards and in senior management of TSX-listed and other non-venture issuers. This transparency is intended to assist investors when making investment and voting decisions."[252] Thus a further goal of assisting investors while they make decisions is included, likely in order to bring the policy within the OSC's statutory mandate.

2.3.3 The Real Reason for NI 58-101F1's Amendments

Why did the OSC, while proclaiming all the business benefits women would bring to the boardroom, choose a policy which in no way guarantees these benefits as an outcome? The obvious answer is that they were told to look at this issue by the government and wished to avoid any backlash from reporting issuers and those who might oppose an abrupt change in policy for the reasons discussed in Chapter 1 and as described at the various senate debates in Chapter 2. According to the OSC's Report to the Ministers of Finance and Women's Issues, most stakeholders thought that the contents of an issuer's gender diversity policy should be determined by the issuer and not mandated by the OSC.[253] There was very little support for implementing quotas.[254] At the OSC's roundtable discussion in 2013, Pamela Jeffrey spoke about the Canadian Board Diversity

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[251] Consultation Paper, *supra* note 186 at 6.
[252] Proposed Amendments, *supra* note 99 at 6.
[253] Proposed Amendments, *supra* note 99 at 6.
[254] *Ibid*.

Council's research which indicated at the time that corporate directors did not support quotas. In fact, 38% supported the status quo, 62% did not, eight percent supported quotas, and 54% favoured a comply-or-explain policy.[255] Thus, if the OSC were to have implemented mandatory quotas, corporate directors would certainly have been against, and likely spoken against, such a policy. Another reason behind the selection of a comply-or-explain policy justified by business case rationales could be that the government did not want to see the policy subject to the same criticism faced by Bills S-238, S-206, and S-217.

The regulators attempted to please the government by exploring the issue as asked, as well as the business community by implementing a policy which did not necessitate much boardroom change if issuers did not feel so inclined. Furthermore, by justifying the implementation of this policy mainly with business case arguments, they avoided criticism about working outside of their mandate.

This is not to say that they avoided all criticism in this regard. There were those who saw through the policy as a social justice effort falling outside the mandate of the OSC and other provincial securities regulators.[256] Not only is this problematic, critics say, because it leads to regulatory burdens for issuers, but it is also a waste of the OSC's resources that may otherwise go towards preventing fraud on the market.[257] On the other hand, diversity proponents thought the policy was a good first step and would have liked to see stronger regulatory intervention. The Ontario Teacher's Pension Plan at the time supported a listing requirement mandating that issuers

[255] Roundtable 2013, *supra* note 174 at 37.
[256] Neil Mohindra, "Who could object to the OSC promoting gender equality? Actually we all should", Financial Post (1 November 2017), online: <https://business.financialpost.com/opinion/who-could-object-to-the-osc-promoting-gender-equality-actually-we-all-should>.
[257] *Ibid*.

with shares trading on the TSX add at least three women to their board by 2020. [258] Thus, while attempting to make everyone happy, the OSC still ruffled a few feathers.

Notwithstanding the above complaints, the comply-or-explain policy was brought in to force with little controversy. Scholars note that this is a sign of the policy's weakness.[259]

2.4 "CHECK ON IT": THE POLICY IS TOO WEAK TO BRING CHANGE

2.4.1 Quotas, Comply-or-Explain, and Explain-or-Explain

The question remains, though, if the intention is to bring about greater female representation on corporate boards because this is a demonstrated way to enhance business performance, why not implement quotas? The regulators were aware of a wide range of diversity policy options available to them. They reviewed the disclosure policies of several jurisdictions during the consultation process, including those of the US, the UK, and Australia. In addition they reviewed the policies of states with stricter, quota-based regulations such as Norway and France.[260] Canadian regulators would have also been aware of the impact of these different policy options. Jim Leech from the Ontario Teacher's Pension Plan, for instance, at the 2013 Roundtable conducted by the Canadian Securities Administrators (CSA), said: "If you're serious and you really want to make that difference and you really believe in it, then set it up for seven years from now as a target, and people have to get there. And it's a listing requirement."[261]

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[258]Letter from Wayne Kozun to OSC (4 October 2013) re Request for Comment on Proposed Amendments of NI 58-101F1, online at <http://www.osc.gov.on.ca/documents/en/Securities-Category5-Comments/com_20131004_58-401_ontario-teachers-pension-plan.pdf>.
[259] Willey, *supra* note 62 at 209.
[260] Consultation Paper, *supra* note 186 at 9-17.
[261] Roundtable 2013, *supra* note 174 at 48. As mentioned above, the Ontario Teachers Pension Plan supported a much more stringent TSX rule that would require issuers with shares trading on the TSX to add 3 women to their boards by 2020 or face the consequence of being de-listed, see Wayne Kozun's letter to the OSC *supra* note 258.

2.4.1.1 Quotas

Several European countries adopted quotas before the Canadian regime came into effect. Norway was the first. The Norwegian Companies Act was amended to include a requirement that public corporate boards (of a certain size) be composed of at least 40% of the underrepresented gender.[262] From 2004 to 2006 this quota was voluntary. There was insufficient compliance with the quota during the voluntary period. By 2006, 24% of board seats in Norway were occupied by women.[263] This requirement became mandatory in 2006. Companies were to meet the quota by 2008 or risk dissolution. Once it was mandatory, corporate boards became gender diverse very quickly.[264] Eric Lamarre from the McKinsey Company, another panelist at the OSC's 2013 roundtable, noted that when disclosure based policies are implemented, female representation goes up by approximately a percentage point per year. He further pointed to the fact that without sanctions, quotas have similar results as comply-or-explain policies.[265]

This is not supported by what happened in France. After Norway, France adopted quotas. The French constitution was amended in 2008 to mandate that men and women be given the same access to professional and social leadership.[266] In 2011 a law was passed implementing corporate gender quotas, requiring that public corporations and private corporations with a certain amount of assets and employees reach 20% female board participation by 2014 and 40% by 2017.[267] Unlike in Norway, the punishment for non-compliance in France was not corporate dissolution. Instead,

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[262] *Norwegian Public Limited Liability Companies Act* , Del K:1, no 45 of 13 June 1997 § 6-11a.
[263] Consultation Paper, *supra* note 186 at 16.
[264] Anne Sweigart, "Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada" (2012) 32:4 Northwestern Journal of International Law & Business 26 at 83A.
[265] Roundtable 2013, *supra* note 174 at 46.
[266] Suk, *supra* note 224 at 451; Carlson, *supra* note 7 at 361.
[267] Loi 2011-103 du 27 janvier 2011 relative *h* la representation & equilibree des femmes et des hommes au sein des conseils d'administration et de surveillance et **A** l'egalite professionnelle (1), Journal Officiel de la Republique Franaise [Official Gazette of France] 1.0.], January 27*,* 2011, at 1680 (Fr.). See also Consultation Paper, *supra* note 186 at 16.

if a company did not comply with the quota, the nomination of its directors would be null and void.[268] The French gender quota was accompanied by a comply-or-explain regime.[269] If public companies (as well as some private companies with significant assets or large numbers of employees) did not comply with the quota, they would have to explain their non-compliance in their annual report. Today, France is a leader in board gender diversity with 44.2% female representation.[270] By 2014, France's boards were composed of 35% women.[271]

2.4.1.2 Disclosure without Quotas

The US, the UK and Australia had introduced disclosure based policies prior to 2014. After these disclosure based policies were implemented, the number of women on corporate boards moved incrementally.

a) The US

The US effected what may be the weakest version of a diversity policy. In 2009, the SEC amended the proxy disclosure requirements to include this policy. Regulation S-K, Item 407(c)[272] requires that publicly traded companies disclose in their Proxy Statements whether the nominating committee "considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees," they must "describe how this policy is implemented, as well as how the nominating

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[268] Emmanuel Zenou, Isabelle Allemand & Bénédicte Brullebaut, "Gender Diversity on French Boards: Example of a Success from a Hard Law" in *Gender Diversity in the Boardroom* (2017) 103 at 113–114.
[269] Carlson, *supra* note 7 at 361.
[270] Claire Zillman, "Need Proof That Companies Can Have Gender Diverse Boards? Look to France," (3 December 2008) online: *Fortune* <http://fortune.com/2018/12/03/board-diversity-france/>.
[271] Simona Comi, Mara Grasseni, Federica Origo & Laura Pagani, "Quotas have led to more women on corporate boards in Europe", (6 October 2016), online: *LSE Business Review* <https://blogs.lse.ac.uk/businessreview/2016/09/30/quotas-have-led-to-more-women-on-corporate-boards-in-europe/>.
[272] Final Rule, *supra* note 188.

committee (or the board) assesses the effectiveness of its policy."[273] The Commission deliberately declined to define diversity, leaving the definition up to reporting corporations.[274] The policy, the SEC claimed, was not intended to "steer behavior" but may lead to benefits such as increased board independence and access to a wider talent pool of candidates.[275] Their belief was that investors would directly benefit from these disclosures.[276] Prior to the policy's implementation, women held 15.2% of Fortune 500 board seats.[277] Approximately ten years after the policy's implementation, 22.5% of directors of the Fortune 500 are women.[278] The US's federal diversity disclosure policy therefore has appeared to have very little impact on the number of women on public corporate boards.

However, in the fall of 2018, Senate Bill No. Bill 826 (Bill 826) was signed in California. This bill adds sections 301.3 and 2115.5 to the Corporations Code. Bill 826 requires public corporations with "principal executive offices" located in California to have a minimum of one female director. This minimum number is to increase over time. By 2021 boards will be required to have at least two female directors if the board has five or more members, or 3 female directors if the board has at least six members. [279] This initiative has faced much controversy.[280] Following Bill 826, other

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[273] *Ibid*.
[274] *Ibid* at 68344.
[275] *Ibit* at 68355.
[276] *Ibid*.
[277] Catalyst, "Report: 2009 Catalyst Census: Fortune 500 Women Board Directors", online: Catalyst <https://www.catalyst.org/research/2009-catalyst-census-fortune-500-women-board-directors/>.
[278] Deloitte: Allilance for Board Diversity, "Missing Pieces Report: The 2018 Board Diversity Census", online: Deloitte United States <https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/missing-pieces-fortune-500-board-diversity-study-2018.html>.
[279] See US, SR *An Act to Add Sections 301.3 and 2115.5 to the Corporations Code, Relating to Corporations,* 2018, Regg Sess, Cal, 2018 ["Bill 826"].
[280] For a fuller analysis of the history of this bill and its controversy, see for instance: Diana Nicholls, "Crashing the Boards: A Comparative Analysis of the Boxing out of Women on Boards in the United States and Canada"(2019) 12:1 J. Bus. Entrepreneurship & L; Joseph Grundfest, "Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826", SSRN Scholarly Paper ID 3248791 (2018); Stephen Bainbridge, "Can California Require Delaware Corporations to Comply with California's New Board of Director Gender Diversity Mandate? No, online at PROFESSORBAINBRIDGE.COM, <https://www.professorbainbridge.com/professorbainbridgecom/2018/09/can-california-require-delaware-corporations-to-comply-with-californias-new-board-of-director-gender.html.>; Hester Peirce, "My Beef with

states have begun to write similar legislation. The House in Illinois for instance recently passed a bill which was originally going to require that all public companies in Illinois have one female and one African American board member by 2020.[281] It is as yet unclear what impact these initiatives will have on women's representation on public companies. First, because the majority of public corporations in the US are incorporated in Delaware and are subject to Delaware state corporate law. Second, and relatedly, the California bill attempts to regulate companies with head offices in California but who may be incorporated elsewhere. This, critics say, may be an unconstitutional breach of the "internal affairs doctrine".[282] A conservative activist group, Judicial Watch, has launched a lawsuit against the California Secretary of State, alleging that the law is unconstitutional on the basis of sex discrimination.[283] This is a surprising first legal challenge

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Stakeholders", (Remarks delivered at the 17th Annual SEC Conference, Center for Corporate Governance Reporting, 21 September, 2018), online at <https://www.sec.gov/news/speech/speech-peirce-092118>, Keith Paul Bishop, "Why California's Gender Quota Bill Is More Likely To Be Unconstitutional Than California's Pseudo-Foreign Corporation Statute", online: <http://www.calcorporatelaw.com/why-californias-gender-quota-bill-is-more-likely-to-be-unconstitutional-than-californias-pseudo-foreign-corporation-statute>; Emily Stewart, "California just passed a law requiring more women on boards. It matters, even if it fails", (3 October 2018), online: *Vox* <https://www.vox.com/2018/10/3/17924014/california-women-corporate-boards-jerry-brown>; "Can California's new boardroom diversity law withstand courtroom backlash? Women say 'bring it on'", (27 November 2018), online: *CALmatters* <https://calmatters.org/articles/california-women-boardroom-law-faces-legal-challenges/>.

[281] See US, HB3394, *An Act Concerning Business*, 101st Gen Assem, Reg Sess, Il, 2019. The bill was substantially amended only to require that firms disclose the demographics of their boards, see Emma Hinchliffe, "Illinois Almost Follows in California's Board Footsteps: The Broadsheet", online: *Fortune* <https://fortune.com/2019/06/07/illinois-almost-follows-in-californias-board-footsteps-the-broadsheet/>. Bo Erickson CBS News November 15, 2018 & 6:13 Pm, "House Democrats consider new rules related to diversity, legislative process", online: <https://www.cbsnews.com/news/democrats-consider-new-rules-related-to-diversity-legislative-process/>; Chuck Jordan, "Critic has it wrong: Legislation seeks greater disclosure of diversity on corporate boards", (8 January 2019), online: TheHill <https://thehill.com/blogs/congress-blog/politics/424432-critic-has-it-wrong-legislation-seeks-greater-disclosure-of>; "Bill requiring women, African-Americans on corporate boards passes Illinois House", (4 April 2019), online: *WEEK* <https://week.com/news/top-stories/2019/04/04/bill-requiring-women-african-americans-on-corporate-boards-passes-illinois-house/>; Jaime Di Paulo, "Corporate board diversity is good for business. But it's not the norm — and that's why a law is needed. - Chicago Tribune", online: <https://www.chicagotribune.com/opinion/commentary/ct-perspec-diversity-corporate-boards-bill-20190503-story.html>.

[282] See Marc I Steinberg, *The Federalization of Corporate Governance* (Oxford University Press, 2018) at 2 wherein he defines the Internal Affairs Doctrine as, "the law that governs the relations among and between the corporation, its fiduciaries, and its stockholders is the law of the subject corporation's state of incorporation". See also Nicholls, *supra* note 280 at 23 for a fuller description.

[283] "Judicial Watch Sues California over Gender Quota Mandate for Corporate Boards", (9 August 2019), online: *Judicial Watch* <https://www.judicialwatch.org/press-releases/judicial-watch-sues-california-over-gender-quota-mandate-for-corporate-boards/>.

because it is not on the basis of a breach of the internal affairs doctrine and was not launched by a corporation subject to the quotas. Regardless of these challenges, at the time of the Canadian policy, it could not have been known that a number of states years later would begin implementing quotas.

b) The UK

The British government in 2010 commissioned a report by Lord Davies regarding the barriers stopping women from being placed on boards in greater numbers and ways in which their numbers on boards could be increased.[284] Following the report's publication, the UK's Corporate Governance Code was updated in September 2012. Two principles of the code relate to diversity. One principle states that board candidate searches should be conducted with an emphasis on merit, relying on objective criteria with appropriate weight placed on the benefits of diversity, including gender. Secondly, the board should review its performance, the performance of its committees, and the performance of directors individually. It should in this review consider, among other things, its diversity, including gender.[285] Listed corporations must disclose their compliance with the Code's principles and if they do not comply, they must provide reasons.[286] This policy was accompanied by a recommendation that Financial Times Stock Exchange (FTSE) 100 companies aim for 25% female representation on boards.[287] In 2010 women comprised 8.9% of board seats

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[284] Consultation Paper, *supra* note 186 at 12.
[285] *Ibid* at 14. See also See also Financial Reporting Council, "Developments in Corporate Governance 2012: The Impact and Implementation of the UK Corporate Governance and Stewardship Codes", online at Financial Reporting Council < https://www.frc.org.uk/getattachment/0aea228a-9c81-4d4c-bd59-b55683c6b88c/Developments-in-Corporate-Governance-2012-final-for-web.pdf> and Financial Reporting Council: "The UK Corporate Governance Code", online at Financial Reporting Council < https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> at Part 3.
[286] Consultation Paper, *supra* note 186 at 14.
[287] See Catalyst, *Quick Take: Women on Corporate Boards* (December 21, 2018).

in the UK. By 2017 women represented 20.3% of UK board seats.[288] This represents an increase of female board participation of approximately one to two percent a year.

c) Australia

Australia's policy is a much more rigorous comply-or-explain policy. Eight core principles in the ASX Corporate Governance Council Principles and Recommendations provide non-mandatory guidance to listed corporations regarding their board nominating process, board composition and board renewal process. Recommendation 3.2, in 2014, stated that corporations should implement a diversity policy and disclose the content of this policy.[289] This recommendation also provided a suggestion for what should be included in the diversity policy. Recommendation 3.3 stated that corporations should provide the measurable objectives they have in place to achieve gender diversity as well as the progress towards achieving these objectives.[290] Corporations must also disclose the number and percentage of women on boards and explain deviations from these recommendations. Before this regime, in 2010, women represented 10.8% of directors in Australia. By 2014 women represented 19.9% of directors in Australia.[291]

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[288] In 2015, a subsequent recommendation in the Hampton-Alexander Review, that FTSE 300 companies aim for 33% female board representation by 2020, see "Women in the boardroom—5th edition", online: *Deloitte* <https://www2.deloitte.com/global/en/pages/risk/articles/women-in-the-boardroom5th-edition.html> at 71.

[289] Consultation Paper, *supra* note 186 at 11.

[290] *Ibid* at 12.

[291] Australia more recently has made substantial progress in increasing female board participation. They now lead all other countries with disclosure based regimes, with 28.7% of board seats being occupied by women in 2017, see "Quick Take: Women on Corporate Boards", online: *Catalyst* <https://www.catalyst.org/research/women-on-corporate-boards/>["Quick Take"]. There is some debate as to whether this is because of the diversity policy itself, or whether it is a result of private initiatives by institutional investors, see Jamie Smyth, "Australia's Corporate Boards Shrink the Gender Gap", online: OZY <http://www.ozy.com/acumen/the-gender-gap-on-australias-corporate-boards-is-shrinking/92425>; "Australia Is Pushing for More Women in Boardrooms", (6 March 2019), online: <https://www.bloomberg.com/news/articles/2019-03-06/push-for-diverse-boardrooms-extended-to-top-300-australian-firms>. Currently, Australia's listed corporations have boards made up of 29.7% female directors, see Greta Stonehouse, "Not enough women on ASX200 boards: AICD", (25 July 2019), online: *7NEWS.com.au* <https://7news.com.au/business/not-enough-women-on-asx200-boards-aicd-c-365480>.

2.5 CONCLUSION

After four attempts at a federal bill that would have required mandatory gender quotas for public boards, the Canadian federal government turned to the provinces to enhance women's representation on boards. These bills and finally the diversity disclosure regime itself were rooted in concern for fairness. The business case seems to have been an after-thought. Setting the origin of the policy aside, the amendments to NI 58-101F1 do not even accomplish their stated objective. Canadian securities regulators were more than aware in 2014 of the efficacy (or lack thereof) of a comply-or-explain regime before amending NI 58-101F1. In attempting to avoid controversy, the regulators implemented a policy which accomplishes neither its "business case" goals, nor its normative goals.

The evidence makes it very clear that the only way to guarantee immediate change is with quotas and penalties for non-compliance. Comply-or-explain and other disclosure based efforts have been much less successful than quotas if we measure success by an increase in women's representation on corporate boards.[292] Canadian securities regulators were aware of these policies and results before NI 58-101F1 was amended. They included a detailed description of international board diversity efforts in their Consultation Paper, even citing specific language of policies used across the world.[293] They would have also been aware that a comply-or-explain policy without measurable targets would not be effective in raising the number of women on boards. If they knew

[292] There are those who do not believe this to be an accurate measurement of success. See for instance Letter from Beverly A. Behan to the OSC (10 February 2014) re Request for Comment on Proposed Amendments of NI 58-101F1, online at <http://www.osc.gov.on.ca/documents/en/Securities-Category5-Comments/com_20140210_58-101f1_behanb.pdf>. She purports that the policy's success should be measured by its impact on board functioning. If adding more women to boards, she says, enhances board functioning it will be a success. It will not be a success simply by virtue of getting more women on boards.
[293] Consultation Paper, *supra* note 186 at 9-17.

this going in, one is led to the conclusion that they may have been paying lip service to the government and to stakeholders with the diversity policy.

Hollins asserts that:

> Empirical targets produce better results, a better chance of success. We know this…If everyone agrees that gender parity-truly having women represent 50 per cent of the leadership of our institutions, companies, law firms-is a good thing, why are we so unbelievably fearful of actually setting that as our goal? And when we do, why is it 25 or 30 per cent? Why is the goal not 50 per cent?[294]

European countries who tried non-mandatory approaches were disappointed with the result, and since have implemented more stringent quotas. If Canada wishes to increase the number of women on boards, stronger regulation must be implemented. If it is true that quotas are outside the OSC's mandate, then a stricter comply-or-explain policy with actual targets for corporations to comply with may be the answer. Alternatively, quotas could be implemented for a short period and phased out once there is gender parity on corporate boards.[295] These alternatives will be compared in further detail in Chapter 5. Furthermore, as demonstrated by Norway's attempt at voluntary quotas, perhaps it is the sanctions which provide the real motivation behind diversification. Therefore, maybe substantial penalties are the only way to move the needle. Ultimately, the policy in its current formulation has not and will not achieve its stated objective.

On the other hand, the discussions at the OSC's 2013 Roundtable could lead one to conclude that this weak intervention was only meant to be a first step. For instance, Eric Lamarre said: "So I think, at least for me, it's a no-brainer first step to go to comply or explain."[296] It is time to proceed to phase two. Before the policy is to be amended or replaced, perhaps it would be most

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[294] Michelle Hollins, "Numbers Matter: Gender Parity in the Legal Profession" (2015) 78 Saskatchewan Law Journal at 249.
[295] See Willey, *supra* note 62 at 206–209.
[296] Roundtable 2013, *supra* note 174 at 47.

useful for the regulators to accurately articulate what the justification is behind the diversity policy. A justification may be most useful if it appeals to both diversity advocates and the business community. This may require a new formulation or a re-statement of the business case.

3 Chapter 3 "Start Over": The Business Case Revisited

> "For many of us, the argument for women's equality, for women's rights, was first and foremost a moral argument and it was a political argument.... But I think where it is now an economic argument is in many cases a maturing of the argument that women's rights are human rights but also a very important way of enlisting greater support."[297]

Chapter 1 detailed popular articulations of the business case. Those market participants with the power to substantially increase women's board representation have not been persuaded by the business case as it is currently formulated. If the business case had become entrenched in corporate governance rhetoric, in the way, for instance, agency theory has,[298] then just as public company boards have a plethora of independent directors, they would have a plethora of female directors. The empirical evidence demonstrating that greater numbers of independent directors lead to enhanced financial performance and lower incidents of fraud is inconclusive,[299] just as the empirical evidence demonstrating a link between greater representation of women on boards and enhanced financial performance of the firm is unsettled. Agency theory has garnered significant traction, while proponents of board diversity are constantly on the defensive. Why? Could it be that agency theory is more intuitively appealing than board diversity theory though both are based upon mixed empirical evidence?

In this chapter, two business case theories will be presented in order to suggest that a restatement of the business case may be possible. First critical mass theory will be discussed. This theory is widely accepted by diversity scholars. Due to the lack of women on boards it has been quite difficult to empirically test the critical mass theory. Next, Richard Roll's Hubris

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[297] Alexander Sifferlin, quoting Hillary Clinton in "Hillary Clinton's Best Advice on Succeeding in a Man's World",Time, online: <http://time.com/49751/hillary-clintons-best-advice-for-succeeding-in-a-mans-world/>.

[298] Tingle, *supra* note 92 at 229.

[299] *Ibid* at 252; Sonnenfield, *supra* note 83; Fairfax, *supra* note 22 at 878; Dalton et al, *supra* note 113 at 270–272.

Hypothesis[300] will be described and applied to female board representation. Although risk aversion and overconfidence have been considered in the literature, this will be the first time Roll's theory has been analysed as it relates to men and women generally and in the context of the boardroom. Thirdly, there will be an analysis of systemic risk and an argument will be made that systemic risk may be affected by boardroom gender diversity. To the author's knowledge, this is the first time such an argument has been made. This chapter will include a possible restatement of the business case as well as an account of what remains missing from the literature. Although there are some gaps in the empirical evidence supporting critical mass and Roll's theory, at the very least, the evidence does not contradict the business case. In fact, the evidence (while there remains certain weaknesses) points to a positive relationship between increased board gender diversity and enhanced board processes, firm financial performance, and decreased shareholder losses. Perhaps just as agency theory, while unsupported by clear and conclusive empirical evidence, has garnered ubiquitous support in the business community, the business case for women on boards may one day also garner such support.

3.1 "ALL THE SINGLE LADIES": CRITICAL MASS

3.1.1 Critical Mass Theory

Rosabeth Moss Kanter posed the original critical mass theory in the 1970s without ever using the phrase "critical mass". She argued that proportions of men and women in an organization affect the relationship between men and women, the individual experience of women, and group dynamics generally.[301] Women in the upper echelons of a firm, according to Kanter, have "token"

[300] Richard Roll, "The Hubris Hypothesis of Corporate Takeovers" (1986) 59:2 The Journal of Business 197.
[301] Kanter, *supra* note 41.

status. This means that they are viewed by the majority or the "dominants", as she refers to them, as representatives of their entire category and not as individuals in themselves.[302] Women in the specific context of the organization Kanter was discussing, and even today at the top of corporations, are often, or have been, the one and only woman.[303] This leads to a few consequences. They must face the visibility which accompanies their "one and only status" as well as stereotyping. Women at the top of large firms, dealing with enhanced visibility, often must choose between over-achieving by working harder than those around them, or finding a way to become invisible to others by retreating and avoiding conflict.[304] While a token is very easily noticed, the tokens interviewed by Kanter reported that their accomplishments were often overlooked.[305] One crucial point made by Kanter is that: "It was rarity and scarcity, rather than femaleness per se, that shaped the environment for women in parts of Indsco [the fictional name for the company Kanter studied] mostly populated by men."[306] In other words, women's experience and the attitudes of others towards them are due to their status as the minority in the organization, not because they are female.

Kanter further notes the changes which can take place as proportions in a group setting are altered. For instance in a "skewed" group, the ratio of the majority group to the tokens being 85:15, the dominants oversee the group and its culture. The tokens are typically viewed as symbolic representations of their categories, rather than individuals. A "tilted" group is where the distribution is closer to 65:35 and there is a larger minority rather than a few tokens. As a larger group, Kanter believes that the minority has the ability to affect the culture of the group and begin

[302] *Ibid* at 6.
[303] *Ibid* at 206.
[304] *Ibid* at 237.
[305] *Ibid* at 216.
[306] *Ibid* at 207.

to be seen in their capacity as individuals, rather than as mere symbols. Finally, a "balanced" group where there are at least 40% of the minority is one where the culture and interaction reflects this balance.[307] Kanter does not make specific reference to numbers; however, she does note that when only two women are present others may either assume that they are an interchangeable pair, or discourage and prevent an alliance to form between them. Thus, it is likely that only two women will not be enough to change a group's culture.[308]

Following Kanter, in the late 1980s, Drude Dalherup explained the origin of the term "critical mass" and extended Kanter's theory in important ways. Critical mass is a phrase from nuclear physics. Specifically, it is the quantity needed to begin a chain reaction.[309] Similarly, when the number of women within a group reaches a critical mass, this is what is needed to begin a noticeable change.[310] Although Kanter argued that women in an organization are held back from their potential because they are in the minority, not because they are women, Dahlerup points to further barriers women face not just as the minority within an organization, but having the status of "minority" outside the organization as well.[311] He lists a number of issues facing women (which include stereotyping and sexual harassment) some of which are compounded by women's external status as "minorities". Once a critical mass, or a larger minority of women is present, the group dynamic and the experience of the women as individuals should be affected. There should be a diminution of stereotyping, visible role models for women, and less resistance to women entering the field. [312]

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[307] *Ibid* at 208–209.
[308] *Ibid* at 237–238.
[309] Drude Dahlerup, "From a Small to a Large Minority: Women in Scandinavian Politics" (1988) 11:4 Scandinavian Political Studies 275 at 275.
[310] *Ibid* at 276.
[311] *Ibid* at 278.
[312] *Ibid*.

While Dalherup is discussing critical mass theory in the context of Scandinavian politics, his points regarding the theory in general are insightful and relevant to any discussion thereof. Despite the fact that Dalherup is credited with extending the phrase "critical mass" in important ways to women's participation in politics,[313] he was not convinced that there was any real evidence as to what exactly the critical mass threshold is.[314]

3.1.2 Women on Boards and Critical Mass

Critical mass theory is by no means new. However, given the slow increase of women's participation on boards worldwide, it has been difficult until recently to truly study the impact a critical mass of female directors may have on large public companies. Certainly in Canada the average board is still far from reaching what has been empirically shown to be a "critical mass" of women. It will be argued that this key component of the business case, while in no way new, may be what is missing from older studies examining female participation on corporate boards.

While Kanter did not discuss critical mass theory as it specifically applies to a boardroom, it is not difficult to apply her theory to just that. A boardroom, like other organizational social groups, is a collection of people in a high pressure environment where men are normally in the majority. On average, Canadian public boards are comprised of 15% female directors.[315] They therefore would tend to be what Kanter calls a "skewed group". One can easily apply the remainder of what she describes as the token woman's experience and why one or even two women on a board may not be nearly as effective as three or more. While Kanter was not advancing the

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[313] Lissa Broome, John Conley & Kimberly Krawiec, "Does Critical Mass Matter? Views From the Board Room" (2011) Seattle University Law Review 1049 at 1051.
[314] Dahlerup, *supra* note 309 at 290.
[315] CSA Multilateral Staff Notice 58-310, *supra* note 2 at 1.

argument that a critical mass of women should lead to firm-wide outcomes, academics have studied this question and subsequently advanced this argument.[316]

3.1.3 Empirical Evidence

A large portion of the empirical studies examining the relationship between greater representation of women on boards and firm financial performance discussed in Chapter 1, did not account for a critical mass of women being present on the board.[317] The majority of studies which account for critical mass and those which examine the relationship between critical mass and board processes as well as firm financial performance find a positive relationship both between female representation and enhanced board processes, and female representation and firm financial performance. Critical mass may be crucial to understanding these relationships and may also provide an explanation as to why empirical studies which do not account for this variable lead to such mixed results.

[316] Dhir, *supra* note 5 at 134.

[317] See for instance Carter et al, *supra* note 23; Carter et al, *supra* note 22; Nguyen & Faff, *supra* note 38; Adams & Ferreira, *supra* note 46; Dobbin & Jung, *supra* note 54; Dalton et al, *supra* note 113; Erhardt, Werbel & Shrader, *supra* note 25; Conyon & He, *supra* note 40.

3.1.3.1 What Constitutes a Critical Mass?

An empirical study conducted by Torchia, Calbro & Huse,[318] examined what a "critical mass" of female directors on a corporate board means. [319] Torchia et al used survey based data from Norwegian firms from the years 2005-2006.[320] Theoretically underpinning Torchia et al's study is Kanter's critical mass theory as described above. When the size of a minority group reaches a point where this group is no longer tokens, its relationship with the majority changes markedly. Its influence in the larger group increases a great deal. [321]

This leads directly into the authors' question, that is, what exactly is this critical mass threshold? Through interviews and discussions with 50 female directors, their findings point to critical mass being reached when there are three or more women present on the board.[322] When there is only one woman, or even two women present, they are assumed to be tokens, or to represent all women. They do not have much impact on corporate decisions or firm innovation.[323] However, once three or more female directors are present on a board, it was found that these women were able to express their views freely.[324]

Torchia et al's results are supported by Kramer, Konrad and Erkut's qualitative study. In interviewing female directors from Fortune 1000 corporations, these authors found that when there was one woman on a board, or even two, these women often felt less confident and comfortable

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[318] Torchia, Calabrò & Huse, *supra* note 78.
[319] *Ibid* at 299.
[320] *Ibid* at 305.
[321] *Ibid* at 301–302.
[322] *Ibid* at 302.
[323] *Ibid* at 308.
[324] *Ibid* at 310–311. This is not to say definitively that female directors being able to express their views more freely is evidence of a more effective board, just that it may be evidence of what the critical mass threshold may be. Whether female directors' ease of expression leads to enhanced board processes will be discussed in greater detail below.

voicing their ideas.[325] Even when they did speak up, there were many respondents who felt their ideas would be ignored and later repeated by a man on the board who would be congratulated.[326] While this improved with two women on the board, and some subjects reported that the entire board culture became more collaborative in nature, particularly in the case of smaller boards, there were still reports of tokenism and the women were often viewed as interchangeable. One female director reported for instance, "I raised a question at a board meeting that caused the board to take some important action. Later on, the board chair thanked the other woman for raising the question."[327] Once the board reached the threshold of three or more female directors a transformation was reported to have taken place. Being a woman was normalized. "Three is like three legs on a stool. Strong. It is clear you are not there because of gender but because of talents," said one of the respondents.[328] The female directors felt confident to associate with the other females, and to voice their opinions. Further, Kramer et al note that what was not reported of boards with three or more women was stereotyping and the female directors' ideas being ignored or later repeated by male colleagues.[329]

3.1.3.2 The Advantages of Critical Mass: from Board Processes to Firm-Wide Benefits

a) A More Active Board Leading to Enhanced Financial Performance

Schwartz-Ziv conducted an empirical study which examined both the effect of critical mass on inner-board processes and whether having a critical mass of women on the board translates into

[325] Alison M M Konrad, Vicki Kramer & Sumru Erkut, "Critical Mass: The Impact of Three or More Women on Corporate Boards" (2008) 37:2 Organizational Dynamics 145; Susan Vinnicombe & Leblanc R, *Women on corporate boards of directors: international research and practice*, New horizons in management (Cheltenham, UK: Edward Elgar, 2008), ch 18.
[326] Vinnicombe & Leblanc R, *supra* note 325 at 224–227.
[327] Konrad, Kramer & Erkut, *supra* note 325 at 153.
[328] *Ibid* at 146.
[329] Vinnicombe & Leblanc R, *supra* note 325 at 227–229.

overall enhanced firm performance. She used data from the minutes of boardroom meetings and board committee meetings of Government Business Companies (GBC) in Israel between 2007 and 2009.[330] This method was selected because the specific actions of boards and their committees cannot be gleaned from public disclosure documents.[331] Using board minutes allows for observations to be made of the contributions of directors at the meetings themselves. GBCs have been gender balanced (with approximately 37% female representation) for 20 years.[332] Further, GBCs are mandated by law to maximize profits,[333] so there is no debate about the role of the board.

First, Schwartz-Ziv observed that gender balance had an impact on the inner-working of the board itself. The results of this study indicated that the board was more active when there was a critical mass of both genders present, measured by attendance at meetings.[334] A critical mass of women is positively and significantly related to a board requesting further information from management (a critical mass of male directors is also positively but not significantly related to this).[335] Secondly, financial performance seemed to be affected by the gender balance of the board. It was found, as previously discussed, that the average ROE[336] was higher when a critical mass of female directors was represented on the board than without. Net profits were found to be three times as large when there was a critical mass of female directors present.[337] This relationship was not linear or U-shaped.[338] This is consistent with the notion that adding women to the board does not have a direct impact on the board's activities, or financial performance, until a certain threshold

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330 Schwartz-Ziv, *supra* note 42 at 5.
331 *Ibid*.
332 *Ibid* at 6.
333 *Ibid* at 5.
334 *Ibid* at 16.
335 *Ibid* at 17.
336 Return on Equity, see *supra* note 29 for a definition.
337 Schwartz-Ziv, *supra* note 42 at 20.
338 *Ibid* at 21.

is reached. The impact of female representation is catalyzed once the board hits a threshold of female directors.

Schwartz-Ziv addresses the possibility of endogeneity and reverse causality.[339] She states that, while it is possible that these problems exist, it is more likely that gender balanced boards lead to higher profits and ROE. The combination of the causal positive relation between gender-balanced boards and the frequency with which they take action implies that the positive impact of a critical mass of female directors "trickles up" to firm financial performance generally.[340] It is also noted by the author of this study that many previous studies examine boards with an average of less than 10% female members.[341] This may explain the mixed results discussed in Chapter 1.

b) From Enhanced Board Strategic Tasks to Organizational Innovation

Torchia et al found that there was a significant and positive link between a critical mass of female directors and organizational innovation, mediated by board strategic tasks. Firm innovation is defined as a company's "commitment to create and introduce new products, processes and organizational systems".[342] Board strategic tasks refers to the extent to which board members are engaged in the "strategic process." "Hence, board strategic involvement covers corporate mission development, strategy conception and formulation, and strategy implementation."[343] This relationship does not exist when women are only represented in token amounts. The authors use Kanter's theory to explain why one or two women, because of increased visibility and stereotyping, will likely not have an impact on board strategic tasks or on firm organization. Once there are three women present on the board, or once a critical mass is reached, female directors

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339 See section 1.2.1.1c for a definition of these terms.
340 Schwartz-Ziv, *supra* note 42 at 22.
341 *Ibid* at 4.
342 Torchia, Calabrò & Huse, *supra* note 78 at 304.
343 *Ibid* at 304–305.

feel freer to express their views and the authors speculate that this leads to the consideration of a broader range of alternatives, enhanced decision making and so enhanced board strategic tasks. The authors argue that better decision making and board strategic tasks as a result of increased gender balance, leads to enhanced firm innovation. [344]

c) Enhanced Advice and Monitoring and Enhanced Firm Performance

Bruno et al also note that very few companies had a critical mass of female directors until very recently, which could have skewed results of past inquiries.[345] The theory being examined in this study is whether female board representation increases shareholder value by improving the board's advising and monitoring roles.[346] This study used data from 2,219 Italian companies listed on the Italian Stock Exchange from 2008-2016.[347] A mandatory quota was introduced in 2012 requiring listed companies to have gender balanced boards by 2018, or face potentially harsh consequences. [348]

The results of this study support critical mass theory. The data produced a distinct U-shape when graphed. The effect of female presence was found to be negatively related to firm performance, measured by ROE, ROA, ROIC and ROS,[349] when 10% of the board was female; their effect was insignificant at 20%; but when female directors accounted for more than 20% of board seats, the effect was significantly positive.[350] Thus, as in Schwartz-Ziv's study, once female representation reaches a specific threshold, women's presence on the board is positively and

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[344] *Ibid* at 308–311.
[345] Bruno, Ciavarella & Linciano, *supra* note 76 at 8.
[346] *Ibid* at 11.
[347] *Ibid* at 19.
[348] These consequences include fines up to 1,000,000 euros after an initial warning. After a second warning, all director appointments may be invalidated. See *Ibid* at 17.
[349] Return on Equity, Return on Assets, Return on Investment Capital, and Return on Sales. See *supra* notes 27-30 for definitions.
[350] Bruno, Ciavarella & Linciano, *supra* note 76 at 25.

significantly related to firm financial performance. Before this critical mass threshold is reached, their presence is insignificant, and in very small numbers may actually be negatively related to financial performance. This supports the results in studies conducted before gender balanced boards became common, where a negative relationship was found between greater female board representation (greater, but still below critical mass) and firm financial performance. In theory, the authors note, "the link between women representation and shareholder value draws from the influence that board composition might have on the way the board addresses its monitoring and advising functions, which in turn affect performance".[351] The authors further point out that with the increase in female directors, there was a decrease in interlocking or non-independent directors.[352] Their data, they speculate, may be a result of female board contributions.[353] One might predict, therefore, that the difference made by enhanced female representation on a board enhances the board's advisory and monitoring function because female directors tend to be more engaged in monitoring than their male counterparts (perhaps by virtue of being more independent).[354] This is supported by Konrad, Kramer and Erkut's study, described above. Generally, the study's respondents found that a significant change occurred with three female board members, leading to a board which listened more attentively and monitored management more vigorously by asking more questions of them.[355]

[351] *Ibid* at 11.
[352] *Ibid* at 26.
[353] *Ibid* at 27.
[354] *Ibid* at 11–12.
[355] Konrad, Kramer & Erkut, *supra* note 325 at 156–160.

d) Norwegian Studies: a Big Problem for Critical Mass Theory?

Two studies may pose real concerns for proponents of critical mass theory. For instance, as described in Chapter 1, Ahern and Dittmar[356] using data relating to 248 Norwegian public companies between 2001 and 2009 (before and after the quota's implementation in 2006), found the mandatory gender quota to have a large, negative impact on firm value.[357] Market prices dropped for those firms which had had no female directors prior to the quota after they announced that they would be adding women to their boards.[358] On top of this downturn, there was evidence that the quota had a negative impact on Tobin's Q, with losses of more than 20% in some cases.[359] Matsa and Miller using similar data reached similar results. They found that between 2006 and 2009 female board representation doubled among the firms subject to the quota.[360] Using a panel of 104 listed Norwegian companies from 2003 to 2009,[361] these authors found that the impact of the quota on profit was negative and significant.[362]

The authors of these studies explain their results in contradictory ways. Ahern and Dittmar attribute the Norwegian losses following the implementation of the quota to the fact that boards were forced to include women with less executive experience, including much less CEO experience than their male counterparts.[363] Matsa and Miller disagree. They argue that the lower short-term gains are actually due to the difference between male and female director preferences. Boards in Norway on average remained stable in both average age and average experience, even with the addition of younger females with less CEO experience. Instead, they say, women tend to

[356] Ahern & Dittmar, *supra* note 57.
[357] *Ibid* at 147.
[358] *Ibid* at 159.
[359] *Ibid* at 168.
[360] David A Matsa & Amalia R Miller, "A Female Style in Corporate Leadership? Evidence from Quotas" (2013) 5:3 American Economic Journal: Applied Economics 136 at 144.
[361] *Ibid* at 141.
[362] *Ibid* at 147.
[363] Ahern & Dittmar, *supra* note 57 at 169–173.

be more long-term and stakeholder oriented. They are on average more altruistic and less concerned with short-term profits than men. This is evidenced by the fact that the Norwegian boards with more female directors during the sample period were less inclined to undertake large layoffs even during a recession. This strategy may save money for the shareholders in the future because once demand is renewed, firms will not have to spend money on hiring and training new employees. Thus, the "female style" may lead to short-term losses, but long-term gains.[364] Importantly, both Matsa and Miller and Ahern and Dittmar's data was based on a specific time in Norway when the implementation of a mandatory quota led to significant board composition transformations almost overnight. They may not therefore, truly represent the affect a critical mass of women has on a board and a firm as a whole if the transformation is more gradual.[365]

3.1.4 Criticism of Critical Mass Theory

"Critical mass is hot. But is it real?"[366] Women, when they are the minority in a male-dominated context, are caught between two seemingly opposing ideas. The first is that they are just as capable as men and on their own are effective and competent members of a group. The second is that it makes a positive difference if there is more than one woman promoted to leadership positions.[367] Broome and Krawiec critique critical mass theory as it applies to women on corporate boards because all of the respondents in their study who were first-and-only female

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[364] Matsa & Miller, *supra* note 360 at 153.
[365] Schwartz-Ziv, *supra* note 42 at 7. A question which should be addressed here is why the market would not account for and reward the corporations which, due to this female leadership style decided not to undertake large layoffs etc.? Why would these choices not be reflected in a higher Tobin's Q? One explanation is that prior to the quota's implementation in Norway there was a great deal of negative press surrounding quotas, see Cathrine Seierstad, "Beyond the business case: the need for both utility and justice rationales for increasing the share of women on boards", *Corporate Governance: An International Review* (July 2016) 390 at 396, suggesting to the investing public that quotas would lead to the nomination of directors who were under-qualified and who did not merit board positions. Thus, it may be that when boards were forced to add women, highly qualified or not, market participants incorporated this negative press into their investment decisions.
[366] Broome, Conley & Krawiec, *supra* note 313 at 1050.
[367] Dahlerup, *supra* note 309 at 279.

directors felt strongly that they were effective and competent board members despite being the lone woman.[368] Perhaps the key word here is "despite". Konrad, Kramer and Erkut, for instance note that their female director respondents felt that as lone women they were highly visible, that they would not be given the benefit of the doubt due to their gender, and that this meant they must work much harder than the men and come to meetings extremely prepared. They were successful board members in spite of their gender.[369] All of these feelings were also expressed by female director respondents in Broome and Krawiec's own study.[370]

The transformative difference of having three or more women can be seen both in the individual female director's experience, and in the board's overall dynamic and decision-making processes. While the individual female director may be an effective board member, just as any male director with similar skills and experience would be, having three or more women may simply alleviate the pressure this lone woman feels at an individual level. Beyond the experience of the individual female director, a larger transformation occurs in the overall board dynamic when a critical mass of women is reached. The board, as described by participants of both Kramer et al, and Dhir's study, undergoes what respondents refer to as "a dynamic shift" from competitive to more collaborative discussions.[371] Men begin to ask more questions and more options are considered and listened to with greater openness, thus increasing the likelihood that the board makes a better decision.[372] Further, as found by Adams and Ferreira, women tend to have fewer attendance problems than their male counterparts and as the number of females increases on a

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[368] Broome, Conley & Krawiec, *supra* note 313.
[369] Konrad, Kramer & Erkut, *supra* note 325 at 150.
[370] Broome, Conley & Krawiec, *supra* note 313 at 1050–1051.
[371] Konrad, Kramer & Erkut, *supra* note 325 at 155; Dhir, *supra* note 5 at 149. See also section 3.1.3.2 for a summary of attendance and collaboration.
[372] Dhir, *supra* note 5 at 149; Konrad, Kramer & Erkut, *supra* note 325 at 158.

board, the male attendance problems decrease.[373] The monitoring and advisory functions are thought to be enhanced by a critical mass of female directors on the board as well. Lastly, the board strategic tasks seem to be improved by a critical mass of female directors.[374] Thus, perhaps the two notions above are not so contradictory after all. It is possible both to be a qualified and capable board member as a singular woman, but it may make a transformative difference to the board process in general when there is a critical mass of female members present. This transformative difference in board process is suggested by the above authors to lead to firm-wide benefits including increased ROE, ROA, ROS, ROIC, net profits, and firm innovation.

Critics of mandatory quotas often employ the Norwegian studies as examples of why quotas are harmful both to the firms forced to comply with them and for the economy generally. These studies certainly do not advance the case for proponents of critical mass and regulatory quotas. However, both Schwartz-Ziv's evidence of gender balanced boards which have been balanced for many years, and her point that the Norwegian evidence is of limited value is quite persuasive.[375] Critical mass theory alone may not provide the entire explanation for the interaction of men and women on corporate boards and their impact on corporate actions. Let us turn now to the impact risk and hubris may have upon board action and overall firm performance.

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[373] Adams & Ferreira, *supra* note 46 at 296–298.
[374] Torchia, Calabrò & Huse, *supra* note 78.
[375] Schwartz-Ziv, *supra* note 42.

3.2 "EGO": HUBRIS AND RISK

3.2.1 Hubris Hypothesis

Takeover activity, particularly hostile takeover activity, [376] exploded in the 1980s.[377] Richard Roll proposed the Hubris Hypothesis in 1986. [378] Underlying this hypothesis is the idea that gains from takeovers, if there are any at all, have been overestimated. This theory focuses on the takeover process and specifically the valuation of the target company's stock which has an apparent and observable market price.[379] Bidding corporations tend to subscribe to the idea that takeovers will result in synergies, tax advantages, and other potential benefits.[380] However, Roll asks whether there really are potential benefits resulting from a takeover. If not, the takeover premium would be what he calls a "random" error made by the bidding firm. The question then becomes if takeovers offer no value, why do bidding firms engage in bids at all? Many advance the argument, Roll describes, that the market behaves as if it is made up of rational beings. Another explanation for how the market moves is that it is composed of extremely irrational individuals, the behaviour of which is cumulatively cancelled out. Psychologists, Roll goes on, have been providing evidence to economists that individuals are not rational actors for years. Takeovers reflect the fact that individuals are irrational if it is the case that they do not provide benefits to the bidder.[381]

If there are in fact not total gains in a takeover, then the existence of takeovers would be a result of the bidder's overconfidence that its valuations of the target's value are correct. In a

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[376] A hostile takeover occurs when the bidding or acquiring company offers to and successfully purchases the shares of the target firm without the support of the target firm's board or executive officers. See Nicholls, *supra* note 177 at 18–19.
[377] *Ibid* at 200.
[378] Roll, *supra* note 300.
[379] *Ibid* at 198.
[380] Nicholls, *supra* note 177 at 4–8.
[381] Roll, *supra* note 300 at 199.

takeover, the first bidder, says Roll, is the market. The acquiring firm should be well aware of what is known as the "winner's curse".[382] The winner's curse is a phenomenon whereby on average winners of an auction overpay for the target's shares. If properly accounted for, the successful bidder should be correct in its assessment of the asset's value (the asset being the shares of the target firm). To avoid falling victim to the winner's curse, a bidder should attempt to pay the lowest acceptable amount while still winning the auction (or launching a successful bid).[383] To do this, a bidder would normally need to "subtract some amount from its valuation,"[384] or lower its bid. Bidding firms though, according to Rolls, do not incorporate the winner's curses properly into their valuations and so tend to pay more for the target shares than they are worth.[385] The total combined takeover gain to both the target and bidder's shareholders is nonpositive.[386] Roll shows this to be the case with a review of the literature. On balance, empirical evidence illustrates that the existence of gains or losses to both remains unclear[387] which still supports his hypothesis.

Keeping in mind that takeovers do not seem to result in net gains for either the target[388] or the bidder, hubris provides an explanation as to why bidders do not abandon their bids. Bidders' valuations of targets are based on positive errors. Thus, due to the overconfidence of bidders, their need to acquire a target company they have set their sights on and because the winner's curse is not properly accounted for, overall takeovers do not lead to shareholder wealth. Roll states that there is no definitive empirical evidence to eliminate this theory.[389]

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[382]. For a more detailed description see Bernard S Black, "Bidder Overpayment in Takeovers" (1988) 41 Stan L Rev 597 at 625–626.
[383] Steven J Brams & Joshua R Mitts, "Mechanism Design in M&A Auctions" (2013) 3 Del J Corp L 873 at 885.
[384] J Russel Denton, "Stacked Deck: Go-Shop and Auction Theory Note" (2007) 5 Stan L Rev 1529 at 1536.
[385] Roll, *supra* note 300 at 200.
[386] *Ibid* at 202.
[387] For his literature review see *Ibid* at 202-206.
[388] There may be gains for the target shareholders due to a bidder's overpayment, but Roll's point is that in sum, takeovers do not produce wealth.
[389] Roll, *supra* note 300 at 212–213.

Roll did not apply his theory to the issue of underrepresentation of women on boards. However, at the time he was writing, large, public boards would have been composed almost entirely, if not entirely, of men.[390] It is fairly simple to extend his hubris hypothesis which at least at the time, would have been based upon data from almost exclusively male boards. The question is then, does this theory also illuminate the value of women on boards? Put differently, is it possible that by increasing women's representation on boards, firms may realize additional benefits because female directors are not as risk prone and overconfident as their male counterparts? According to the evidence, the answer to this question seems to be yes.

3.2.2 Risk Aversion

Women tend to be more risk averse than men.[391] This has been found to be true in many contexts, including in financial decision making.[392] There are a number of explanations for the conclusion that men are more risk prone than women.

One is that those with greater levels of testosterone tend to be less risk averse.

> According to a new breed of researchers from the field of behavioral finance, Wall Street's volatility is really driven by our body chemistry. It's the chemicals pulsing

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[390] In 1984 it was reported that women occupied 3.6% of Fortune 500 board seats, see Dan R. Dalton and Catherine M. Dalton, "On the Progress of Corporate Women: less a Glass Ceiling than a bottleneck?", Vinnicombe & Leblanc R, *supra* note 325 at 185.

[391] See Catherine Eckel & Philip Grossman, *Men, Women and Risk Aversion: Experimental Evidence*, Handbook of Experimental Economics Results (2008) for a review of the literature. The authors conclude that in abstract experiments, the results tend to show that women are less risk prone than men. The results of contextually framed experiments are less conclusive.

[392]See Paola Sapienza, Luigi Zingales & Dario Maestripieri, "Gender differences in financial risk aversion and career choices are affected by testosterone" (2009) 106:36 PNAS 15268 at 15268; Irwin P Levin, Mary A Snyder & Daniel P Chapman, "The Interaction of Experiential and Situational Factors and Gender in a Simulated Risky Decision-Making Task" (1988) 122:2 The Journal of Psychology 173; "(PDF) Ambiguity and Gender Differences in Financial Decision Making: An Experimental Examination of Competence and Confidence Effects.", online: <https://www.researchgate.net/publication/5020398_Ambiguity_and_Gender_Differences_in_Financial_Decision_Making_An_Experimental_Examination_of_Competence_and_Confidence_Effects>; Mary Condon, "Gendered Risks of Retirement: The Legal Governance of Defined Contribution Pensions in Canada" (2007) Gendered Risks San Diego, CA: Glasshouse Press, 2007, online: <https://digitalcommons.osgoode.yorku.ca/scholarly_works/68> at 146; Marion Hutchinson, "Who selects the 'right' directors? An examination of the association between board selection, gender diversity and outcomes" (2015) 55 Acct & Fin 1071.

> through traders' veins that propel them to place insane bets and enable bank executives to make risky decisions—and those same chemicals tend to have the same effect on everyone... And because the vast majority of these traders and finance executives are men, the most important chemical in question is testosterone.[393]

By virtue of the fact that men on average have greater levels of testosterone, this may explain why men are less risk averse than their female counterparts.[394] There are those who have drawn a connection between high levels of testosterone and the financial crisis. Famously, Christine Lagarde said: "If Lehman Brothers had been Lehman Sisters, today's economic crisis clearly would look quite different."[395]

Another explanation is that risk assessment is influenced by social factors. According to this theory, men and women perceive risk differently because of social differences, affect, and worldviews. [396] Slovic argues that gender (among other attributes) is correlated strongly with risk judgments.[397] In a study of risk assessment in 1,512 Americans who were asked to rank items in terms of hazardousness, the percentage of high risk responses was greater for women on every item. However, it seemed that socialization was responsible for the differences between white males and the other participants. The response difference between white males and white females, for instance, did not exist for non-white males and non-white females. The risk-perception scores were linked with education, income and political leanings.[398] From these results, it seems that socialization rather than just biological differences may contribute to risk aversion.

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[393] Shcelah Kolhatkar, What If Women Ran Wall Street?, N.Y. MAG. (Mar. 21, 2010), archived at http://perma.cc/6P5K-VCD7
[394] Sapienza, Zingales & Maestripieri, *supra* note 392 at 15268.
[395] Dealbook, "Lagarde: What If It Had Been Lehman Sisters?", (1273572042), online: *DealBook* <https://dealbook.nytimes.com/2010/05/11/lagarde-what-if-it-had-been-lehman-sisters/>.
[396] Paul Slovic, "Trust, Emotion, Sex, Politics, and Science: Surveying the Risk-Assessment Battlefield" (1999) 19 689-701 1999, Wiley Online Library, online: <https://onlinelibrary-wiley-com.ezproxy.library.yorku.ca/doi/abs/10.1111/j.1539-6924.1999.tb00439.x>.
[397] *Ibid* at 692.
[398] *Ibid*.

Yet another explanation for their greater risk aversion is that women are less overconfident than their male counterparts.[399] Overconfidence can take two forms, according to Levi, Li and Zhang. Women more often view their predictions of the future both in less favourable terms, and as less precise than men view their future predictions.[400] This is not to say that women are not overconfident at all, just that they are less so than men. Overconfidence, studies reveal, is greatest in tasks which are difficult in nature and those that do not lead to clear and immediate feedback (such as a merger or acquisition).[401]

3.2.3 Mergers and Acquisitions

If the hubris hypothesis is to be accepted, that is, if we accept that bidding corporations overpay for the shares of target corporations due to hubris, does the composition of the bidding corporation's board have any bearing on this hypothesis? According to at least one empirical study, the answer is yes. In this study, Levi et al using data from the S&P 1500 from 1997-2009 found that increasing the gender balance on boards seems to impact mergers and acquisitions in two important ways. Firstly, as the representation of women on boards is increased, the acquisitiveness of a bidding company decreases. Specifically, the fraction of female board representation being increased by 10% was related to a reduction in the number of bids by 7.5%.[402] This, the authors note, is consistent with women having less overconfidence than men. Secondly, the gender diversity on the board of bidders was found to be related significantly and negatively to the size of

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[399] It is not clear whether this overconfidence is a result of social or biological differences. For the purpose of this paper, the cause of the observable differences in risk aversion between men and women may not be critical.
[400] Maurice D Levi, Kai Li & Feng Zhang, "Men are from Mars, Women are from Venus: Gender and Mergers and Acquisitions" (2011) SSRN Paper ID 1785812, online: <https://papers.ssrn.com/abstract=1785812> at 2.
[401] *Ibid* at 7.
[402] *Ibid* at 12.

bid premiums. A 10% increase in female board representation corresponded with a 13.3% reduction in the bid premium.[403]

Aside from the impact of the board's composition on mergers and acquisitions, there is also evidence that the gender makeup of management can have an impact upon the acquisitiveness of a corporation. Credit Suisse's 2016 report demonstrates that in cases where a female CEO replaces a male CEO, mergers and acquisitions tend to decrease and divestitures tend to increase.[404] They found that those corporations worldwide with enhanced female representation in management saw better returns at lower risk.[405] Similar results were discovered by Huang & Kisgen whose data suggested that male managers overestimate Net Present Values (NPVs) of transactions. They tend to engage in more transactions because they extend the pool of acceptable deals to include those that in fact have negative NPVs and are value destroying for shareholders. These authors also explained these findings in terms of overconfidence, namely that men exhibit greater overconfidence than women.[406] To confirm that it was overconfidence rather than other factors which led to these results, Huang and Kisgen conducted additional tests, including earnings forecasting and the career outcomes for male and female CEOs and CFOs. Each of these additional tests confirmed that male executives tend to be more overconfident than their female counterparts.[407] While the focus of this paper is on the gender composition and actions of the board, as previously mentioned, greater gender diversity on boards tends to be followed by greater gender

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[403] *Ibid* at 15.
[404] Dawson, Kersley & Natella, *supra* note 44 at 33.
[405] *Ibid* at 27.
[406] Jiekun Huang & Darren J Kisgen, "Gender and corporate finance: Are male executives overconfident relative to female executives?" (2013) 108:3 Journal of Financial Economics 822 at 824.
[407] *Ibid* at 833–834.

diversity in management.[408] So perhaps enhanced board gender diversity may in turn lead to a management team which is less overconfident.

The hubris hypothesis seems to be supported by empirical evidence. As the overconfidence of the board in general is lowered, the bid premiums and the acquisitiveness of the bidding corporation are lowered. Thus, perhaps female board members are particularly valuable in the context of evaluating mergers and acquisitions, especially if one holds a shareholder-centric view of the board's role.

3.2.4 Insolvency, Fraud and Scandal

The confidence gap may reach further than just mergers. It may also influence corporate disasters. Empirical evidence suggests that the greater number of female directors a board has, the lower the firm's chances are of insolvency, fraud and scandal. In a study of over 900,000 limited companies in the United Kingdom using data from 2007 to 2008, Wilson and Altanlar found evidence of a relationship between the gender composition of boards and the risk of insolvency.[409] They conclude that having female directors on a board reduces the risk that the firm will become insolvent.[410] One explanation provided by these authors for their results is gendered difference in preference and behaviour. Men are more likely to take excessive risks which could lead to either higher profits or a greater chance of insolvency.[411] Their results are consistent with other studies finding that males are more prone to overconfidence and that they are more likely to overestimate the precision of their information.[412] Companies with at least three female directors (a critical

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[408] Eastman, Rallis & Mazzucchelli, *supra* note 12 at 9–10.
[409] Nick Wilson & Ali Altanlar, "Director Characteristics, Gender Balance and Insolvency Risk: An Empirical Study" (2009) SSRN Paper ID1932107, online: <https://papers.ssrn.com/abstract=1932107> at 5. It must be noted of course that these companies were private. The focus of this paper has been on large, publicly traded firms. Although the market capitalization and size of organization of the firms in this study were wide ranging, this study may not be as valuable as one examining public company boards.
[410] *Ibid* at 46.
[411] *Ibid* at 5.
[412] *Ibid* at 14–16.

mass) have been found to have come through the financial crisis better than those with fewer than three females on their boards.[413]

In another study it was found that female directors lead to the reduction of both the occurrence and the severity of securities fraud.[414] In a large sample of Chinese companies it was found that as the proportion of female board members increased, the likelihood of fraud decreased.[415] Similarly, as the proportion of female directors increased, the severity of the fraud which did occur in this sample was reduced.[416] The relationship was found to be a non-linear, U-shape where the greatest reduction of fraud was correlated with the most balanced representation of men and women on boards.[417] The authors connect their results to the theory that women are more risk-averse and less overconfident than men and so are less likely to engage in fraud purposefully.[418]

Even in situations where no intentional fraud occurs, Johnson outlines that the overconfidence of financial market participants could lead to overly risky behaviour.[419] Johnson argues that risk management may provide the most significant rationale for diversifying boards.[420] The elimination of groupthink (as discussed in Chapter 1) not only leads to a wider range of perspectives brought to bear on decisions being made, but also enhances risk management and oversight of executives.[421]

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[413] Johnson, *supra* note 33 at 359.
[414] Douglas J Cumming, Tak Yan Leung & Oliver M Rui, *Gender Diversity and Securities Fraud*, SSRN Scholarly Paper ID 2562399 (Rochester, NY: Social Science Research Network, 2015).
[415] Chinese companies' boards have similar roles and responsibilities to US companies, see *Ibid* at 14.
[416] Cumming, Leung & Rui, *supra* note 414 at 22–27.
[417] *Ibid* at 8.
[418] *Ibid* at 7.
[419] Johnson, *supra* note 33 at 347.
[420] *Ibid* at 352.
[421] *Ibid* at 353.

Thus perhaps there are inherent differences (either biological or as a result of socialization) in male and female directors which can lead to attitudes and decisions that have a serious impact on shareholder wealth.

3.2.5 Systemic Risk and the OSC's Mandate

If there is a difference between risk aversion in men and women which may impact on shareholder wealth, insolvency, and fraud, could risk appetite have an influence on financial institutions and the capital markets more generally? Put another way, could gender balance reduce systemic risk? Systemic means of or pertaining to a system.[422] Systemic risk is defined in several ways. Some define it as the "chain-like" risk of failure among institutions and market participants which could be harmful to the whole financial system.[423] Others define it as the risk of one market participant defaulting on a contractual obligation leading to other participants' failure to meet their obligations. Again, these defaults cause a domino effect leading to greater and greater financial difficulties. Yet another definition of systemic risk involves an economic shock leading to extreme volatility in asset prices, liquidity, bankruptcies and efficiency losses.[424] As Anand and Schwarcz summarize, a common theme in these definitions is a specific activating event which leads to a "domino effect".[425]

While regulation of systemic risk may be disruptive to the natural and efficient growth of markets,[426] the International Organization of Securities Commissions (IOSCO) has recognized the

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[422] Steven Schwarcz, "Systemic Risk" (2008) 97 Georgetown Law Journal 193 at 197.
[423] Anita I Anand, "Is Systemic Risk Relevant to Securities Regulation?" (2010) 60:4 University of Toronto Law Journal 941 at 942.
[424] *Ibid* at 94.
[425] *Ibid* at 942; Schwarcz, *supra* note 422 at 199.
[426] Schwarcz, *supra* note 422 at 209.

importance thereof since 1998 (IOSCO principles Sept. 1998).[427] Because individual market participants do not have adequate incentives to limit their risk-taking in order to decrease systemic risk, the benefits of a state-led approach to reduce systemic breakdowns outweighs the costs.[428] The Ontario Securities Commission updated its objectives to include the reduction of systemic risk in 2017.[429] And the *Ontario Securities Act* was amended in the same year to add a reference to the reduction of systemic risk to the purpose of the Act.[430] Thus, the reduction of systemic risk was not a part of the OSC's mandate when the gender diversity policy contained in NI 58-101F1 was implemented in 2014.

Given what is known about risk propensity in men and women, could all-male boards be contributing, rather than detracting from systemic risk? Muller-Kahle and Lewellyn examined the question of whether or not board configuration of US financial institutions leading up to the financial crisis had an impact upon subprime lending. Their results indicated that board gender diversity was inversely related to the decision to heavily engage in subprime lending during the relevant time period (1997-2005).[431] This relationship was found to be negative and significant.[432] More research is needed to definitively show whether gender balance (and specifically whether a greater number of female directors present on financial institutions' boards) leads to a reduction in systemic risk. However, this may be a question that the OSC should examine. Furthermore, given that it is within the Commission's mandate, it may be a question which must be examined.

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[427] International Organization of Securities Commissions, "Objectives and Principles" (Sept 1998) online at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD82.pdf>.
[428] Schwarcz, *supra* note 422 at 237.
[429] Ontario Securities Commission, *Statement of Priorities for Fiscal 2017-2018,* online at <https://www.osc.gov.on.ca/documents/en/Publications/rpt-on-sop_fiscal-2017-2018.pdf>.
[430] *Securities Act*, *supra* note 153, 2017, c 34, sched 37, s 2 adding s 1.1(c).
[431] Muller-Kahle & Lewellyn, *supra* note 79 at 413.
[432] *Ibid* at 411.

3.2.6 Risk Aversion Skepticism

Adams and Ragunathan examine the "Lehman Sisters" hypothesis. They find that men and women in finance do not show much difference in risk aversion.[433] These authors warn against generalizing about gender differences from the main population to a subpopulation of women. Most of the studies finding that women are more risk averse than men used the general population or undergraduate students.[434] Women in finance tend to be quite different from women in the general population and evidence in this study finds that women in finance tend to be far more risk prone than the general population of women.[435] Furthermore, gender diverse bank boards do not seem to engage in less risky behaviour than those with less diversity.[436]

Two important points must be made regarding this study. First, the authors do note that gender diversity seems to make a difference in the financial performance of these large banks during the financial crisis. Those with more gender diverse boards tended to have a higher Tobin's Q and a lower portion of non-performing loans than those banks with less gender diverse boards. To explain this result, Adams and Ragunathan point to evidence that women show greater concern for stakeholders and so in times of crisis, boards with more women do not lose the trust of their stakeholders.[437] Second, this study is not inconsistent with critical mass theory. The average bank board at the time the data was collected had eleven directors, one of which, or 9.5% of which were female. On average these boards did not have a critical mass of female directors and were for the most part male. According to critical mass theory, one woman or even two, may not make much

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[433] Renee B Adams & Vanitha Ragunathan, *Lehman Sisters*, SSRN Scholarly Paper ID 2380036 (Rochester, NY: Social Science Research Network, 2015).
[434] *Ibid* at 3.
[435] *Ibid* at 4.
[436] *Ibid* at 18–19.
[437] *Ibid* at 20–21.

of a difference in the board's decision making process. The authors do acknowledge that their results may be driven by tokenism; however, they argue that this is unlikely because of the difference in financial performance that the female directors seem to make.[438] They conclude with a statement that gender diversity may be important for the financial industry in times of crisis, although they do not believe that greater gender diversity would have prevented the financial crisis because of the lack of difference between male and females risk appetite in the financial industry.[439]

3.3 "UPGRADE U": THE BUSINESS CASE—IS IT POSSIBLE TO RESTATE?

> "[C]urrent research does not really support a business case for board gender quotas. But it does not provide a case against quotas either. There is little hope that any (credible) research will ever do so. Causal effects will always be too hard to estimate…"[440]

The business case in support of women's enhanced representation on corporate boards is very popular. It has been employed by many, including organizations such as Catalyst,[441] institutional investors,[442] academics,[443] and policy makers[444] to support initiatives to increase board diversity. However, as was detailed in Chapter 1, there remains serious doubt with respect to the underlying empirical evidence upon which the business case is supposedly based. From the glacial pace at which Canadian public boards are adding female directors, one can see that the business case rhetoric has not convinced those responsible for making board nominations. If those at the

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438 *Ibid* at 21.
439 *Ibid* at 24.
440 Daniel Ferreira, "Board Diversity: Should We Trust Research to Inform Policy?" (2015) 23:2 Corporate Governance: An International Review 108 at 110.
441 See "Quick Take", *supra* note 291.
442 See Larry Fink's Letter, *supra* note 102, Canada Pension Plan, *supra* note 101. See Martin Lion, "Policy Guidelines", online: *Glass Lewis* <https://www.glasslewis.com/guidelines/>, Canada at 20.
443 See Chapter 1.
444 See Chapter 2.

top of Canadian reporting issuers were convinced that female directors enhanced firm financial performance or corporate governance, then one would expect to have seen women's representation increase at a much more rapid pace.

The empirical evidence supporting both critical mass and the hubris and risk aversion theories, while inconsistent, does not in any way eliminate the business case. In fact, it tends to favour the business case when a critical mass is accounted for. At the very least, there seems to be a weak business case supporting greater gender diversity on boards. The empirical evidence suggests that when there is a critical mass of female directors (that being three or more) present on a board, the firm' financial performance benefits. The reason why previous studies may have had varying results, as mentioned, could be because until recently (and excluding the Norwegian experience) boards have not had three or more women present. These financial benefits stemming from the presence of a critical mass of female directors may be as a result of less risk aversion and less overconfidence. As discussed above, women tend to be more risk averse and less overconfident than their male counterparts.[445] This leads to shareholders benefits, or at least, to fewer losses for shareholders. The evidence indicates that once a critical mass is reached boardroom culture shifts.[446] The board transforms into a collaborative group with fewer attendance problems[447], with a culture of compliance[448] and less competitiveness.[449]

Furthermore, boards with adequate female representation are less likely to engage in takeovers which lead to shareholder losses. These boards tend to be less acquisitive in nature and

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[445] Eckel & Grossman, *supra* note 391.
[446] Konrad, Kramer & Erkut, *supra* note 325.
[447] Adams & Ferreira, *supra* note 46 at 296–298.
[448] Cumming, Leung & Rui, *supra* note 414 at 6.
[449] Johnson, *supra* note 33 at 353; Dhir, *supra* note 5 at 122; Vinnicombe & Leblanc R, *supra* note 325 at 225–227.

as more female directors are present, the bid premium decreases by a significant amount.[450] Thus, these firms are less likely to destroy shareholder value. Aside from the financial performance benefits that a critical mass of female directors may bring, there is also a further benefit of having adequate representation of women on public boards. This benefit manifests as a firm being less likely to engage in fraud[451], fall into insolvency[452], or be embroiled in corporate scandal.[453]

Skepticism about the effects of critical mass and the hubris hypothesis as they relate to enhanced female representation on boards, do not seem to be supported by the preponderance of the evidence. However, it still may not be possible to definitively restate the business case so that it appeals logically to those in the business world. Unlike agency theory which is based on one cogent narrative that seems to make complete sense, the business case is composed of several iterations and more than one competing narrative. What is the difference that women make and how? This question can be answered by a multitude of empirical studies examining different variables and drawing a multitude of conclusions.

Perhaps most troubling for proponents of the business case though is the near impossibility, if not sheer impossibility, of demonstrating clearly that if there is a transformation of board process, this leads to organizational benefits.[454] It is very difficult to draw a clear connection between what goes on at the board level and how this may impact profits, or other measures of firm performance. Although a number of the above studies (like Schwartz-Ziv's) address this concern, there is still a fair amount of doubt that the observed transformation in the board's composition and processes have any real effect on the overall performance of the corporation. This

[450] Levi, Li & Zhang, *supra* note 400.
[451] Cumming, Leung & Rui, *supra* note 414.
[452] Wilson & Altanlar, *supra* note 409.
[453] See Cumming, Leung & Rui, *supra* note 414; Wilson & Altanlar, *supra* note 409; Levi, Li & Zhang, *supra* note 400; Johnson, *supra* note 33.
[454] Fanto, Solan & Darley, *supra* note 7 at 930.

criticism is persuasive and may be crucial to the explanation for why the business case for women on boards has not garnered more traction. The causal chain is simply too complex. However, this same complex causal chain should also represent a problem for agency theory and it appears not to have.

Beyond the private sector, as argued in Chapter 2, it is not clear whether Canadian securities regulators themselves, while they justified the board diversity disclosure policy with business case rationales, are convinced by the business case in its current iterations. The diversity disclosure policy found in NI 58-101F1 seems to have originated first out of an equity-based concern for gender equality. Systemic risk reduction has been added to the OSC's mandate. They therefore are required to contribute to its reduction. Given the evidence that risk appetite may have contributed to systemic risk leading up to the financial crisis, the OSC may re-examine what they are truly regulating with the gender diversity policy and why. If board diversity is a possible way to reduce systemic risk, the OSC may be required to consider whether their gender diversity policy is furthering this part of their mandate and whether it could if amended.

From the preponderance of the evidence, the best functioning boards appear to be those with gender balance. This conclusion is consistent with both the hubris hypothesis and critical mass theory. Of course, it is not always beneficial for corporations and directors to avoid risks; however, it is not beneficial to take so many risks that they destroy share prices and the financial markets themselves. Further empirical research regarding the value to corporations of having a critical mass of female directors and the relative risk aversion of male and female directors should be pursued as public boards in the US and Canada are beginning to diversify. Such research could ultimately yield a unified business case theory which is persuasive to both regulators and corporate decision makers.

4 Chapter 4: "I Know You Care": The Normative Case

> "For if those who support diversifying corporate boards do so because they believe diversity to be a worthy value in its own right, then the arguments about whether diversification enriches shareholders would seem to be a necessary intellectual justification, but not one of significant concern."[455]

As described in Chapter 1, there are many reasons to avoid using purely business case rationales to justify diversity efforts. For one, these rationales are not based on definitive empirical evidence and so have yet to be effective in persuading boards to actually diversify. For another, implied within justifications that diversification leads to wealth is that these efforts would not be worth pursuing otherwise.[456] In this sense, the business case "belittles" or "cheapens" boardroom diversity initiatives.[457] It may be useful therefore to focus on what Rosenblum calls the "normative case" for board gender diversity.

This chapter will begin with an argument that in Canada, and even in the US where it is often assumed that a corporation's exclusive or primary purpose is to generate shareholder wealth, directors acting in accordance with their fiduciary duties are at the very least permitted, and may be required, to pursue board diversity efforts. It will move on to an argument that the normative case may be readily and usefully combined with business case arguments.

The normative case for board gender diversity is based upon the idea that women should be represented in greater numbers on boards, not to serve as a means to an end (that is, better firm performance) but rather as an end in itself. The fundamental premise is that it is wrong that women are inadequately represented in positions of power. There are various versions of the normative case. One is that it is unfair to women at an individual level that they are poorly represented in the

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[455] *Ibid* at 921.
[456] Dhir, *supra* note 5 at 66; Dhir, *supra* note 23 at 601.
[457] Fanto, Solan & Darley, *supra* note 7 at 930.

upper echelons of corporate Canada given that they now represent half of the labour force and the majority of university graduates.[458] Another version is, as previously described, that in order to have a legitimate economic system, we need the representation of women in positions of power.[459]

It is difficult to separate the normative case from the business case because public corporate boards are by their very nature an integral part of for-profit businesses. A purely normative or social-justice based argument may not be persuasive if the role of a public corporation's board is to pursue profit above all-else. Thus in order for the normative case to truly resonate, it may be necessary to accept a view of the board (and corporation itself) as something beyond a shareholder wealth maximizer.

4.1 "HOLD UP": BOARDS LEGALLY PERMITTED AND ENCOURAGED TO PURSUE GOALS BEYOND PROFIT OR SHAREHOLDER WEALTH MAXIMIZATION

> "The corporate persona, however, is not so monolithic as to preclude consideration of factors besides the business case and profit motive."[460]

Shareholder primacy is thought to be a pervasive norm of corporate governance.[461] However, even in the US where it is generally assumed that the shareholder primacy norm underlies corporate law, this norm may not actually exist in the law, and as a concept seems to be incoherent. Further, policies directed toward board diversity, even accepting the shareholder primacy norm, would be protected by the business judgment rule. In Canada, where the shareholder primacy norm

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[458] Suk, *supra* note 224 at 452.
[459] Senate Debate May 2014, *supra* note 189 at 1431.
[460] Thomas Lee Hazen, "Diversity on Corporate Boards: Limits of the Business Case and the Connection between Supporting Rationales and the Appropriate Response of the Law" (2011) 89:3 North Carolina Law Review 887 at 890.
[461] Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law Essay" (2000) 2 Geo LJ 439.

has not been supported by the Supreme Court, the legitimacy of board diversity policies is even more unassailable.

4.1.1 The Extreme Case of Shareholder Primacy: Not So Extreme after All

In the US context, where shareholder primacy is much more ingrained in corporate governance than in Canada, it is still wholly legal for corporations to pursue goals going beyond profit maximization. Indeed, since the Great Depression there has been controversy over whether corporations should operate solely for the benefit of their shareholders. Berle and Dodd's debate in the 1930s raised some important points regarding corporate governance which still remain relevant today. Berle, for instance, was of the view that corporations are and ought to be operated purely for shareholders. Powers granted to the corporation, or a group within same, are at all times to be exercised for the benefit of the shareholders.[462] If a corporate decision is to be scrutinized, it should be judged in its specific context with reference to whether it fairly protects shareholder interests.[463] Dodd was critical of this view.[464] He argued that it may be more appropriate to view a corporation as an institution run for the benefit of itself. A corporation should operate not solely for the benefit of shareholders, but rather as an individual would, with regard to the law and public opinion. Dodd identified corporate stakeholders, one of which was the general public,[465] and stated that "[o]ne no longer feels the obligation to take from labor for the benefit of capital, nor to take from the public for the benefit of both, but rather to administer wisely, fairly, and in the interest of all".[466]

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[462] A A Berle, "Corporate Powers as Powers in Trust" (1931) 44:7 Harvard Law Review 1049 at 1049.
[463] *Ibid* at 1074.
[464] E Merrick Dodd, "For Whom Are Corporate Managers Trustees?" (1932) 45:7 Harvard Law Review 1145.
[465] The others were the shareholders, the employees, and the customers.
[466] Dodd, *supra* note 464 at 1159.

Easterbrook and Fischel advance a persuasive argument that the corporation is a "nexus of contracts".[467] They use contract law as an analogy to demonstrate the relationship between shareholders, directors and managers. Shareholders, they state, in exchange for bearing the residual risk of the firm's actions, expect that the firm will act to maximize long-term profits, which will result in an increase of the share price. These shareholders are entitled to residual claims to profit because they are bearing this risk. If investors are promised that profits will be maximized (or an attempt at maximization of profits will be made), actions in furtherance of this goal must be taken, or shareholders will have a cause for complaint. However, these authors note, that it should not matter what the purpose of a corporation is. For instance, so long as it is made clear to investors at the outset, it is perfectly acceptable for a newspaper publisher's primary goal to be printing a newspaper, while profit remains a secondary goal. [468] They further acknowledge that society may impose financial penalties in order to curb corporate behaviour.[469] They argue that it is better for corporate behaviour to be curbed by prices either increasing or decreasing, rather than for regulation to alter governance structure and impede a firm's ability to maximize wealth.[470] "A manager told to serve two masters (a little for equity holders, a little for the community) has been freed of both and is answerable to neither."[471] In other words, management (and presumably the board) cannot effectively maximize profits and consider society as a whole in every decision made, and be held accountable to all constituencies. Finally, Easterbrook and Fischel argue that wealth maximization in turn benefits social wealth. High performing firms are more likely to provide better working conditions and adopt environmentally friendly practices. [472] It is not difficult to

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[467] Frank H Easterbrook & Daniel R Fischel, *The economic structure of corporate law* (Cambridge, Mass: Harvard University Press, 1991) at 12.
[468] *Ibid* at 36.
[469] *Ibid* at 37.
[470] *Ibid* at 38.
[471] *Ibid*.
[472] *Ibid* at 38–39.

apply this argument to the issue of women on boards. For instance, it is clear that high performing firms have far more resources to devote to diversity initiatives generally and at the board level. Thus, profit and wealth maximization by this logic may actually further gender diversity on boards.

Historically in the US, however, corporations were chartered with reference to the public interest. They were not intended to serve wholly as wealth maximizers.[473] The public utility of business was not viewed as conflicting with private benefits. Thus it was possible for a corporation to operate within a shareholder primacy norm and in the public interest.[474] Indeed, the "shareholder primacy norm may be one of the most overrated doctrines in corporate law".[475] While legal scholars often assume that this norm is embedded within all managerial actions, in reality this may not be true. In Smith's opinion, in almost all corporate actions shareholder primacy is not considered by management. [476]

This could be because corporate law in the US has never obligated corporations to pursue shareholder wealth over and above all else.[477] State corporation codes do not define the purpose of corporations as such. The majority of these codes actually contain provisions that explicitly allow boards to consider the interests of other stakeholders in making strategic decisions.[478] The US Supreme Court has also recognized that profit may be important to corporate functioning, but may not be the be-all and end-all of such operation. In *Burwell v Hobby Lobby Stores Inc.*, for instance,

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[473] D Smith, "The Shareholder Primacy Norm" (1998) Journal of Corporation Law 277 at 292.
[474] *Ibid* at 294.
[475] *Ibid* at 323.
[476] *Ibid* at 279. For a fuller look at his argument supporting this claim see *Ibid* at 279-291.
[477] Lynn A Stout, *Why We Should Stop Teaching Dodge v. Ford*, SSRN Scholarly Paper ID 1013744 (Rochester, NY: Social Science Research Network, 2007); Lynn A Stout et al, *The shareholder value myth: how putting shareholders first harms investors, corporations, and the public*, 1st ed. ed, BK business book (San Francisco, Calif: Berrett-Koehler Publishers, 2012), ch 2.
[478] Stout, *supra* note 477 at 6. Stout notes that while Delaware's corporation code does not explicitly mention the board and management's consideration of other stakeholder interests, it still does not define shareholder wealth maximization as the corporation's purpose.

the Supreme Court stated, "[although] a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives."[479]

This line of thinking may be taken one step further. Shareholder wealth maximization as a concept is itself undefinable.[480] First of all, as Stout points out, many view shareholders as the owners of corporations. This is inaccurate. A corporation is a legal entity, which, like a human being, cannot be owned. Shareholders, rather than ownership, Stout claims, similarly to Easterbrook and Fischel, have a contract which allows for certain legal rights. Unlike Easterbrook and Fischel though, Stout argues that shareholders are not the residual claimants of the corporation, other than in the context of bankruptcy. The view that shareholders are the residual claimants of any leftover profits, Stout says is inaccurate. Furthermore she argues, they have no direct control over the behaviour of management or the board of directors, especially in large, widely held companies.[481] Boards thus can choose to engage in attempts to maximize shareholder wealth, or pursue objectives which benefit society, while maintaining the firm itself. Furthermore, shareholder wealth maximization does not make sense because shareholders' interests themselves differ across classes of shareholders, those who have diversified portfolios and those that do not, and between those who wish to sell their shares in the short term and those who wish to hold them for the long term.[482]

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[479] *Burwell v Hobby Lobby Stores Inc*, 134 S Ct 2751, 2771 (2014).
[480] Stout et al, *supra* note 477, ch Conclusion.
[481] *Ibid*, ch 3.
[482] *Ibid*, ch 5.

If one views a corporation and its shareholders this way, it is far easier to accept a normative rationale for diversifying boardrooms. Viewing shareholder wealth maximization as simply one possible business strategy among many, corporations should be free to pursue social goals, provided those are in the best interests of the firm itself. If shareholder wealth is an incoherent concept which a board is not required by law to pursue at all times, then there is no reason why a board cannot and should not pursue diversity as a goal, provided it does not harm the firm in the long term. If corporations are more than able to be vehicles for positive social change, they should very easily be able to pursue diversity at the board level.

On the other hand, if shareholder wealth maximization is a coherent concept to be treated as the board's main mission, diversity efforts should still be protected by the business judgement rule. Under the business judgement rule, boards are given broad discretion in the United States.[483] Diversity proponents, therefore, should not need perfect empirical evidence to support the case for board diversification. Rather, they should only need persuasive arguments to be adopted by boards.[484] The law, as Fanto et al illustrate, allows the board to take actions which are only tenuously related to shareholder value. There is no reason for diversity advocates not to take full advantage of how flexible the law is on this point. Unless convincing evidence is presented proving that board heterogeneity is harmful to shareholder value (which is unlikely), the law allows action.[485]

[483] The business judgement rule in the US is a standard of review applied to directorial decisions. It is "a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis,* Del. Supr., 473 A.2d 805, 811 (1984).
[484] Fanto, Solan & Darley, *supra* note 7 at 919.
[485] *Ibid* at 931.

Thus, it may be possible that even in the United States, where it has often been assumed that the board's role is primarily to pursue shareholder wealth maximization, there is at the very least hope for normative based rationales for board diversification. Those in favour of greater board diversity "should not limit themselves to the shareholder value paradigm, for it obscures the other perspectives and values that they offer to justify board diversity and reinforces that paradigm." Corporate law in the United States allows directors the freedom to diversify at the board level.

The obvious difficulty with this argument is that it is not politically appealing to those who accept a shareholder-centric view of the corporation. It would require a massive cultural shift and change in perspective in the United States where shareholder primacy is still very much embedded in corporate governance rhetoric. In Canada however, shareholder primacy is not so deep-seated in corporate governance.

4.1.2 Canada

As previously described in Chapter 1, Canadian boards are permitted and encouraged to approach decisions in a stakeholder friendly manner. Directors have a duty of loyalty which requires that they act honestly and in good faith with a view to the best interests of the corporation.[486] Directors thus owe a duty at all times to the corporation itself, not to shareholders in particular.

Even prior to the recent amendments to the *CBCA*, the Canadian Supreme Court has stated that in discharging their fiduciary duty to the corporations they serve, directors may consider the interests of various stakeholders even in *Revlon*-type situations.[487] However, there is no guidance

[486] CBCA, *supra* note 8 at section 122(1).
[487] *BCE*, *supra* note 178. See also Chapter 1 section 1.3.1.4 for a discussion of the *Revlon* line of cases and how they have been interpreted in Canada.

on how seriously other stakeholders' interests must be considered, and given the strength of the business judgement rule,[488] directors are not likely to be penalized for prioritizing shareholder wealth. Professor Puri notes that the *BCE* decision did not provide directors with guidance about how to balance the interests of various stakeholders in making challenging decisions.[489] It leaves the decision of how to balance these rights entirely up to directors, rather than the court, while simultaneously leaving the door open for boards to prioritize stakeholders. The expansive statement of the business judgement rule in the *BCE* case essentially protects directors' decisions from review by the court.[490] As mentioned in Chapter 1, the *CBCA* was recently amended to essentially codify the *BCE* decision.[491] Commenters remain unconvinced as to whether these amendments will impact the behaviour of directors in any way.[492]

One can imagine possible cases where the interests of the corporation diverge from the interests of shareholders. If the view is taken that the board is a wealth generator,[493] this does not necessarily mean that in every instance it should maximize shareholder wealth.[494] Instead, it could mean that it should maximize the total enterprise value of the corporation. We know from *BCE* and *Peoples*[495] that Canadian directors are given broad discretion. The business judgement rule should protect them from the charge of violating their fiduciary duties, provided they uphold what

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[488] For description, see *supra* note 208.
[489] Poonam Puri, "The Future of Stakeholder Interests in Corporate Governance" (2009) 48 Can Bus LJ 427 at 430.
[490] *Ibid* at 431–434.
[491] Canada Bill C-97, *supra* note 182 at section 141.
[492] "Significant Amendments to CBCA Proposed in 2019 Federal Budget", online: <https://www.dwpv.com:443/en/Insights/Publications/2019/Amendments-to-CBCA-in-Federal-Budget>.
[493]See William Bratton, "Confronting the Ethical Case Against the Ethical Case for Constituency Rights" (1993) Faculty Scholarship at Penn Law, online: <https://scholarship.law.upenn.edu/faculty_scholarship/907>.
[494] Sarra, *supra* note 100 at 1139.
[495] *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68 ["*Peoples*"]. In interpreting the business judgement rule in this case, the Supreme Court stated: "Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making…" at para 67.

they consider in their judgement to be the best interests of the corporation, even if this means not always prioritizing shareholder wealth maximization.[496]

Permitting directors to consider other interests and pursue goals beyond profit and shareholder wealth maximization, does not require them to do so. At the very least though, it is difficult not to recognize that in Canada directors are more than able to pursue goals which go beyond making a profit. So long as the directors believe that diversity would be in the best interests of the corporation, board diversity efforts would certainly be among these acceptable goals. Furthermore, as specified by the Supreme Court, "acting as a good corporate citizen"[497] undoubtedly would include the pursuit of diversity goals. Thus, corporations are more than welcome to prioritize diversity and pursue it at the board level.

4.1.3 Accepting the Shareholder Wealth Maximization View of the Board

Milton Friedman conceives the firm's social responsibility as solely to increase profits.[498] The managers, as economic agents, are to fulfill the wishes of the shareholders (the supposed owners). Generally these wishes are fulfilled by making as much money as possible. He asserts that social efforts made by a corporation which diminish shareholders' returns are akin to an unacceptable form of taxation, as they are social initiatives paid for with other people's money.[499] What Friedman fails to address is the idea that shareholders, aside from and including institutional investors, may agree with, and indeed invest in, a corporation because of its social conscience.[500]

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[496] Sarra, *supra* note 100 at 1139.
[497] See *BCE*, *supra* note 178 at para 66.
[498] Milton Friedman, "The Social Responsibility of Business is to Increase its Profits", The New York Times Magazine (13 September 1970) 32, online at <https://is.muni.cz/el/1456/podzim2015/MPH_AMA2/um/58872690/The_Social_Responsibility_of_Business_is_to_Increase_its_Profits.pdf.>.
[499] *Ibid.*
[500] For a fuller description of these investments see Shlomit Azgad-Tromer, "The Virtuous Corporation: On Corporate Social Motivation and Law" (2016) 19 U Pa J Bus L 341 at 343; see also Oliver Hart & Luigi Zingales,

Even if it is true instead that boards are there only to protect the interests of shareholders and maximize profits, given the current calls from institutional investors, greater gender diversity may still be an issue well within and perhaps required to be addressed by directors in their duties as fiduciaries. Powerful institutional investors are pushing for greater gender diversity on large public boards in both the United States and Canada. Some examples of these initiatives include BlackRock's letter to corporations with no women directors urging them to diversify,[501] ISS and Glass Lewis' promises to recommend voting against nominations of directors on boards with no women,[502] and Ontario Teachers Pension Plan's letter to the OSC calling for companies with fewer than three female directors by 2020 to be delisted from the TSX.[503] The Canada Pension Plan (CPP) and Caisse de dépôt et placement du Québec (CDPQ) are requesting boards with all men to diversify.[504] "The responsible investment team at CDPQ now maintains a database of highly qualified female directors, which they send to male-dominated boards who claim such falsehoods [that there are no qualified women to add to the board]."[505]

It is not just firms with large market capitalizations that are being pushed by institutional investors to diversify. In the US, the Teachers Insurance and Annuity Association of America (TIAA) has begun to focus its attention on firms with small to medium market capitalizations. During the last proxy season, TIAA reached out to 500 firms with no female directors and requested that they adopt search practices that require nomination pools to have diverse candidates

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"Companies Should Maximize Shareholder Welfare Not Market Value" (2017) 2:2 Journal of Law, Finance, and Accounting 247[wherein the authors argue that investors incorporate social externalities into their investments. Neither investors nor the corporations they invest in separate money making from social goals.]

[501] Larry Fink's Letter, *supra* note 102.

[502] See *supra* note 427.

[503] Letter from Wayne Kozun to OSC, *supra* note 258.

[504] Dustyn Lanz, "Gender lens investing", (26 April 2019), online: *Investment Executive* <https://www.investmentexecutive.com/inside-track_/dustyn-lanz/gender-lens-investing/>.

[505] *Ibid*.

and to promise to nominate a female director in the next two years. They have stated publicly that if these efforts do not work, they may consider voting against directors who they view as responsible for the "gender gaps".[506] While these initiatives are based in part on business case rationales, they are also based in morality. If we are to accept that the interests of shareholders should outweigh any other stakeholders, boards may still be required to diversify because this is what the shareholders demand.

As described in Chapter 1 briefly, there is a great deal of debate about whether shareholder activism is good or bad for corporations in the long term and whether the normative leanings of institutional investor leaders should impact corporate governance in this way. Institutional investor efforts may be an efficient and cost effective way to promote board diversity. Or at the very least, a board decision to pre-emptively pursue diversity may be the most cost effective way to avoid shareholder activism.[507] Not only do these initiatives place no regulatory burden on firms, they allow for diversity to increase at a much more rapid pace.[508] Further, they address many of the concerns of those who oppose stronger regulation, that is, inappropriate interference from the regulator etc. Lastly, successful shareholder proposals may mean that those stakeholders concerned with diversity will be more likely to increase their holdings in companies which have diversified as a result of these proposals.[509]

However, the question remains as to whether it is appropriate for institutional investors to demand that boards diversify. There are those who disagree with institutional investor involvement

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[506] Roger Ferguson, "All boards must be accountable for gender balance" Financial Times, (24 March 2019), online: <https://www.ft.com/content/3b457a38-4c9a-11e9-bde6-79eaea5acb64>.
[507] Johnson, *supra* note 33 at 366.
[508] Joseph Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, SSRN Scholarly Paper ID 3248791 (Rochester, NY: Social Science Research Network, 2018).
[509] Lynne (Lynne E) Devnew et al, *More women on boards: an international perspective*, Women and leadership : research, theory, and practice (Charlotte, NC : Information Age Publishing, Inc., 2018) at 8.

in social issues. For instance, in 2005, the Ontario Teachers' Pension Plan took the position that non-financial considerations (such as ESG considerations) could not take priority over the risk and return management of the fund.[510] However, as just mentioned, Teachers has since changed its position and even advocated for gender quotas to be required for corporations listed on the TSX. Moreover, if ESG requirements benefit long-term shareholder value, then this criticism becomes moot. Institutional investors are however using other people's money in order to pursue a normative goal, one which is not clearly linked to returns for those on whose behalf they are investing. It is as yet unclear if shareholder activists interests align with only short-term share value, or if they align with the long term value of the firms which they target.[511] It may therefore, still be appropriate for a board to recommend voting against a shareholder proposal if the directors believe it not to be in the best interests of the corporation in the long term.

4.2 "1+1": Combination of Utility and Morality

The business and normative cases for board gender diversity, as described in greater detail in Chapter 1, are extremely difficult to separate. The combination of utility and morality may, as Fairfax states, be inextricably linked.[512] While the business case may not be persuasive as a stand-alone justification, perhaps the normative case is not either.

4.2.1 Directors Nominated Not on Basis of Merit

A study of large US public companies found that on average female first-time directors were much more highly qualified for board membership than their male colleagues.[513] Despite their merit, women were far less likely to be recommended for additional board seats as compared to

[510] Sarra, *supra* note 100 at 1143–1144.
[511] For review of the evidence and its ambiguity see Coffee & Paulia, *supra* note 112 at 49–64.
[512] Fairfax, *supra* note 22 at 879.
[513] Michael McDonald & James D Westphal, "Access Denied: Low Mentoring of Women and Minority First-Time Directors and its Negative Effects on Appointments to Additional Boards" (2013) 56 The Academy of Management Journal 1169 at 1170.

their first-time male counterparts.[514] Thus, women, even at the highest levels of the corporate elite, still may be passed over in favour of less qualified men. The logical conclusion to be drawn from this is that boards are not as highly qualified as they could be and that the current nomination system is not truly a meritocracy. Not only is this unfair to the women who are being passed over, but it is hard not to conclude that boards could be made better if board nomination was truly a meritocratic process.

This quantitative evidence is supported by qualitative evidence as well. In a study examining the opinions of those who benefited from the Norwegian quotas, Seierstad found that quotas became a welcome corporate governance strategy once implemented. Participants used both instrumental arguments and individual justice rationales to justify the usefulness of quotas.[515] It was found that these two kinds of rationales were interrelated. That is, female directors who benefited from the Norwegian quotas spoke about how their talents and skills had been ignored in favour of mediocre men. Importantly, it was noted by this author that only two respondents relied entirely on fairness rationales in discussing the justification of gender quotas.[516] This study highlights the point made above. Unfairness (that is, ignoring talented women in favour of less talented men) may actually have an instrumental impact on the corporation (that is, it may lead to less meritorious director nominations). This argument is based on a combination of morality and business case reasoning.

4.2.2 Consumer and Shareholder Loyalty

The normative case becomes the business case in other contexts as well. It is difficult to ignore public opinion and social values in making corporate decisions. Rooted within every

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[514] *Ibid* at 1181.
[515] Seierstad, *supra* note 365 at 391.
[516] *Ibid* at 399.

corporate decision are social considerations.[517] Corporate conduct which advances social goals can increase revenue. Consumers are often more loyal to, and willing to pay more for goods and services of, brands which they consider socially conscious.[518] It was found in 2015 that investors had since 2013 contributed $8.2 billion to socially responsible stocks and bond funds. While the total assets in all mutual funds rose by 52% between 2012 and 2017, the assets in these socially conscious funds rose by 59%.[519] Other studies have shown that firms with social and environmental policies perform better than those without.[520] Shareholders have become very interested in ESG reporting. There is a growing interest in ESG reporting and transparency and some view ESG disclosure as a proxy for management quality.[521] Thus, the normative case bleeds into the business case. Market participants are calling for board diversity. Consumers and investors, while they are not the only constituencies whose interests should be considered by corporate directors in Canada, are willing to pay more for diversity. If share prices rise because of the growing demand and reward for diversity efforts, then institutional investors and boards themselves, even accepting the shareholder primacy norm, may be required to prioritize board diversity.

4.3 CONCLUSION

Canada may not reach gender parity on public corporate boards in the foreseeable future without at least the limited acceptance of normative based rationales justifying stronger regulation.

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[517] Azgad-Tromer, *supra* note 500 at 343. See also Fanto, Solan & Darley, *supra* note 7 at 908, noting that firms and boards do not exist in a vacuum and are influenced by societal pressures and norms.
[518] Azgad-Tromer, *supra* note 500 at 347.
[519] *Ibid* at 352.
[520] Robert G. Eccles, Ioannis loannou & George Serafeim, "The Impact of Corporate Sustainability on Organizational Processes and Performance", (2014) 60 Sci. 2835, 2835- Mgmt.
[521] Robert G Eccles, Michael P Krzus & George Serafeim, "Market Interest in Nonfinancial Information" 23:4 Journal of Applied Corporate Finance, online: <https://onlinelibrary-wiley-com.ezproxy.library.yorku.ca/doi/abs/10.1111/j.1745-6622.2011.00357.x>.

Paradoxically, while politically appealing, the business case has yet to be established empirically, likely because of the critical mass issue and may never be without stronger regulatory intervention aimed at increasing women's board participation. The fairness based rationale for stronger regulation may not be able to stand alone either. Perhaps this is why the regulators have been so unclear about what the true purpose of NI 58-101F1's gender diversity policy is. In order for stronger regulation to be justified by the normative case, we may have to view for-profit firms as social institutions with purposes that go beyond shareholder wealth maximization. The Supreme Court of Canada has already accepted a stakeholder-friendly model of the corporation, allowing for the board to consider interests beyond shareholder value.[522] Parliament has endorsed such a view in the recent *CBCA* amendments. Combined with the stated objective of the OSC's gender diversity policy, that is, to enhance female representation on reporting issuer boards, it is obvious that public corporations are not only permitted by law, but encouraged in many ways, to diversify at the board level. Regulatory amendments will be necessary to spark change and many options for such intervention will be presented in the following chapter.

[522] See *BCE supra* note 178 and Peoples *supra* note 495.

5 Chapter 5 “Forward”: Barriers and Solutions Applying the Normative and Business Case Rationales

The purpose of this paper has been to explain where the Canadian board diversity policy originated, the failure of this policy, the underlying theories behind regulation, their shortcomings, and why these theories may be useful to regulators. The intention has not been to provide a recommendation for the exact form an amended policy might take. However, it seems necessary to discuss why women are so poorly represented on public boards and the possible solutions regulators might apply to the barriers faced by women. Again, this chapter will apply the business and normative cases in order to provide possible options to the regulators. Stronger regulation is recommended, but the decision of what form this regulation will take should be left to the securities regulators.

5.1 “Partition”: Root of the Underrepresentation Problem: Demand and Supply Side Barriers[523]

On the road to directorships women face both supply and demand-side barriers.[524] Supply-side barriers are those which come between women and becoming board-ready, while demand-side barriers prevent those women who are qualified from sitting on boards. As their name suggests, supply-side barriers affect the supply of qualified female directors and demand-side barriers narrow the demand for female directors. The focus of this paper has been on demand-side solutions in the form of regulation. However, demand-side solutions may in turn work to eliminate supply-side barriers as well. Greater female representation at the board level may result in more

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[523] For a definition and detailed explanation of supply and demand-side barriers see Patricia Gabaldon et al, “Searching for Women on Boards: An Analysis from the Supply and Demand Perspective" (2016) Corporate Governance: An International Review - Wiley Online Library, online: <https://onlinelibrary-wiley-com.ezproxy.library.yorku.ca/doi/epdf/10.1111/corg.12141>.
[524] *Ibid.*

flexible employment policies, less work-family conflict as well as greater numbers of female executive officers because more gender diverse board may be more inclined to adopt such policies.[525]

A looming question remains on the demand-side. Are the above rationales enough to justify stronger regulation aimed at increasing board gender diversity? The empirical business case for greater representation of women on boards may not be strong enough because there have yet to be enough women on boards to provide the data needed to definitively make this case. And until the empirical case is compelling, there may not be sufficient impetus for boards to increase gender diversity significantly enough to furnish that data. There are those who acknowledge this cycle, but still believe that stronger regulation of this issue remains unwarranted.[526] If we continue to wait for an air tight empirical business case to support stronger regulation, due to this circular problem, there may never come a time in Canada when women are adequately represented on corporate boards.

It may be impossible to separate business case rationales from normative ones. The question of why women should be represented more adequately may have to be answered both in terms of utility and fairness. Where should the regulators go from here? One thing is clear. The policy contained in NI 58-101F1 in its current formulation is not advancing its stated objective.

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[525] Dawson, Kersley & Natella, *supra* note 44 at 9; Carlson, *supra* note 7 at 388. As previously noted, studies have shown that firms with greater numbers of female directors, after some time, tend to have a greater number of female executive officers.
[526] Hazen, *supra* note 460 at 898.

5.2 "BEST THING I NEVER HAD": DEMAND-SIDE SOLUTIONS

5.2.1 Theoretical Underpinnings of Quotas and Disclosure Requirements

5.2.1.1 Is it the Quota or the Penalty Making the Difference?

There is some debate about the way in which regulation motivates corporate action. A full picture of that debate is beyond the scope of this paper. Briefly, some scholars argue that regulatory intervention ought to be proactive in nature with a view to encouraging market participants to adopt the norms underlying the regulation and to develop a "culture of compliance." [527] Others believe that a deterrence-based regulatory approach is more effective because issuers will violate regulations if they perceive the benefits of doing so outweigh the costs of compliance.[528]

Applied to the issue of women on boards, the question is whether regulators should encourage reporting issuers to adopt the underlying norms of the diversity disclosure policy, and hopefully increase their representation of female board members, or alternatively, whether regulators should implement severe enough sanctions to coerce the same result. Some commenters believe implementing quotas is the only way to guarantee gender diversity on boards.[529] Countries with quotas saw dramatic increases in female board participation almost immediately when the sanctions were severe enough. States which have implemented comply-or-explain models have seen much less dramatic change. However, they have seen change.

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[527] Mary Condon, "Rethinking Enforcement and Litigation in Ontario Securities Regulation" (2006) 32 Queen's LJ 1 at 30.

[528] Mary Condon & Poonam Puri, "The Role of Compliance in Securities Regulatory Enforcement" (2006) (paper commissioned by the Task Force to Modernize Securities Legislation in Canada, June 28, 2006) at p. 19, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1116&context=reports>.

[529] Bryce Covert, "Opinion | The One Proven Way to Diversify Corporate Boards", *The New York Times* (5 October 2018), online: <https://www.nytimes.com/2018/10/03/opinion/the-case-for-quotas-on-corporate-boards.html>; Maria Reinertsen, "Only gender quotas can guarantee women in the boardroom | Maria Reinertsen", *The Guardian* (2 March 2011), online: <https://www.theguardian.com/commentisfree/2011/mar/02/gender-quotas-norway-women-boardroom>.

Perhaps the best regulatory approach is somewhere in the middle, as suggested by Professor Anand.

> Legislators and regulators do not uniformly recognize that firms have incentives for voluntary behavior in corporate governance. It is possible to take advantage of these incentives by creating a governance regime that is less costly for firms, yet still protects investors. In particular, a partially enabling structure has the effect of minimizing costs but at the same time encouraging compliance.[530]

Evidence from several jurisdictions seems to point to the idea that it is specific, numerical targets and not sanctions which make the difference. In most of the examples which were described in Chapter 2, when specific numeric targets are provided by regulators, corporations tend to diversify. Quotas with heavy sanctions for non-compliance lead to diverse boards being achieved rapidly, but ultimately, it may be that specific goals even within a comply-or-explain regime, are just as effective in the end.

5.2.1.2 Therapeutic Disclosure

Theoretically, disclosure based regimes work by exposing corporate governance deficiencies to the public.[531] "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[532] This is what is known as "therapeutic disclosure".

Following NI 58-101F1's amendment, the number of women on boards increased at a rate which was similar to what it was before the amendments, that is, glacial. This is because the policy is too weak to produce any real gains. Willey for instance calls it an "explain-or-explain" policy.[533] There are no targets provided in the national instrument with which issuers must comply. Issuers must explain whether or not they have, for instance, a diversity policy and if they do not, they must

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[530] Anand, *supra* note 169 at 251.
[531] Dhir, *supra* note 5 at 84.
[532] Louis D Brandeis , *Other People's Money and How the Bankers Use It* (New York : F.A. Stokes ,1914) at 92.
[533] Willey, *supra* note 62 at 193.

explain why not.[534] They must disclose how many women are on their board,[535] but no suggested number or percentage is provided for in NI 58-101F1. What then must they comply with other than disclosure requirements?

To a certain extent, the Canadian diversity disclosure policy may be an example of therapeutic disclosure. However, as discussed above, because the policy is not specific enough about what issuers should work towards, it is also ineffective at public shaming. It is arguable that the policy has forced those reporting issuers who previously had no or very few female directors to add women (or a woman) to their boards. Prior to the policy's implementation more than half of reporting issuers had no female directors. Now, 66% of reporting issuers have at least one woman on their boards.[536] Thus, by virtue of requiring disclosure of the number of women directors, the policy has lowered the number of public companies with entirely male boards. Given the overall number of women who have been added to boards and the strikingly slow pace of progress since its implementation, it is arguable that NI 58-101F1 is not even effective as a form of therapeutic disclosure.[537]

Fairfax points out that issuers in North America have been more than willing to implement other corporate best practices, despite the mixed empirical evidence upon which they are based.[538] Yet, they remain reluctant to diversify. Perhaps this is because the diversity policies of both the United States and Canada are too weak.[539] A solution to this would be to set measurable targets.

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[534] NI 58-101F1, *supra* note 3 at item 11.
[535] *Ibid* at item 15.
[536] CSA Multilateral Staff Notice 58-310, *supra* note 2 at 2. Interestingly, the last Fortune 500 company to have no female directors recently added its first woman to the board, see Aimee Picchi, "The last S&P 500 company with an all-male board adds a woman", online: <https://www.cbsnews.com/news/copart-auto-auction-company-the-last-s-p-500-company-with-an-all-male-board-adds-a-woman/>.
[537] Or perhaps therapeutic disclosure itself is not an effective means by which to steer behaviour. The broader issue of the efficacy of therapeutic disclosure as a regulatory tool is beyond the scope of this paper.
[538] Fairfax, *supra* note 22 at 878.
[539] See Foster, *supra* note 17; Willey, *supra* note 62.

In other words, the "comply" part of the Canadian NI 58-101F1 could require at least three[540] women on boards of a certain size and the "explain" portion could require a description of why a non-compliant issuer does not have this number.

5.2.2 Regulatory Options

If one completely accepts either the normative or the business case rationale to justify regulation of board gender diversity, the most efficient and appealing solution to the underrepresentation of women is mandatory quotas. If one does not believe that the normative case is enough to justify such strong regulatory intervention, a stricter comply-or-explain disclosure model seems to be justified by combining normative and business case justifications. Even if one rejects the normative case entirely and is only prepared to accept the business case, a say-on-diversity vote, as discussed in greater detail in s.5.2.2.3 is still appropriate. Alternatively, if one accepts neither the business case nor the normative case, a say-on-diversity vote still seems warranted.

5.2.2.1 Quotas

a) Mandatory

As a demand-side solution, mandatory quotas have been shown in every case to increase boardroom gender diversity.[541] It is difficult to justify implementation of a mandatory quota without reference to the normative case. However, if one is prepared to entirely accept the business case, quotas still may be the appropriate regulatory intervention. That is, if it is true that adequate female representation on boards definitely provides business benefits, then quotas are one way to guarantee these benefits, provided they are introduced in a gradual manner and not all at once as

[540] Refer to Chapter 3 for the significance of this number.

[541] As described in Chapter 2, at section 2.4.1.1, Norway and France, after the introduction of mandatory quota laws with severe penalties for non-compliance saw rapid and immense gender diversity enhancements on the boards impacted by the quota laws.

they were in Norway. An important criticism of quotas is that they do not address supply-side problems. In other words, they do not broaden the pool of future female directors because they do nothing to address structural or institutional issues that limit the number of women who may serve on boards, such as work-family conflicts or a lack of flexible work schedules. These supply-side barriers which appear in the early years of women's careers often work to prevent them from advancing to a stage where they would be qualified to act as a director. A further discussion of these barriers will follow later in this chapter. However, quotas may broaden the pool of future female board candidates in other ways. They do this by increasing the gender spillover into executive officer positions and by providing women with board experience. As previously described, it has been shown that firms with greater numbers of female directors are likely to have greater numbers of executive officers in later years.[542] Quotas may be the "necessary evil" to change the current state of board composition.[543] While certainly not the ideal solution, other demand-side solutions increase board diversity at such a slow pace as to make progress nearly imperceptible.

Many critics who reject mandatory quotas, purport that quotas are just a way to bring down men. [544] This seems to be more of a distraction from what is really at issue than a valid argument. High achieving men who sit on boards are not those who should fear quotas. "Mediocre" men, who likely should not be on boards in the first place, are those whose board membership may be at risk.[545] Quotas are not intended to remove high achieving men in favour of women who may

[542] Eastman, Rallis & Mazzucchelli, *supra* note 12 at 9–10; Matsa & Miller, *supra* note 13 at 638.
[543] Dhir, *supra* note 5 at 117.
[544] See Senator Frum's arguments in Senate Debate April 2010, *supra* note 205 at 413 as well as Ian Maitland, "Why the Business Case for Diversity Is Wrong" (2018) 16 Georgetown Journal of Law & Public Policy 731.
[545] See Seierstad, *supra* note 365 at 399 (description of the crisis of the mediocre man). For an analogous finding of "mediocre" men being squeezed out of politics due to implementation of mandatory quotas see Timothy J Besley et al, *Gender Quotas and the Crisis of the Mediocre Man: Theory and Evidence from Sweden*, SSRN Scholarly Paper ID 2465902 (Rochester, NY: Social Science Research Network, 2013). This study measured the competence of

not deserve to be on boards. They are intended to replace lower achieving men with women who merit board seats but would otherwise be overlooked.

> The new law will not affect the best men at all; they will still have the opportunities. What the law does is to "squeeze" out the mediocre men in order to exchange them with excellent women. The way I see it, the good men are not afraid of the law, but the average men are; average will no longer be good enough for men either. [546]

It is often the same critics who use "merit" based arguments against quotas, who point to graduation rates (women graduating at higher rates than men) to say that quotas are unnecessary.[547] Concern about women dominating boards because of their higher levels of education is another reason to implement quotas. Quotas protect both genders from being underrepresented. With their implementation, men will never have to worry about being as poorly represented on boards in the future as women have been.

From critical mass theory and the empirical data which supports this theory, three women on a board seems to be the transformative number.[548] If implemented, a quota would ideally mandate that a reporting issuer board have at minimum three people of each gender. It may of course be that boards simply expand their size in order to adhere to the quota. This could be addressed by combining California's quota with that of Norway. That is, a board with five members could be required to have two members of each gender, a board with six members might be required to have three members of each gender, [549] a board with nine members must have four

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politicians with earnings potential predicted by education, age, occupation and time before and after a mandatory quota was implemented. It was found that the quota led to both a greater proportion of females being nominated as well as the nomination of a greater proportion of competent male politicians. The only politicians who were pushed out because of the gender quota were the mediocre men. Thus, the overall competence of the party increased as a result of the quota, contrary to what many mandatory quota critics predicted.

[546] Seierstad, *supra* note 365 at 398. This is a quote from a participant in Seierstad's study regarding the introduction of mandatory quotas in Norway.

[547] See again Senator Frum's remarks, Senate Debate April 2010, *supra* not 205 and Epstein, *supra* note 163.

[548] Refer to Chapter 3 for an in-depth discussion of the importance of this number.

[549] See Bill 826, *supra* note at 279, wherein corporations by the year 2021 will be required to have 2 female directors if their board has 5 directors, and 3 female directors if their board has 6 or more directors.

of each gender, and if the board has more than nine members, each gender must represent 40% of the board.[550] This quota would effectively eliminate women's underrepresentation on public boards, while addressing concerns that men may one day be poorly represented on these boards.

Of course not all public issuers would be able to meet this quota and there should be exemptions available for those with smaller boards and smaller market capitalizations. Another crucial step to implementing a quota is that it be introduced gradually. A lesson should be learned from the Norwegian experience. To avoid an overnight transformation of public boards in Canada, a mandatory quota should be implemented in phases. It may be useful to allow corporations a few years to reach 20-30% female board representation (depending on their board sizes) and a further few years for boards to include three women or 40% representation of each gender (again, depending on board size).

b) Voluntary

If it is not within Canadian securities regulators' capacity to implement mandatory quotas, they may implement a voluntary quota. Voluntary quotas still arguably do not solve most supply-side barriers. Furthermore, they have far less impact than mandatory quotas. The numbers and percentages for gender representation for a voluntary quota could match the example mandatory quota provided in the previous section. For instance, just as the proposed mandatory quota above would require a reporting issuer to have at least three men and three women on its board for a board with six members, a voluntary quota would recommend this same minimum gender representation. It would also be prudent to introduce voluntary quotas in a gradual manner; however, it may not be necessary to allow for as much time as the mandatory quotas should be

[550] See Norway's Companies Act, amended in 2003, at § 6–11a.

given because there will not be a penalty for non-compliance. It would be useful to provide corporations with a list of acceptable reasons for non-compliance with the voluntary quota.

Further, voluntary quotas could be combined with other incentives such as tax breaks.[551] As Alstott states in reference to tax incentives combined with board gender quotas, "they preserve the appearance of voluntarism".[552] Those corporations which adopt the voluntary quota would be rewarded with paying lower taxes, and those which do not do so would pay more tax. In Canada taxes implemented for a social purpose are far from unheard of. The recent example of the *Greenhouse Gas Pollution Pricing Act,* or what is colloquially known as the "Carbon Tax", is a perfect example of tax incentives used to curb the behaviour of corporations to further a social goal.[553] The *Greenhouse Gas Pollution Pricing Act* received Royal Assent in June of 2018. Its object is, "to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts".[554] Tax incentives would certainly encourage more corporations to adopt the voluntary quota, while leaving the choice of whether to prioritize board diversity with issuers instead of the regulators.

5.2.2.2 Stricter Disclosure

> "Non-numerical objectives such as "introducing a diversity policy" or "establishing a diversity council", and aspirational objectives such as "achieving a culture of inclusion", while individually worthwhile, are unlikely to be effective in improving gender diversity unless they are backed up with appropriate numerical targets."

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[551] See for instance Anne Alstott, "Gender Quotas for Corporate Boards: Options for Legal Design in the United States" (2014) 26:1 Pace Int'l L Rev 49 (suggestion that securities regulation could combined with tax incentives in order to create regulatory quotas).

[552] *Ibid* at 45.

[553] Canada, *Greenhouse Gas Pollution Pricing Act* SC 2018, c 12, s 186, (assented to 21 June 2018). See also Katheryn Harrison, "COMMENTARY: How Canada's carbon tax works - National | Globalnews.ca", online: <https://globalnews.ca/news/5125670/how-the-carbon-tax-works/>.

[554] *Greenhouse Gas Pollution Pricing Act*, *supra* note 553.

- ASX Corporate Governance Code, Recommendation 1.5[555]

As it stands, Canadian public boards will not reach parity for another 50 years,[556] 100 years after women joined the labour force in great numbers. The OSC's current gender diversity policy is meant to increase women's participation on boards. In order to accomplish this objective within a reasonable time, regulatory reform is necessary.

For those countries which have disclosure based diversity policies, Australia currently has the highest percentage of women on boards of public corporations.[557] This may be due to the very clear recommendations set out in the ASX Corporate Governance Code. If Canada is to amend NI 58-101F1, the ASX Code is an excellent model for stricter disclosure requirements. For instance, to comply with the Canadian model, reporting issuers might be required to disclose a diversity policy with set measurable targets and disclose these targets and its progress towards achieving those targets.[558] Further, it could be required, as it is in Australia, that the largest firms (in Australia these are the S&P/ASX 300 Index corporations) have a measurable target of not less than 30% representation of each gender on the board.[559] Canada could use this same percentage, or indeed take it one step further. The measurable target could be specific numbers of each gender depending on board size, as with the quotas described above. Alternatively, the measurable objective recommended could be 40% of each gender by a certain period. If reporting issuers are unable to comply with this target, they could provide an explanation as to why they are not.

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[555] ASX Corporate Governance Code, 4th ed (February 2019) Recommendation 1.5, Commentary, online at <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf> ["ASX Corporate Governance Code"].

[556] Roundtable 2017, *supra* note 175.

[557] Women represent 29.7% of Australia's publicly traded corporations' boards. See "Gender diversity progress stalling on ASX 200 boards", online: <https://aicd.companydirectors.com.au/media/media-releases/gender-diversity-progress-stalling-on-asx-200-boards>.

[558] ASX Corporate Governance Code, *supra* note 555, Recommendation 1.5.

[559] *Ibid*.

Currently, NI 58-101F1 requires reporting issuers to disclose the number and percentage of female board members, whether they have a policy regarding the representation of women on their board, how (if they do at all) they are implementing this policy, and whether they consider diversity during the nomination process. If they have no women, no policy, and no diversity nomination considerations, all they must do is explain why, with no guidance as to what appropriate explanations might be. There is no requirement that issuers set measurable targets, or any recommended number or percentage of female directors. At the very least, the policy contained in NI 58-101F1 should be amended to include specific recommendations for numbers or proportions of female directors. Issuers should be given something specific with which to comply. A model gender diversity policy should be provided in a companion policy and exact numbers and proportions should be prescribed. If these metrics are not complied with, then an explanation should be required.

Just as quotas are criticized for not solving supply-side barriers, stricter disclosure would face similar criticism. However, the Australian model also addresses this criticism. Recommendation 1.5's commentary suggests that listed companies: "Recognise that employees (female and male) at all levels may have domestic responsibilities and adopt flexible work practices that will assist them to meet those responsibilities."[560] Again, this may be a useful recommendation which could easily be introduced in a commentary accompanying NI 58-101F1. This recommendation would encourage firms to work towards eliminating the pool problem.

As demonstrated above it is not entirely clear whether what makes quotas so effective are the harsh penalties which often accompany them, or whether it is the clear, numerical targets provided by the quotas with which firms must comply that make the difference. Whatever the

[560] *Ibid.*

answer, a stricter comply-or-explain model would at the very least be the logical next step towards progress in Canada, especially if a mandatory quota seems unpalatable at the present time.

5.2.2.3 Say-on-Diversity

One does not have to accept either the normative or the business case rationales to agree that a say-on-diversity vote may be an appropriate regulatory intervention. This is an alternative regulatory model which allows for corporate autonomy and greater shareholder participation. A binding "say-on-diversity" vote, much like a "say-on-pay" vote may be mandated.[561] The supply-side issues described above which quotas fail to address, still would not be solved.[562]

Management currently has incentives to either block diverse appointments, or not to be proactive in seeking female nominees because, as previously noted, women tend to be more scrupulous monitors of management.[563] Just as the Dodd-Frank Act introduced a say-on-pay vote which led to significant changes to pay practices after unfavourable votes,[564] the say-on-diversity vote would ideally lead to significant changes as well.[565] Whether diversity is to be prioritized is left up to the shareholders. With a say-on-diversity vote the stigma attached to newly appointed female directors (if they were beneficiaries of quotas) would disappear[566] and diversity efforts would almost certainly increase given the current shareholder demand for these. This solution fits within a shareholder primacy view of the board and management. It is not necessary to use normative case rationales to justify this form of regulatory intervention because it is one which allows for complete flexibility and shareholder participation.

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[561] Sandeep Gopalan & Katherine Watson, "An Agency Theoretical Approach to Corporate Board Diversity" (2015) 52 San Diego L Rev 1.
[562] *Ibid* at 58.
[563] *Ibid* at 64.
[564] *Ibid* at 63.
[565] In Canada, while most reporting issuers already held say-on-pay votes (see note 492) recently the *CBCA* was amended to include a provision mandating that "prescribed corporations" hold non-binding say-on-pay votes. See CBCA, *supra* note 8, section 125.1.
[566] See section 1.3.1.1.

One criticism of a say-on-diversity vote model is that, similarly to the current Canadian model, it is a very weak regulatory intervention. By leaving board diversity policies and what these might look like in the hands of reporting issuers, the progress may be similar to the progress already being made. Unless shareholders and institutional investors take on the responsibility of ensuring that public companies implement effective diversity policies with clear and measurable targets, it is perfectly likely that firms will implement policies which may not further women's participation in a meaningful way.

5.3 "If I Were A Boy": Supply-Side Solutions

Far less researched and proposed are supply-side solutions. These include work-family conflict reduction, flexible work hours, and mentorship programs aimed at increasing the number of board-ready females in Canada.[567] These are certainly outside the realm of securities regulation in Canada, but are still important solutions to discuss.

5.3.1 Work-Family Conflict Reduction and Flexible Hours

The value of these policies and the value of supporting those women who wish to prioritize their families is often under-estimated in the corporate world:

> "Corporate America seems to regard child bearing and child rearing as just a lifestyle choice that some women make, just as other women dedicate leisure time to improving their tennis game or to training for a marathon. Bearing children and raising them well, however, is not just another lifestyle choice. It is the source of human capital, a sufficient supply of which is critical to the society as a whole."[568]

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[567] Gabaldon et al, *supra* note 523 at 375. Although there are currently an ample number of board-ready females in Canada, there are still, despite graduation rates, far more board-ready men. Thus, while the so-called "pool problem" is not an accurate conception of the labour market, in so far as the number of board-ready females are not adequately represented on boards, see for instance, Dhir, *supra* note 23 at 577–579, it may still be important to address certain barriers which are stopping women who may wish to become board-ready from doing so.

[568] Branson, *supra* note 61 at 385.

Furthermore, the idea that flexible work schedules and work-family conflicts are purely women's issues[569] may represent one of the greatest hurdles women in the corporate world must overcome. In fact, if allowed flexible work hours both men and women tend to take advantage of these at the same rate.[570] A McKinsey survey found that despite common perceptions, men and women in middle and higher management positions were equally willing to give up aspects of their family lives to achieve career goals.[571] One observes, for example, that Norway, where corporate culture is more open, non-hierarchical and encourages parental leave and work-from-home policies, has the highest rate of female participation in politics and business.[572]

5.3.2 Mentorship

In addition to the above barriers, women who aspire to be on boards face a lack of mentorship. This barrier exists before women achieve their first board seat and after. First, because there are not as many female directors on boards and in executive officer positions, women have fewer role models and potentially fewer mentors encouraging their advancement and pursuit of leadership roles. Second, once a woman obtains her first board seat, it is difficult for her to obtain a second because she is less likely to receive mentorship from her fellow board members.[573] A study by McDonald and Westphal showed that board members who are male tend to offer mentorship and advice to first-time male board members and are much less likely to offer same to first-time women.[574] There are certain board procedural norms which one cannot glean simply from observation.[575] For instance, this study used the example of obtaining the CEO's approval

[569] Gabaldon et al, *supra* note 523 at 375.
[570] Carlson, *supra* note 7 at 386.
[571] McKinsey "Moving mind-sets on gender diversity", online: <https://www.mckinsey.com/business-functions/organization/our-insights/moving-mind-sets-on-gender-diversity-mckinsey-global-survey-results>.
[572] Foster, *supra* note 17 at 409.
[573] McDonald & Westphal, *supra* note 513.
[574] *Ibid* at 1182.
[575] *Ibid* at 1173.

prior to a board meeting before raising concerns in the meeting as an important board procedural norm. First-time members would not know about this norm other than through mentorship. Because they are privy to mentorship far less often, first-time female board members tend to violate procedural norms much more often. They therefore make less than ideal first impressions, which have a lasting impact on their fellow board members. Hence, they are far less likely to be recommended for (and indeed hold far fewer) additional board seats than their first-time male counterparts.[576] An obvious solution to this problem is for boards to adopt mentorship programs, both for those who have yet to sit on a board and for those first-time directors so that more women are able to progress beyond this point.

Thus, while the supply-side barriers are for the most part beyond the scope of this paper, they may be crucial to achieving gender equality in the upper corporate echelons. It is worth noting that solutions to these barriers would work towards eliminating the pool problem identified by those who oppose stronger regulation, if there is in fact such a problem. If there is not, they may work towards putting to rest concerns of the pool problem.

[576] *Ibid* at 1183–1184.

“Hard to Say Goodbye”: Conclusion

Women remain vastly underrepresented on public corporate boards in Canada. While most scholars and policy makers agree that this is a problem, there is no consensus on how this problem should be solved. The various solutions which have been presented in the last few years range from free market solutions to invasive regulatory intervention.

This thesis has focused on regulatory intervention and the two main justifications used by proponents of regulation, those being the business case and the normative case. Neither seem to be standalone rationales capable of convincing those who do not already subscribe to their premises. The literature review in Chapter 1 revealed that the business case has not been conclusively proven empirically and that the normative case is difficult for those who view the board as a shareholder wealth maximizer to accept.

If neither of these competing, or perhaps complementary, rationales have been accepted by the business community and scholars, what was the impetus for NI 58-101F1’s diversity disclosure policy? The securities regulation which was introduced in 2014, given the legislative journey from which it originated, appears to have been prompted by normative based concerns. That is, the Canadian government was first concerned with the unfairness of female board underrepresentation. However, given the mandate and regulatory constraints of securities regulators, they must justify regulatory intervention with concerns of investor protection, market fairness and efficiency, and more recently, reduction of systemic risk. They thus implemented a regulation which was ostensibly meant to better business and increase female representation on reporting issuer boards. But, the model chosen in fact achieves neither of these goals.

The business case clearly has not persuaded business leaders or we would have seen much more rapid increases in female directorships. What is missing from this rationale? Why is it so unpersuasive? For one, the empirical evidence seems to be missing data about how critical mass theory applies to this issue. There have not been enough women on boards in Canada to test critical mass theory properly and this may not be possible without regulatory intervention. For another, risk aversion and the impact this could have on systemic risk does not seem to have been studied enough. Therefore the business case may not be dead. It may still be important to scholars and regulators. For instance, the OSC's mandate now includes the reduction of systemic risk. There is empirical evidence which shows that increasing female representation on boards may reduce systemic risk. While this evidence is not yet conclusive, the OSC may be required to examine this question further, or at least might be able to justify stronger regulation while keeping within its mandate.

As the normative case and its short comings were examined more closely, it became clear that in order to fully accept this rationale it may be useful to view the board as something other than a shareholder wealth maximizer. Even accepting the shareholder wealth maximization view of the board though, according to statutory and common law, boards of directors are free to pursue board diversity initiatives. This however is really a business judgement decision, not a requirement under law. Regulatory intervention remains necessary.

Finally, the barriers to women's advancement and regulatory options were analysed. Although the perfect regulatory model may not be as yet obvious, it is clear that NI 58-101F1 in its current formulation is increasing female representation on boards at a glacial pace. Stronger regulation is required. Justifying this with normative, business or both rationales, with a view to reducing systemic risk, should still allow for at least stricter disclosure requirements, or at the very

least a say-on-diversity vote. A voluntary or mandatory quota may be the necessary evil to achieve real change in a reasonable amount of time. Whatever regulatory amendments are selected, they should be selected in a timely manner in order to begin to bring change. Women have been waiting long enough.

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