THE "GOOD CORPORATE CITIZEN" BEYOND *BCE*

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In its landmark corporate law decision of BCE Inc. v. 1976 Debentureholders, *the Supreme Court of Canada expressly referenced the "good corporate citizen" when commenting on the best interests of the corporation. The Supreme Court's reference to good corporate citizenship is often viewed as salient yet ambiguous. As the Supreme Court did not provide any substantive legal analysis of the term, legal scholars and practitioners can only speculate on its intended meaning. This article provides an empirical study on the historical development and usage of good corporate citizenship when referenced in judicial cases. The empirical findings show that Canadian courts have invoked the notion for decades and in a variety of contexts. The meaning of good corporate citizenship varies from context to context and does not necessarily dovetail with corporate social responsibility as commonly perceived. Good corporate citizenship as a legal concept carries some practical yet controversial consequences in the environmental sentencing context. Importantly, the oft-acclaimed corporate governance paradigm shift since* BCE *seems more symbolic than substantive in judicial practices. The Canadian experience also provides insights into the global emergence of explicit corporate social responsibility legislation and stakeholder-oriented corporate governance.*

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I. INTRODUCTION

In 2008, the Supreme Court of Canada delivered one of the most important judgments in Canadian corporate law: *BCE Inc. v. 1976 Debentureholders*.[1] In *BCE*, the debentureholders of BCE Canada, a subsidiary of BCE, sought an oppression remedy against directors of BCE for their decision in a leveraged buyout that increased debt and, in turn, reduced the value of the debentures. In its decision, the Supreme Court reaffirmed its stance in the 2004 case of *Peoples Department Store Inc (Trustee of) v. Wise*[2] that directors have the fiduciary duty

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1 2008 SCC 69 [*BCE*].

2 2004 SCC 68.

to act in the best interests of the corporation, and directors may consider the interests of, among others, "shareholders, employees, suppliers, creditors, consumers, governments and the environment" to determine the corporation's best interests.[3] In *BCE*, the Supreme Court expressly referenced the terms "good corporate citizen" and "responsible corporate citizen" when commenting on directors' duty to act in the best interests of the corporation.[4]

The Supreme Court of Canada's references to "good corporate citizen" and "responsible corporate citizen" are often viewed as "bold,"[5] "groundbreaking,"[6] "striking and candidly unexpected."[7] Meanwhile, since the Supreme Court did not provide any substantive legal analysis for the terms, many legal scholars and practitioners regard the references as "casual,"[8] "superfluous,"[9] "[of] conspicuous ambiguity"[10] in which "nobody really knows what it means,"[11] and that people can only "speculate on the intended meaning."[12]

The vagueness of good corporate citizenship (GCC) raises a number of questions when used in judicial settings. In the business world, GCC is often viewed as synonymous with corporate social responsibility (CSR).[13] It is unclear whether the Supreme Court had the notion of CSR in mind when referring to GCC. Since CSR is a far more common phrase than GCC in the English corpus,[14] why did the Supreme Court choose to adopt the term GCC instead of CSR if it intended to mean CSR? How did the Supreme Court come across the notion of GCC? Before the *BCE* decision, was there any Canadian case referring to GCC? If any, how did such cases illustrate the meaning of GCC? As it has been more than a decade since the Supreme Court made the *BCE* decision in 2008, how have lower courts applied the notion of GCC since then? In what contexts would courts expressly label a corporation as a good corporate citizen? Have Canadian courts understood the meaning of GCC in the same way? Is GCC really a synonym of CSR when being referenced in judicial cases? Does the notion of GCC carry any legal consequences? Fundamentally speaking, what is the function of express judicial reference to GCC or similar terms?

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3 *BCE*, *supra* note 1 at para 39.

4 *Ibid* at paras 66, 82.

5 Carol Liao, "A Canadian Model of Corporate Governance" (2014) 37:2 Dal LJ 559 (reporting that "one practitioner noted how the concept was 'a bit of surprise coming out of our courts … they are not usually quite so bold'" at 583).

6 *Ibid* (reporting that "the practitioner felt that, aside from the good corporate citizen concept, the decision wasn't 'groundbreaking'" at 576).

7 Jeffrey Bone, "Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?" (2011) 24:2 Can JL & Juris 277 at 302.

8 Ed Waitzer & Johnny Jaswal, "*Peoples*, *BCE*, and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439 at 441.

9 Sarah P Bradley, "*BCE Inc v 1976 Debentureholders*: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2010) 41:2 Ottawa L Rev 325 at 346.

10 Anita Anand, "Backing the BCE Board," online: *University of Toronto Faculty Blog* <www.law.utoronto.ca/blog/faculty/backing-bce-board>.

11 Liao, *supra* note 5.

12 Bone, *supra* note 7 at 299.

13 For business scholarship, see Archie B Carroll, "The Four Faces of Corporate Citizenship" (1998) 100 Bus & Society Rev 1; Dirk Matten & Andrew Crane, "Corporate Citizenship: Toward an Extended Theoretical Conceptualization" (2005) 30:1 Academy Management Rev 166 at 168–69; Andrew Crane & Sarah Glozer, "Researching Corporate Social Responsibility Communication: Themes, Opportunities and Challenges" (2016) 53:7 J Management Studies 1223 at 1227 (taking CSR synonyms including, among others, "corporate citizenship"). For general business information, see James Epstein-Reeves, "So You Call This CSR? Or One of Its Many Other Names?" *Forbes* (28 July 2011), online: <www.forbes.com/sites/csr/2011/07/28/so-you-call-this-csr-or-one-of-its-many-other-names/#3e434eb32d41>.

14 See data in the Appendix.

To answer these questions, this article presents an empirical analysis of the usage of GCC in Canadian court cases. The dataset includes 151 court decisions. Among various findings, this article shows that Canadian courts have expressly referenced GCC for a long time and in a variety of legal contexts beyond corporate law. Notably, the Supreme Court mentioned GCC in three different cases. The court cases show that GCC may carry different meanings in different contexts, including, among many others: legal compliance, philanthropy, attention to stakeholders' interests, voluntariness, non-financial objectives, and so on. From a legal perspective, GCC cannot be treated as a synonym of CSR, as is commonly understood, because GCC has its own distinctive legal implications. The usage of GCC in some court cases may be problematic in light of modern CSR development. For instance, GCC, when interpreted as corporate philanthropy, carries some controversial consequences in the environmental sentencing context. More importantly, the empirical evidence shows a virtual absence of corporate law cases that have ever meaningfully applied the stakeholder principle as stated in *BCE*. The oft-acclaimed corporate governance paradigm shift since *BCE* seems more symbolic than substantive in judicial practices.

While focusing on Canada, the findings in this article speak to the emerging global phenomenon of explicit CSR laws in which more and more countries are adopting laws that explicitly reference GCC and similar terms. Available evidence in Canada and other countries raises concerns about the enforceability and effectiveness of the apparently aspirational laws.

The remainder of this article proceeds as follows. Part II explains the empirical methodology. Part III provides a critical analysis of the usage of GCC in three types of court cases: Supreme Court cases, non-corporate law cases, and corporate law cases. Part IV compares the differences between GCC and CSR in judicial usage. Part V concludes with a modest reform direction and comparative insights into the global rise of explicit CSR law and stakeholder-oriented corporate governance.

II. EMPIRICAL METHODOLOGY

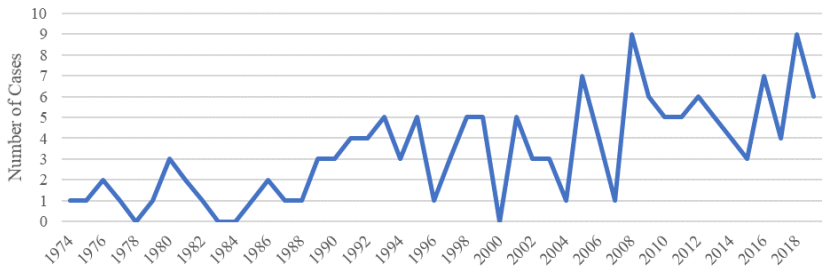
I collected court decisions from three databases including Lexis Advance Quicklaw, WestlawNext Canada, and CanLII. I collected cases where courts expressly referenced "good corporate citizen(s)," "good corporate citizenship," "responsible corporate citizen(s)," or "responsible corporate citizenship." Of note is that the Supreme Court used the terms subtly in the English version but not in the French version of the *BCE* decision. In the French version, both "good corporate citizen" and "responsible corporate citizen" were indistinguishably translated as "entreprise socialement responsible" (literally meaning "socially responsible company" in English). My dataset includes search results with the French term. The dataset does not include cases referring to "socially responsible company" in English, because the phrase is a derivative of the French translation of "good or responsible corporate citizen" rather than the English original. I applied the same search method to each of the three databases.

My dataset includes cases updated as of the end of December 2019. The cases were cross-referenced to eliminate duplication. One case was removed because the Court mistakenly

described an individual as a corporate citizen.[15] Cases arising from the same facts (trial and appeal) and containing the same text regarding the subject terms were counted as one case. As a result, it leaves a pool of 201 unique independent cases. Courts expressly referenced GCC in 151 of the 201 cases, while parties (as opposed to courts) mentioned GCC in the rest. Quite often, parties used the notion of GCC simply to describe their own behaviour or motivation in a favourable way.[16] The party-as-user cases are excluded from analysis because the purpose of my study is to understand how *courts* use the subject terms. As such, the analysis in this article is based on the 151 court-as-user cases. For convenience, I refer to such cases as GCC cases hereafter. I use the subject terms interchangeably when discussing the results below.

Figure 1 shows the temporal distribution of court cases with explicit reference to the subject terms. Despite the fluctuations across individual years, the general pattern shows an increasing trend. All the cases prior to 2008 were non-corporate law cases. The number of cases reached a record high in 2008 and again in 2018. On its face, the spike in 2008 appeared to be associated with the Supreme Court's *BCE* decision that expressly referenced the subject terms. Closer analysis of the data shows that *BCE* was not the reason. Of the eight cases (excluding *BCE*) in 2008, none of them referenced *BCE* and none involved corporate law. The absence of cases referencing *BCE* in that year could be mainly because the Supreme Court released the reasons for its decision in the *BCE* case near the end of the year (December 19), and it took time for the judgment to diffuse its impact. Between 2009 and 2019, there were 60 cases in total, with 36 cases (60 percent) referencing *BCE*.

FIGURE 1:
NUMBER OF GCC CASES OVER YEARS, 1970–2019



15 See *R v Datta*, [2011] OJ No 2685 (Sup Ct) at para 93. This case was concerned with the sentencing of Mr. Datta for his convictions for possession of illicit drugs. The Court commented that "[i]t appears that Mr. Datta is now motivated by the pending arrival of his new child to be a good dad and a good corporate citizen."

16 See e.g. *Gordner v 2384898 Ontario Ltd*, [2017] OJ No 987 (Sup Ct) at para 177. In that case, the defendant company denied its behaviour constituted a nuisance to its neighbours, arguing that it was "a good corporate citizen who reasonably and immediately responded to Police requests made to turn down the music in the early hours of the morning."

III. ANALYSIS OF EMPIRICAL RESULTS

In this part, I provide a detailed account of the usage of GCC in Supreme Court cases, non-corporate law cases, and corporate law cases, respectively.

A. GOOD CORPORATE CITIZEN IN SUPREME COURT OF CANADA CASES

BCE is neither the only nor the first case in which the Supreme Court referred to "good corporate citizen(s)." The empirical results show that the Supreme Court referenced the subject terms in three distinct cases. The best-known case was the *BCE* decision made in December 2008. In fact, earlier in the same year (March), the Supreme Court in its decision of *Tele-Mobile Co. v. Ontario*[17] explicitly quoted a source stating "duties as good corporate citizens." Just nine months before the *Tele-Mobile* case, the Supreme Court also expressly referenced "good corporate citizen" in the case of *Canada (Attorney General) v. JTI-Macdonald Corp*.[18] The Supreme Court mentioned the term GCC multiple times within a short period of about 18 months. A close look at the two cases prior to *BCE* may shed light on how the Supreme Court initially came across the notion of GCC and whether the three cases present consistency in the meaning of GCC. Close analysis of the three cases suggests that the Supreme Court's understanding of GCC varies from case to case.

In *JTI-Macdonald Corp.*, a group of tobacco manufacturers challenged the *Tobacco Act*[19] and the *Tobacco Products Information Regulations*,[20] claiming that various provisions including, among other things, the ban on lifestyle advertising and the ban on sponsorship promotion unjustifiably limited their right to freedom of expression under the *Canadian Charter for Rights and Freedoms*.[21] The Supreme Court found that each provision satisfied the proportionality test, as the suppressed speech was of relatively low value compared to the benefits of reducing tobacco consumption and addiction. In its discussion about sponsorship promotion, the Supreme Court noted that "[t]obacco manufacturers have a long tradition of sponsoring sporting and cultural events and facilities as a means of promoting their product and, they would argue, acting as good corporate citizens."[22] In this context, GCC meant philanthropy.

Tele-Mobile considered the appropriateness of awarding cost compensation to private actors who comply with the production order under the *Criminal Code*[23] — a judicial order to produce data for use in the criminal investigation. Telus was subject to two production orders to produce data records of a particular phone number. Telus sought exemptions from the orders on the ground that the financial burden of compliance would be unreasonable if there was no compensation. Justice Vaillancourt of the Ontario Court of Justice dismissed Telus' application, finding that the absence of compensation was not unreasonable.[24]

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17 2008 SCC 12 [*Tele-Mobile*].
18 2007 SCC 30 [*JTI-Macdonald Corp*].
19 SC 1997, c 13.
20 SOR/2000-272.
21 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
22 *Ibid* at para 117.
23 RSC 1985, c C-46.
24 *R v Tele-Mobile Company (Telus Mobility)*, 2006 ONCJ 229.

Notably, he stated that "[c]orporations are legal entities and as such have responsibilities as corporate citizens"[25] and "citizens, both individual and corporate,"[26] have a "legal duty" as well as a "social and moral duty … to cooperate with law enforcement agents," as indicated in the Supreme Court's decision in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research Restrictive Trade Practices Commission)*.[27] Telus appealed directly to the Supreme Court, arguing judges had the authority and discretion under the *Criminal Code* to issue a production order with a compensation condition.

The Supreme Court unanimously dismissed Telus' appeal. Drawing on various evidence including the Department of Justice policy reports and others, the Supreme Court concluded that the Parliament had not intended to provide judges with the authority to include compensation as a term of the production orders under the impugned sections of the *Criminal Code*. In support of this conclusion, the Supreme Court quoted the text of a discussion paper published by the Department of Justice:

> One way of alleviating the previously noted concern would be to specifically provide in the legislation creating these orders for the possibility for courts to provide for third parties to be compensated for the payment of any unduly burdensome or unreasonable costs. However, any specific provision to that effect would open once again the issue of why third parties should be compensated for work they undertake pursuant to their duties as good corporate citizens.[28]

The Supreme Court did not provide any direct comment on "duties as good corporate citizens" in the quoted text. However, in another paragraph of the same judgment, it clearly stated that "[t]he conclusion that a judge cannot order compensation for compliance with a production order also accords with what this Court affirmed as a general 'moral' and 'social' duty imposed on citizens."[29] The Supreme Court cited Justice Vaillancourt's calculation of the compliance costs as 0.058 percent of Telus' pre-tax earnings and accepted the interpretation that the amount was "the equivalent of a person earning $100,000 a year having to spend up to $58 to comply with jury duty."[30] It seems that the Supreme Court adopted Justice Vaillancourt's opinion. GCC in this case indicated legal and moral compliance.

BCE is a case that dealt with the oppression remedy. In the face of a potential takeover in 2006, the board of BCE Inc. decided to set up an auction process for multiple bidders to compete against each other. Three different groups made offers to BCE. All the three offers were structured as leveraged buyouts with Bell Canada, a subsidiary of BCE, taking on a substantial amount of new debt. The BCE board eventually accepted the offer from a group headed by the Ontario Teachers Pension Plan Board. Debentureholders of Bell Canada opposed the transaction and sought oppression relief as the new debt diminished the value of the debentures and caused the loss of investment grade designated by credit rating agencies. The Quebec Superior Court approved the transaction and dismissed the oppression

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25 *Ibid* at para 62.
26 *Ibid* at para 92.
27 *Ibid* at paras 43, 58, 61, 66, 70; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research Restrictive Trade Practices Commission)*, [1990] 1 SCR 425.
28 *Tele-Mobile*, *supra* note 17 at para 39 [emphasis added by the Supreme Court].
29 *Ibid* at para 50.
30 *Ibid* at para 68.

claim. On appeal by the debentureholders, the Quebec Court of Appeal set aside the Superior Court's decision on the basis that the BCE board had a duty to consider the interests of the debentureholders beyond their contractual rights set out in the indentures, and the board failed to do so in the context of the arrangement.

In its decision, the Supreme Court referred to GCC when elaborating on directors' duty to act in the best interests of the corporation. The Supreme Court provided that "[d]irectors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders … viewed as a good corporate citizen."[31] The Supreme Court also provided that where conflicts arise among stakeholders, "it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen."[32] Importantly, the Supreme Court further explained that "the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly … commensurate with the corporation's duties as a responsible corporate citizen."[33] In *BCE*, the meaning of GCC focused on the impact on stakeholders in the determination of the best interests of the corporation.

The three cases taken together provide a broader view on the Supreme Court's understanding of GCC. The Supreme Court cases present multiple dimensions of GCC, including philanthropy, legal and moral compliance, and the consideration of the interests of stakeholders (including shareholders and non-shareholders). *BCE* illustrates merely one, albeit important, aspect of GCC envisioned by the Supreme Court.

GCC as illustrated in the Supreme Court cases seems to overlap with the common understanding of CSR in business literature. The four-part definition of CSR proposed by Professor Archie Carroll, probably the most cited CSR definition in business scholarship, provides that CSR "encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time."[34]

B. GOOD CORPORATE CITIZEN IN NON-CORPORATE LAW CASES

The term GCC gained its attention from the legal community largely through *BCE*, a corporate law case. However, the term is more often used in non-corporate law cases, accounting for 75.5 percent (114/151) of the cases. The non-corporate law cases involve a wide range of law. The most frequent area involved is environmental law, accounting for 34.2 percent (39/114) of the non-corporate law cases. The second common area of law is occupational safety law, making up 11.4 percent (13/114) of the non-corporate law cases. The dominance of environmental and occupational health issues may be unsurprising given that CSR is often associated with environmental protection and employee treatment.

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31 *BCE*, *supra* note 1 at para 66.
32 *Ibid* at para 81.
33 *Ibid* at para 82.
34 Archie B Carroll, "A Three-Dimensional Conceptual Model of Corporate Social Performance" (1979) 4:4 Academy Management Rev 497; Archie B Carroll, "The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders" (1991) 34:4 Bus Horizons 39.

In terms of the substantive issue at dispute, a majority (58/114) of the non-corporate law cases involved sentencing in relation to regulatory violations. For instance, virtually all of the environmental law cases were concerned with the determination of appropriate fines resulting from violation of environmental law such as the *Fisheries Act*[35] (Canadian or provincial), *Environmental Protection Act*,[36] and so on. In determining the appropriate fines, the courts would consider a number of factors such as the nature of the environment, the extent of the injury, the extent of attempts to comply, criminal records and any other aggregating or mitigating factors. Reference to GCC often appeared in the discussion regarding the attempt to comply, past records, and other mitigating factors.[37]

As the GCC cases involved a variety of legal topics, it is challenging to use standardized categories to sum up all possible usages. Nevertheless, a perusal of the GCC cases indicates some common themes. Table 1 presents the number of non-corporate law GCC cases by the type of meaning used by the courts. Note that the categories in Table 1 do not intend to be exhaustive and exclusive. Some cases do not fit any of the defined categories while some cases may fall in more than one category.

TABLE 1:
NON-CORPORATE LAW GCC CASES BY THE TYPE OF MEANING USED BY COURT

Type of Meaning	Number of Cases (%)
Legal Compliance	55 (48.2%)
Philanthropy	8 (7.0%)
Community	8 (7.0%)
Beyond Profit	7 (6.1%)
Voluntariness	5 (4.4%)

Note that the denominator is 114, the number of non-corporate law cases.

1. LEGAL COMPLIANCE

The most common meaning of GCC is legal compliance, accounting for nearly 50 percent of the cases. Specifically, legal compliance often refers to either law-abiding behaviour, absence of prior violation records,[38] or prompt action to bring breaches into compliance.[39] For instance, in *Tele-Mobile Company, A Partnership v. Bell Mobility Inc.*,[40] Bell sought an

35 RSC 1985, c F-14.
36 RSO 1990, c E.19.
37 See e.g. *R v Village of 100 Mile House*, [1993] BCJ No 2848 (Prov Ct); *R v Weldwood Canada Ltd*, [1999] BCJ No 2242 (Prov Ct).
38 For instance, in the case of *R v Connors Bros Ltd*, [1991] NJ No 263 (SC (TD)), the Judge fined the defendant corporation under the *Criminal Code* of Canada in the amount of $40,000 for defrauding the government of money by issuing false employment records, noting that "[i]n arriving at this amount, I have not been unmindful of the plea of guilty which has saved the Court and the state considerable time and money, nor have I overlooked the fact that Connors Bros., Limited is a fishing company with a long tradition in Atlan Canada and is a good corporate citizen with no criminal record."
39 For instance, in *R v Shell Canada Products Ltd*, [1992] BCJ No 2975 at para 20 (Prov Ct), when determining the sentence for Shell's conviction for discharging toxic substance in a fishing area, the Court considered a number of mitigating factors and noted that "[t]he company considers itself, as does the court, a good corporate citizen and has taken steps to ensure this type of incident does not happen again."
40 2006 BCSC 329.

injunction to halt Telus' advertisement allegedly misleading and in contravention of the *Competition Act*.[41] The Court ruled that an injunctive relief was not necessary, noting that Telus made efforts to "comply with the direction of the court" and "these two large and responsible corporate citizens have both expressed to the court a desire to comply with the *Competition Act*."[42]

Note that a great majority (37/55) of the legal compliance cases are related to sentencing. Seven cases in different jurisdictions cited *R. v. United Keno Hill Mines Ltd.* for its good summary of factors in environmental sentencing, including the nature of the environment, the extent of the injury, criminality of conduct, the size of the corporation, remorse, any criminal record, the extent of attempts to comply, and so on.[43] GCC was often discussed under the factors of prior compliance records and attempts to comply.

GCC may be a debatable notion. Yet, there is less doubt that a good corporation should be expected to comply with the law. As with the CSR debate, even critics of CSR such as Milton Friedman accepted that corporations should make profits within the confines of the law.[44] Legal compliance is a very basic aspect of GCC. The observation that nearly a majority of the cases in the dataset viewed legal compliance as part of GCC suggests that Canadian courts echo this minimal agreement. By framing GCC as legal compliance and connecting it with mitigated sentencing, courts provide a judicial incentive for corporations to be a good corporate citizen. Companies may reduce liability risks through developing and implementing compliance programs — a benefit commonly cited in CSR literature.[45]

Meanwhile, it does not seem to require "complete" legal compliance to earn a GCC label attached by courts. In the highly cited case *United Keno Hill*, the accused company pleaded guilty of a charge of depositing waste in excess of the permitted amount.[46] When determining the appropriate fines, the Court noted that "[t]he evidence, with minor exceptions, portrays a corporation diligently trying to be a good corporate citizen."[47] A perusal of the Court decision suggests that the "minor exceptions" referred to the impugned violation and a prior albeit dissimilar environmental breach.[48] Such usage of GCC indicates that a "good" corporate citizen is not and does not have to be a perfect corporate citizen. Occasional minor

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41 RSC 1985, c C-34.

42 *Ibid* at paras 17–18.

43 See e.g. *R v Teck Cominco Metals Ltd*, 2003 NUCJ 5 at para 71 (expressly noting that "[a]n excellent summary of the principles and factors applicable to an environmental sentencing is set out in *R v United Keno Hill Mines Limited*"); *R v United Keno Hill Mines Limited*, [1980] YJ No 10 (Terr Ct) [*United Keno Hill*].

44 Milton Friedman, a leading advocate of profit maximization, maintained that "[t]hat responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom." See Milton Friedman, "The Social Responsibility of Business is to Increase its Profits" *The New York Times Magazine* (13 September 1970). See also Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89:2 Geo LJ 439 at 411 (observing that profit maximization should be within the confines of the law).

45 Elizabeth Pollman, "Corporate Social Responsibility, ESG, and Compliance" in D Daniel Sokol & Benjamin van Rooij, eds, *The Cambridge Handbook of Compliance* (Cambridge, UK: Cambridge University Press, 2020); B Kytle & JG Ruggie, "Corporate Social Responsibility as Risk Management: A Model for Multinationals" (2005) John F Kennedy School of Government, Working Paper No 10, online: CSRI <www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_10_kytle_ruggie.pdf>.

46 *United Keno Hill*, supra note 43 at para 64. As of mid-December 2019, 102 cases cited *United Keno Hill*.

47 *Ibid* at para 64.

48 *Ibid* at paras 55, 64.

violations of environmental law would not disqualify a corporation from being regarded as a good citizen.

2. PHILANTHROPY

The second popular meaning of GCC relates to charitable donations and philanthropic activities, presenting 7 percent of the non-corporate law cases. For example, in *R. v. Bata Industries Ltd.*, the Court refused to impose heavy fines on the corporation for an environmental offence by noting that:

> Some of the cases cited, and the interpretation given to these cases have an underlying theme that Corporate Canada will strive to find the cheaper method of achieving profits, disregarding the environment, unless the Courts are firm and punitive in sentencing. I do not subscribe to that theory. It should be remembered that Corporate Canada is a major contributor to most charities. They are a contributor to scholarship funds at many of our universities. They fund research and in my opinion strive to be good corporate citizens.[49]

Notably, in a few cases, the courts viewed charitable contributions as part of GCC and a mitigating factor for environmental or occupational safety convictions.[50] A corporation could be a good citizen by making charitable donations despite committing environmental or occupational safety crimes. The corporation could pay smaller fines because of its donations to charitable events or organizations (even if unrelated to environmental or employee safety concerns), though the courts made it clear that the accused corporation would "not [be] entitled to a dollar for dollar credit."[51] Many advocates of GCC and CSR would probably disagree with this usage, as nowadays the focus has shifted from charity to the social and environmental impact of the corporation's daily management.[52] Corporate donations are often suspected of being merely window dressing for corporate public image.[53] The view that a corporation could be a good citizen by virtue of its philanthropic contribution and thus deserved a lighter punishment for causing environmental harm would raise the concern of encouraging decorative public relations without improving the groundwork for sustainable business operations.

3. COMMUNITY

In eight cases, the meaning of GCC emphasized the corporation's important role in the community, often in terms of supporting the local economy and employment.[54] For instance,

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49 [1992] OJ No 667 at para 12 (Ct J (Prov Div)).

50 *R v Fiesta Party Rentals (1984) Ltd*, 2000 ABPC 218 [*Fiesta*]; *R v Fiesta Party Rentals Ltd*, 2001 CarswellAlta 1817 (QB) [*Fiesta* 2001]; *R v Harrison Hot Springs Hotel Ltd*, [1998] BCJ No 2426 (Prov Ct).

51 *Fiesta*, *ibid* at para 30; *Fiesta* 2001, *ibid* at para 15.

52 Simon Zadek, *The Civil Corporation* (London, UK: Routledge, 2012) at 29 (stating that "[t]oday, the focus is shifting from philanthropy to the impact of core business activities across the broad spectrum of social, environmental and economic dimensions represented by the vision of sustainable development").

53 Inger L Stole, "Philanthropy as Public Relations: A Critical Perspective on Cause Marketing" (2008) 2 Intl J Comm 20.

54 In an occupational safety case, the court commented on Shell Canada as "being a good corporate citizen in this community" in which it employed some 300 full time workers. See *R v Shell Canada Products Co*, 1998 CarswellOnt 7640 at paras 6, 29, 40 (Ct J (Prov Div)). In an insolvency case, where a creditor of the bankrupt corporation challenged an en bloc sale of assets to a buyer who planned to continue the business and retain existing employees, the Court noted that another creditor (the first mortgagee of the

in a case with respect to sentencing the defendant company for an environmental law breach, the Court noted that "the defendant is a good, corporate citizen … obviously the company employs approximately 50 people and is a good company in that sense within the Fraser Valley."[55] Notably, in the case of *R. v. Snap-On Tools Canada Ltd.*, the Court provided that "its stature in the community demonstrat[ing] [a] responsible corporate citizen" would be a distinct legal factor for reducing fines.[56] Although GCC could be a distinct mitigating factor, its weight in affecting the sentencing decision remained unclear, as the courts adopted a totality approach in which none of the factors alone was dispositive.[57]

4. VOLUNTARINESS

GCC is sometimes associated with voluntariness or action under no legal obligation. In such cases, courts often used expressions such as "voluntary co-operation" with legal authorities,[58] "voluntarily assumed [the] obligation,"[59] "willingly … without any court order or authorization,"[60] or "refrain[ing] from [doing the subject matter] … notwithstanding the fact that the applicants had the legal right to [do it] in any event."[61] Such interpretation of GCC is consistent with a common understanding of CSR as defined by the Government of Canada: "the voluntary activities undertaken by a company, over and above legal requirements."[62] Yet, modern CSR may no longer be understood simply as voluntary engagement without coercion, given the hardening of soft law in regulating corporate activities, especially in the international business domain.[63] Defining GCC as voluntary behaviour beyond legal compliance may encourage the false divide between law and ethics of business.[64] Moreover, as a company's core business is typically regulated by law to some degree, the voluntary GCC notion may encourage the company to engage in activities unrelated to its core business for window-dressing purposes.[65]

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properties) supported the deal and praised it as "a good corporate citizen, recogniz[ing] the social benefit of continued employment in the isolated Perth area of approximately 100 employees (a large number in the Perth job market area)." See *National Bank of Canada v Global Fasteners & Clamps Ltd*, 2001 CanLII 28448 at para 5 (Ont SC).

55 See *R v Fraser Valley Duck and Goose Ltd*, [1995] BCJ No 3088 at para 8 (Prov Ct)f.

56 [2002] OJ No 5520 at para 66 (Ct J (Gen Div)).

57 *Fiesta*, *supra* note 50, provides another example. In *Fiesta*, the Court adopted a residual category titled "other factors" and noted that GCC as corporate philanthropy could be a mitigating factor. Another case (*R v Independent Automatic Sprinkler Ltd*, 2009 ABQB 264 at para 16), citing *Fiesta*, also considered GCC as a distinct factor under the residual category.

58 *Canada (Department of National Revenue) (Re)*, [1998] OJ No 3517 at para 10 (Ct J (Prov Div)).

59 *Northland Bank v Zenetic Corporate Fitness Systems Co*, [1988] SJ No 230 at para 18 (QB).

60 *R v TELUS Communications Co*, 2015 ONSC 3964 at para 18.

61 *594431 Saskatchewan Inc (cob Clark's Crossing Brew Pub) v Saskatchewan (Liquor and Gaming Commission)*, [1995] SJ No 517 at para 5 (QB).

62 Global Affairs Canada, "Responsible Business Conduct Abroad," online: *Government of Canada* <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng#RBCGuidelines>.

63 Gerlinde Berger-Walliser & Inara Scott, "Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening" (2018) 55:1 Am Bus LJ 167.

64 Beate Sjåfjell, "Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation" (2011) 8 Eur Company L 56 at 58–59.

65 *Ibid* at 59.

5. BEYOND PROFIT

Seven cases indicated that GCC was associated with purposes beyond profit. For instance, in a case concerning the appropriate sentencing for environmental violations, the Court stated that:

> It is more important, in this court's opinion, that the environment be protected rather than the interests of any business enterprise. It's all very well and good to say that businesses create [j]obs and that puts money in the economy. Money doesn't mean anything if we don't have a fit environment for the people and the other creatures of this planet to live in and that's what the expression "sustainable development" is all about … I'm sure the company understands that, most companies do and obviously this company doesn't want a black eye and wants to come across as a good corporate citizen.[66]

In a similar case regarding environmental sentencing, the Court was concerned about the limitations of monetary fines because corporations tended to view fines as a normal cost of doing business.[67] The Court noted that:

> Fines fail to realign non-financial values that steer and influence corporate decision making. Profit making is not the only corporate objective. Monetary penalties alone cannot directly influence corporations to accord greater importance to non-monetary objectives such as their reputation as a responsible corporate citizen and the importance of ensuring due diligence in caring for communities and environments affected by their operations.[68]

Although the courts in such sentencing cases emphasized the importance of corporate purposes beyond profit, they concluded by mitigating fines for the violating corporations, for reasons such as remedial efforts, remorse, and limited effects of monetary punishment. The beyond-profit statement carried little or uncertain weight in the decisions.

An overall assessment of the non-corporate law cases suggests that the meaning of GCC was usually outdated and focused on mere legal compliance, philanthropy, or voluntariness. The usage of GCC was often either controversial or inconsequential. Such outdated and inconsequential usages of GCC in the non-corporate law cases highlight the distinct value of GCC envisioned in the corporate law case of *BCE* that seems more consistent with the modern concept of CSR: connecting GCC with directors' fiduciary duties and as such integrating social/environmental concerns into daily business management. It then raises an important empirical question: How have courts utilized the notion of GCC in corporate law cases before and after *BCE*?

C. GOOD CORPORATE CITIZEN IN CORPORATE LAW CASES

In the dataset, courts mentioned GCC in 37 corporate law cases. The first case occurred in 2008, which was the landmark case, *BCE*. In other words, *BCE* ushered in the use of GCC in corporate law cases. The other 36 cases cited *BCE*. Of the 36 cases, only one did not

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66 *R v IMP Aerospace Compoments Ltd*, 1995 CarswellNS 633 at para 2 (Prov Ct).
67 *R v Northern Metalic Sales*, [1994] YJ No 141 (Terr Ct).
68 *Ibid* at para 31.

involve an oppression claim. In that latter case, the Court considered whether the director of the corporation owed a fiduciary duty to the company's joint venture partner, citing *BCE* to conclude that the director's fiduciary duty was owed to the corporation only.[69]

Most (86 percent = 30/35) of the oppression cases citing *BCE* were sought by shareholders. These cases presented typical oppression scenarios in corporate law literature.[70] The oppressive behaviour complained of often involved dilution or deprivation of the applicant shareholder's ownership interests, personal use of corporate funds by those controlling the corporation, and refusal to the minority shareholder's access to corporate information. Such cases quoted the relevant *BCE* paragraphs to make the point that when acting in the best interests of the corporation, directors shall treat stakeholders in a fair manner. The stakeholders at issue in such cases were shareholders. In other words, a great majority of the corporate law cases remained focused on shareholders' interests.

Only five cases (excluding *BCE*) involved non-shareholder stakeholders. All of the applicants in these cases were creditors. In one case, a trade creditor alleged that the corporation's minority shareholder (also a corporate entity) acted oppressively by improperly directing corporate funds to another contract and thus leaving it unpaid.[71] The Court dismissed the plaintiff's claim, finding that the plaintiff was not a creditor or other stakeholder of the minority shareholder, given that the corporation and the minority shareholder were separate legal entities. As an *obiter dictum*, the Court quoted a GCC paragraph in *BCE* to affirm directors' fiduciary duty owed to the corporation, not to any particular stakeholders including creditors.

Two cases presented a similar situation where the judgment creditor sought oppression relief when the controlling shareholder of the debtor corporation intended to avoid the obligation by stripping the judgment debtor of its assets.[72] In both cases, the Courts found the defendant's act oppressive against the creditor. In one of the cases, the Court quoted a GCC paragraph in *BCE* to support the view that the oppression remedy could be a broad remedy for stakeholders including creditors under certain circumstances.[73] In the other case, the Court quoted the same GCC paragraph in *BCE* and found that the defendant corporation unfairly disregarded the creditor's reasonable expectations.[74] The citation to *BCE* was not critical for the ruling of these cases. Some precedents prior to *BCE* already considered similar fact patterns and provided useful guidance.[75]

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69 *Density Group Ltd v HK Hotels LLC*, 2012 ONSC 3294.

70 For an empirical overview of Canadian oppression cases, see Stephanie Ben-Ishai & Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995-2001" (2004) 30:1 Queen's LJ 79.

71 *BAE-Newplan Group Limited v Altius Minerals Corporation*, 2010 NLTD(G) 133.

72 *Dinis v Nobrega*, 2016 ONSC 6156 [*Dinis*]; *Builders' Floor Centre Ltd v Thiessen*, 2013 ABQB 23 [*Builders' Floor*].

73 *Dinis*, *ibid* ("[i]n each case, the question is whether in all the circumstances the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen" at para 15).

74 *Builders' Floor*, *supra* note 72 at paras 90–91.

75 See *C-L & Associates Inc v Airside Equipment Sales Inc*, 2003 MBQB 104; *Gignac, Sutts and Woodall Construction Co v Harris*, [1997] OJ No 3084 (Ct J (Gen Div)); *Adecco Canada Inc v J Ward Broome Ltd*, 2001 CanLII 28360 (Ont SC).

One of the five cases involved a creditor who was a former CEO of the company seeking oppression relief to recover loans to the defendant corporation, which was a public company. In this case, *Estate of John Wood v. Arius3D Corp.*, the creditor lent Arius3D money to finance a break fee required under an acquisition agreement that the company had negotiated with another company.[76] The promissory note from Arius3D made it clear that the company would repay the loan with the funds obtained from the closing of the designated financing deals. However, the company did not repay the loan, but instead used the money to pay payroll, tax arrears, and loans made by the directors. The creditor claimed oppression by the directors. The Court cited a GCC-paragraph in *BCE* to express the view that the oppression analysis should be specific to circumstances with "no absolute rules."[77] The Court noted that the company was in financial difficulties and the company broke many promises to many creditors including the complainant creditor. The Court concluded that the directors unfairly disregarded the complainant creditor's interests by repaying themselves loans for their own self-interests. Meanwhile, the Court concluded without any substantive analysis that paying overdue employee wages was not oppressive.[78] This case presented competing interests among different stakeholders including creditors, employees, the government, and shareholders. However, the Court's analysis was focused on directors' self-interests rather than balancing the interests of various stakeholders.

The only case that arguably considered the balance of different stakeholders' interests as part of GCC is *Lightstream Resources Ltd. (Re)*.[79] In this case, the company completed a transaction with its two large unsecured noteholders who agreed to exchange their unsecured notes for secured notes. The transaction excluded two smaller unsecured noteholders, who argued that the exclusion was oppressive and sought an order for the company to exchange their notes on the same terms. The Alberta Court of Queen's Bench ruled on a summary judgment basis in favour of the applicants. The Court applied the factors set out in *BCE* to determine whether the applicants had reasonable expectations. For the factor of fair resolution of conflicts, the Court observed that the company offered the applicants an opportunity to participate, but they rejected the opportunity because the terms were less favourable than the terms in the first exchange. The Court observed that the company viewed the offer as an attempt at a fair resolution of conflicting interests. After considering all the factors, the Court found that the applicants were not bound to fail at trial on the issue of whether they held a reasonable expectation, on the evidence that the applicants were repeatedly told that no exchange would be contemplated and if there would be one, all unsecured noteholders would be able to participate. As such, the Court considered whether the exchange transaction was oppressive, assuming the existence of reasonable expectations. The Court cited *BCE* for the view that directors had to resolve conflicts "in accordance with their fiduciary duty to act in the best interest of the company, viewed as a good corporate citizen."[80] The Court then applied the business judgment rule and opined that it would not second-guess whether the exchange transaction was in the corporation's best interest. Nevertheless, the Court found no evidence that the board was informed of the management's repeated assurances to the applicants; if such assurances were made, the board should have

76 2014 ONSC 3322.
77 *Ibid* at para 128.
78 *Ibid* at para 131.
79 2016 ABQB 665.
80 *Ibid* at para 75.

been informed and the board might have made a different decision. As a result, the Court concluded that the applicants were not bound to fail at trial. Finally, the Court ruled that the appropriate remedy was damages rather than an order to exchange securities. The Court considered the exchange order's impact on other creditors, noting that it would adversely affect the two large noteholders who had bargaining power to secure a favourable and exclusive transaction as well as other unsecured creditors who did not engage in any blameworthy conduct.

BCE is often celebrated as an authoritative (re)affirmation of the stakeholder-oriented corporate governance model in Canada.[81] It has been more than a decade since the Supreme Court made the decision in 2008. The empirical results show that corporate law cases since then have made little real headway in advancing the stakeholder principle. All the corporate law cases just mechanically cited the GCC text without giving any substantive analysis. The lack of substantive analysis for GCC could be explainable. The issues in such cases did not require the resolution of conflicts between shareholders and other stakeholder groups or between economic value and social or environmental goals. As shown, most cases focused on shareholders' interests, with only a few cases concerning creditors. No other stakeholders were involved. Most of the creditor cases involved fraudulent or self-dealing behaviour against creditors. Such creditor cases bore a close resemblance to many oppression precedents involving creditors and reached similar results regardless of *BCE*. There was only one case arguably involving the consideration of corporate development strategy and possible conflicts among different creditors. The empirical evidence lends weight to the view that the paradigm shift towards stakeholder-oriented governance remains uncertain.[82]

Why were there limited judicial applications to protect non-shareholder interests? It could be either the absence of substantive fiduciary breaches or oppressive acts, or the reluctance or inability of non-shareholders to bring legal action. Conspicuously, although the Supreme Court mentioned GCC in connection with directors' fiduciary duty to the corporation, none of the GCC cases were derivative actions. The absence of GCC derivative suits was consistent with the prior empirical observation of the general lack of derivative suits in Canadian corporate law.[83] This result might be attributable in part to the procedural requirement for bringing a derivative action. Still, the oppression remedy without the leave requirement presented limited evidence of any substantive use of GCC, with a few cases initiated by creditors but none by other stakeholders such as employees. This finding is consistent with an empirical study conducted years prior to *BCE* showing no freestanding employees successfully qualifying as eligible complainants for oppression remedy.[84] The

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81 See e.g. Charles-Étienne Borduas & Petra Vrtkova, "Stakeholders' Primacy: Paradigm Shift Confirmed," online: <www.nortonrosefulbright.com/en-ca/knowledge/publications/a979357b/stakeholders-primacy-paradigm-shift-confirmed>; Gesta Abols & Brad Freelan, "Shareholder Governance, 'Wall Street' and the View from Canada," online: *Harvard Law School Forum on Corporate Governance* <corpgov.law.harvard.edu/2020/02/16/shareholder-governance-wall-street-and-the-view-from-canada/>.

82 See Poonam Puri, "The Future of Stakeholder Interests in Corporate Governance" (2009) 48 Can Bus LJ 427 at 429 (arguing that *BCE* failed to provide clarity as to whether the Court supported shareholder primacy or stakeholder theory); Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48:2 Can Bus LJ 232; Patrick Lupa, "The BCE Blunder: An Argument in Favour of Shareholder Wealth Maximization in the Change of Control Context" (2011) 20 Dal J Leg Stud 1 (arguing the uncertainty of the *BCE* duty); Claudio R Rojas, "An Indeterminate Theory of Canadian Corporate Law" (2014) 47:1 UBC L Rev 59.

83 Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44:2 Alta L Rev 229 at 307 (finding only three derivative actions during the period of 1999–2004).

84 Ben-Ishai & Puri, *supra* note 70 at 102.

continued absence of stakeholders other than shareholders and creditors as complainants in derivative and oppression actions could be explained by practitioners still holding onto a view that shareholders are the interested parties and creditors step into shareholders' shoes when the company is in the vicinity of insolvency.[85] Courts as passive players relying on litigation brought to them would have no adequate opportunity to reflect the recent shift towards a more stakeholder-oriented governance regime.

The lack of meaningful application of the stakeholder principle since *BCE* further raises questions about how the *Canada Business Corporations Act*'s new section 122(1.1) would help develop a stakeholder-oriented decision-making process of the board of directors.[86] *CBCA* section 122(1.1) provides that, when acting with a view to the best interests of the corporation,

> directors and officers may consider, but are not limited to, the following factors:
>
> (a) the interests of
>
> (i) shareholders,
> (ii) employees,
> (iii) retirees and pensioners,
> (iv) creditors,
> (v) consumers, and
> (vi) governments;
>
> (b) the environment; and
>
> (c) the long-term interests of the corporation.

The amended *CBCA* provision does not expressly incorporate the term GCC as included in *BCE*. If GCC in *BCE* means balancing the interests of stakeholders in corporate decision-making, the amended *CBCA* provision appears to carry the substance of GCC as stated in *BCE*, albeit without the express label. Nevertheless, compared to the GCC paragraphs in *BCE*, *CBCA* section 122(1.1) not only removes the express label but also arguably downgrade the consideration of stakeholder interests from an obligation to an option.[87] *BCE* provides that "the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly … commensurate with the corporation's duties as a responsible corporate citizen,"[88] while *CBCA* section 122(1.1) merely states that directors *may* make such stakeholder consideration. Given the limited judicial progress in applying the stakeholder principle since *BCE*, there is little reason to be optimistic about more progressive judicial

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85 *Ibid* at 104.

86 RSC 1985, c C-44, s 122(1.1) [*CBCA*].

87 Scholars and practitioners are divided on whether directors are required to consider stakeholders' interests under *BCE*. See *supra* note 82. Some scholars interpreted the *BCE* statement as mandatory. See e.g. Jeffrey Bone, "Corporate Environmental Responsibility in the Wake of the Supreme Court Decision of BCE Inc. and Bell Canada" (2009) 27 Windsor Rev Leg Soc Issues 5; Rojas, *supra* note 82 at 86–88; Liao, *supra* note 5 at 851 (reporting that some practitioners took a mandatory view).

88 *BCE*, *supra* note 1 at para 82.

application of *CBCA*'s new section 122(1.1) in promoting sustainable business. At least for now, the widely-celebrated stakeholder model of Canadian corporate law seems more apparent than real in judicial practices.

IV. ALTERNATIVE INQUIRY: "CORPORATE SOCIAL RESPONSIBILITY"

The empirical analysis of court cases shows that GCC shares many similar elements with CSR. It raises an intuitive question: how has the term CSR been used in court cases? Is CSR comparable to GCC in terms of judicial usage? With "corporate social responsibility" as the keyword, the databases of Lexis Advance Quicklaw, Westlaw Next Canada, and CanLII returned a total of 19 unique independent cases as of December 2019.

A review of the CSR cases shows that virtually all of the CSR references were merely made because the term was part of the witness's job title (for example, vice president of CSR) or of the document title (for example, "CSR Standards," "CSR Report," "CSR policies"). In such CSR cases, the plaintiffs often alleged, among other claims, that the defendant corporations were negligent in failing to adhere to the defendants' internal CSR policies. For instance, in *Garcia v. Tahoe Resources Inc.*, seven individuals brought a claim against Tahoe Resources Inc. for injuries caused by the security personnel at the mine owned by Tahoe's subsidiaries in Guatemala.[89] On the negligence claim, the plaintiffs argued that "Tahoe breached its duty of care by failing to conduct adequate background checks on … the security personnel, failing to establish and enforce clear rules of engagement for them, failing to adequately monitor them, and failing to ensure they adhered to Tahoe's CSR policies."[90] In the dataset, similar well-known cases include *Araya v. Nevus Resources Ltd.* and *Choc v. Hudbay Minerals Inc.*[91] The cases are still ongoing. The question about whether corporate internal CSR standards are sufficient to ground liability for Canadian mining companies remains to be decided.[92]

In the dataset, there is only one case that referenced both the terms GCC and CSR — *Das v. George Weston Limited*.[93] That case illustrates an attempt to hold a multinational company liable for labour issues in global supply chains. Loblaws, one of Canada's largest retailers, outsourced its products to a manufacturer whose factory was in the Rana Plaza, a building in Bangladesh. In 2013, the building collapsed, causing death or injury to thousands of people, many of whom were allegedly workers of the contractor of Loblaws. In 2015, several putative representative plaintiffs commenced an Ontario class action against Loblaws for its direct liability in negligence and vicarious liability for its suppliers' negligence. Among various claims, the plaintiffs argued that "Loblaws adopted its CSR standards because of … the dependence and vulnerability of the workers in Bangladesh, whom Loblaws as a

89 2017 BCCA 39.
90 *Ibid* at para 26.
91 *Araya v Nevsun Resources Ltd*, 2017 BCCA 401, aff'g 2016 BCSC 1856; *Nevsun Resources Ltd v Araya*, 2020 SCC 5; *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414.
92 Fred Pletcher, Rick Williams & Ramsey Glass, "British Columbia Court of Appeal Rules on Corporate Veil Case: Garcia V. Tahoe Resources INC," online: *Borden Ladner Gervais* <blg.com/en/News-And-Publications/Publication_4839> (analyzing the recent cases on CSR standards as a possible source of liability).
93 2017 ONSC 4129.

responsible corporate citizen did not wish to be seen to be exploiting."[94] The plaintiffs alleged that "Loblaws breached its own CSR Standards as well as industry and international standards."[95] However, the Court dismissed the action. The Court found that Bangladeshi law applied to the plaintiffs' claims and under the applicable law, the claims were beyond the one-year limitation period and had no reasonable causes of action.

Why have courts preferred to use the term GCC and have virtually never adopted CSR? Citizenship itself has been a common legal term for a long time, originally applied to individuals, not corporations.[96] According to Lexis Advance Quicklaw, over 3,500 Canadian legislative instruments expressly include the term citizen(s). Citizenship is a fundamental legal concept, and courts have applied it on a regular basis. Naturally, courts may prefer to adopt a term with which they already have great familiarity. Unlike GCC, CSR was a term extraneous to law and imported to Canada. The term CSR was first coined in 1953 by American economist Howard Bowen in his book *Social Responsibilities of the Businessman*.[97] The term CSR has an extra-legal origin and has developed largely outside the purview of law.

From a legal perspective, the judicial preference of GCC over CSR may carry important legal implications. One distinction between GCC and CSR is the scope of obligations. CSR highlights social or extra-legal obligations, while GCC seems more concerned with the duty to comply with the law. Another related distinction is that CSR emphasizes responsibilities while GCC implies rights and duties. In this regard, GCC seems more favourable to corporations, compared to CSR. Treating corporations as citizens raises the question about whether corporations, like individuals, have political rights such as the freedom of expression.[98] Advocates of CSR may be concerned that the recognition of such political rights for corporations would increase corporate power and reduce corporate accountability.[99] Whether corporations should have political rights like natural individuals and to what extent their political rights (if any) may be limited are constitutional questions beyond the scope of this article.[100] The empirical findings here indicate that courts may have good reasons not to

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94 *Ibid* at para 77.

95 *Ibid* at para 122.

96 The legal status of Canadian citizens was first formally created in 1947 by the *Canadian Citizenship Act*, SC 1946, c 15. For a brief history of citizenship legislation in Canada, see Immigration, Refugees and Citizenship Canada, "History of Citizenship Legislation," online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/overview/history-legislation.html>.

97 Archie B Carroll, "Corporate Social Responsibility: Evolution of A Definitional Construct" (1999) 38:3 Bus & Society 268 at 291.

98 The Supreme Court of the United States considered this question in the controversial case of *Citizens United v Federal Election Commission*, (2010) 558 US 310 [*Citizens United*]. In that case, the US Supreme Court affirmed that corporations as persons have free speech rights and struck down a ban on campaign expenditures by corporations. By contrast, in many jurisdictions of Canada, corporations are prohibited from making political donations.

99 Cynthia A Williams & John M Conley, "Trends in the Social [Ir]Responsibility of American Multinational Corporations: Increased Power, Diminished Accountability?" (2013) 25:1 Fordham Envtl LJ 46; David G Yosifon, "The Public Choice Problem in Corporate Law: Corporate Social Responsibility after Citizens United" (2011) 89 NCL Rev 1197; Leo E Strine, Jr & Nicholas Walter, "Conservative Collision Course: The Tension Between Conservative Corporate Law Theory and *Citizens United*" (2015) 100:2 Cornell L Rev 335.

100 In *Harper v Canada (Attorney General)*, 2004 SCC 33, the Supreme Court held electoral spending limits as constitutional. One might argue that *Canada Without Poverty v Attorney General of Canada*, 2018 ONSC 4147, could be viewed as Canada's *Citizens United*. In this case, the Ontario Superior Court ruled that limiting the amount of money a charity could spend on non-partisan political activity infringed on freedom of speech. However, unlike *Citizens United*, charities remain prohibited from engaging in partisan political activities.

view GCC as a conceptual equivalent of CSR. As such, GCC and CSR are not synonyms as commonly believed and should be used carefully in legal contexts.

V. CONCLUSION

The empirical results in this article show that the term GCC bears different meanings depending on the context. Prior to *BCE*, GCC had already been used in a variety of non-corporate law contexts. However, quite often the usages of GCC in such non-corporate law cases were outdated or controversial. As modern CSR is increasingly focused on the integration of social, environmental, ethical, and human rights concerns into daily business management, *BCE*, in connecting GCC with directors' fiduciary duties to consider stakeholder interests, appears to be a legal milestone in promoting sustainable development. However, the legal significance of GCC as stated in *BCE* is largely more symbolic than substantive in judicial practices. The corporate law cases since then have made little progress in applying the stakeholder principle, despite Canadian courts' broad discretion to allow any person they consider appropriate to bring a derivative or oppression action. Given that there is no obvious doctrinal obstacle that forbids non-shareholders from making derivative or oppression claims under corporate law, it calls for judges and practitioners to exercise their creativity and willingness to advance the aspirational goals envisioned in the broad language of GCC and similar notions. The implementation of stakeholder-oriented corporate governance as aspired in *BCE* requires not only socially responsible behaviour of corporate executives but also social conscience of courts and lawyers.

More broadly, the Canadian empirical evidence offers comparative insights into two interrelated corporate law developments emerging around the world: the rise of stakeholder-oriented decision-making processes and the rise of explicit reference to CSR. In recent years, a growing number of countries have adopted corporate statutes that explicitly incorporate consideration of stakeholder interests into directors' fiduciary duties. The most studied country in this literature is the United Kingdom, whose *Companies Act 2006* section 172 requires directors to consider various stakeholders' interests when pursuing the benefits for shareholders.[101] Empirical evidence in the UK shows that since the law came into effect in 2006, only a few cases have applied the section and most of them have focused on the fair treatment between shareholders rather than any interests of other stakeholders.[102] Only one UK Court decision has been reported concerning the consideration of interests of non-shareholder stakeholders as outlined in section 172.[103] However, in that case, the Court provided that shareholders could seek merely to influence but not to force the board to consider stakeholders' interests because the decision-making power ultimately remained with the board of directors.[104] The Canadian empirical findings here provide additional evidence deflating the excitement about the rise of stakeholder-oriented corporate law. Case law in both the UK and Canada to date has made little development in how to apply the stakeholder consideration in decision making as aspired in the landmark statutes or decisions. In both jurisdictions, most of the cases remain focused on shareholders' interests and unrelated to

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101 (UK), c 46, s 172.

102 Georgina Tsagas, "Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures" in Nina Boerger & Charlotte Villiers, eds, *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Oxford: Hart, 2018) 137–38.

103 *R (on the application of People & Planet) v HM Treasury*, [2009] EWHC 3020 (Admin).

104 *Ibid*.

any consideration about other stakeholders. Among the scant number of cases concerning non-shareholder stakeholders, the available judicial decision in the UK leaves the consideration of stakeholder interests at directors' discretion while the judicial cases in Canada present typical oppression scenarios resolved with pre-existing rules without recourse to new analysis.

Relatedly, in recent years, a growing number of countries have explicitly included CSR, GCC, or similar terms in their corporate statutes. Despite expressly referencing CSR or GCC, the corporate statutes themselves usually do not provide any definition for the terms. The meaning of CSR or GCC entails elaboration through regulations or judicial decisions. A comparative review suggests that the meaning of CSR and GCC varies from country to country and Canada has its own features. For instance, the *Company Law of People's Republic of China* expressly requires companies to "undertake social responsibility," and Chinese courts have used it as a basis to deny judicial dissolution sought by shareholders for "maintaining social stability."[105] Indonesia's corporate statute (2009) requires companies in the natural resources sector to implement "social and environmental responsibility,"[106] and Indonesian Constitutional Court (the highest court) has interpreted it as a duty to comply with existing laws governing the natural resources sector.[107] India's *Companies Act 2013* requires companies to set up a CSR committee tasked to advise the board on how to spend the requisite CSR fund and monitor the implementation — an obligation commonly interpreted as mandatory philanthropy.[108] South Africa's corporate statute requires large companies to set up a "social and ethics committee"[109] with a function to monitor the company's activities in relation to

> (ii) good corporate citizenship, including the company's
>
> (aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;
>
> (bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
>
> (cc) record of sponsorship, donations and charitable giving.[110]

GCC under South Africa's corporate law carries some meanings not seen in Canadian GCC cases.

From a comparative perspective, different countries have different understandings about CSR and GCC. The meaning of CSR or GCC is not universal but context-specific. The

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105 2006 (China), art 5. For detailed analysis of the law, see Li-Wen Lin, "Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China" Am J Comp L [forthcoming].

106 *Limited Liability Company Act* (Indonesia), No 40 of 2007, art 74.

107 Constitutional Court, Decision No 53/PUU-VI/2008 (Indonesia). See also Laurensia Andrini, "Mandatory Corporate Social Responsibility in Indonesia," (2016) 28:3 Mimbar Hukum 512.

108 (India) no 18, Acts of Parliament, 2013 s 135. For detailed analysis of the law, see Afra Afsharipour, "Redefining Corporate Purpose: An International Perspective" (2017) 40:2 Seattle UL Rev 465.

109 *Companies Act, 2008* (S Afr), No 71 of 2008, s 72(4) as amended by *Companies Amendment Act, 2001* (S Afr), No 3 of 2011.

110 *Companies Regulations, 2011* (S Afr), No R 351 of 2011, s 43(5)(ii).

legalization of CSR and GCC is often criticized for its lack of (clear) definition.[111] The context-specific nature of CSR and GCC suggests that the focus should not be on drafting a perfect definition of CSR or GCC but on institutional capacity building to deliver the concrete meaning sensitive to the context of each case. In terms of judicial capacity, it includes, but is not limited to, entrepreneurial lawyers who are motivated to bring creative claims as well as sympathetic judges who are willing to undertake an active role in legal and norm changes — an important task that the Canadian legal community needs to continue working on.

APPENDIX I:
PHRASE FREQUENCY IN THE ENGLISH CORPUS (1940–2008)[112]

111 Patricia Rinwigati Wassgstein, "The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications" (2011) 98 J Bus Ethics 455 at 461 (arguing that "[w]ithout the clear clarification that such a regulation would provide, Article 74 is more inspirational in character than it is any kind of operational regulation"); Knowledge@Wharton, "Corporate Social Responsibility in India: No Clear Definition, but Plenty of Debate," online: <knowledge.wharton.upenn.edu/article/ corporate-social-responsibility-in-india-no-clear-definition-but-plenty-of-debate/>; Lin, *supra* note 105. See also *supra* notes 8–12.

112 Google Book Ngram Viewer chart for "corporate social responsibility" and "good corporate citizen," 1980–2008, online: <books.google.com/ngrams>.

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