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THE CHAMELEON EFFECT: BEYOND THE BONDING HYPOTHESIS FOR CROSS-LISTED SECURITIES

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ABSTRACT

This paper is based on a presentation made at the New York Stock Exchange Conference on the Future of Global Equity Trading, March 12, 2004, Sarasota, FL.

Looking back, was it a momentary enthusiasm? The dramatic increase in cross-listed securities, particularly in the United States, was one of the remarkable phenomena of the 1990s capital markets. The bonding, or corporate governance, hypothesis was one of the more intriguing theories to surface to explain the phenomenon. Cross-listing, the hypothesis suggested, might be a bonding mechanism by which firms, incorporated in a jurisdiction with "weak protection" of minority shareholder rights or poor enforcement mechanisms, could voluntarily subject themselves to higher disclosure standards and stricter enforcement of the US markets in order to attract investors. By focusing on shareholder protection as key to cross-listing, the bonding hypothesis became inextricably linked to an important and influential body of academic work, the "law and finance" literature.

As intriguing as the bonding hypothesis is, this article argues that it offers only a partial explanation for the cross-listing phenomenon in the United States in the 1990s. Largely overlooked has been the main motor driving the exponential growth of cross-listings on the NYSE and NASDAQ in the 1990s: Canadian-based interlisted corporations (CBIs). CBIs form the largest single group of interlisted foreign corporations in the United States, by a huge margin, representing over 25% all interlistings on the NYSE, NMS-NASDAQ and AMEX in 2004. In fact, Canadian issuers form the largest single group of foreign private issuers (FPIs) in the United States, period. In 2004, there were nearly five times as many Canadian FPIs as the next largest national group, United Kingdom issuers.

The bonding hypothesis does not explain CBIs easily. CBIs do not come from a "weak investor protection" jurisdiction and, for a variety of reasons and in a number of ways, tend not to "signal" their entry into the US market. Rather than "bonding", CBIs have been adroitly exploiting what financial economists have described as the "home bias" of U.S portfolio investors. CBIs have been, at least until very recently, chameleons, deliberately blending into the woodwork of the US markets.

This article will look at what makes CBIs different from most other interlisted companies and why the bonding hypothesis may not be explanatory of their behavior. In doing so, the article questions some of the underlying assumptions of the law and finance literature *which supports the bonding hypothesis. Finally, the article considers implications of the CBI experience which may merit further consideration going forward.*

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I. Introduction

Looking back, was it a momentary enthusiasm? [1] The dramatic increase in cross-listed securities, particularly in the United States, was one of the remarkable phenomena of the

[1] In the post-Sarbanes-Oxley environment, delisting by non-U.S. issuers from U.S. exchanges has become a prominent issue of the day. Between 1990 and 1999, 10 foreign firms deregistered with the U.S. SEC, whereas between 2000 to 2005, 110 firms deregistered. *See* Andras Marosi & Nadia Ziad Massoud, *"You Can Enter but You Cannot Leave..." – U.S. Securities Markets and Foreign Firms,* Table 1, *available at* SSRN: http://ssrn.com/abstract=882152, (February 2006). According to the Wall Street Journal, $9 out of every $10 raised by foreign companies through new stock offerings in 2000 was done in New York rather than London or Luxembourg. "By 2005, the reverse was true: Nine of every 10 dollars was raised through new company listings in London or Luxembourg, the biggest spread favoring London since 1990." *See*

1990s capital markets. In the ten year period from 1990 to 2000, the number of foreign corporations listed on the two main U.S. exchanges increased 450%.[2] In the same ten year period, American Depositary Receipt programs increased over 500%.[3] Listing and trading in the United States by non-U.S. issuers is often by way of American Depositary Receipts, or "ADRs", a form of derivative security.[4] Leading the charge, it appeared, were Latin American issuers.[5]

New York Loses Edge in Snagging Foreign Listings, WALL ST. J., Thursday, January 26, 2006, at C1. The pressure, primarily from European issuers already listed in the United States, to permit non-U.S. corporations to delist and terminate their reporting obligations with the U.S. SEC, has been so intense as to prompt a proposed rule change by the SEC. Currently deregistration of a non-U.S. issuer is permitted only if it has fewer than 300 U.S. shareholders under rules adopted in 1964 and last amended in 1983. Under the proposed rule, a non-U.S. company that is listed in its home country would be able to terminate the SEC registration of its shares if it has been registered for two years, has filed all required SEC reports, has not offered its securities in the U.S. market for a year (including in a Rule 144A transaction or other private placement) and meets one of two quantitative tests: (i) 5% or less of its public float is held by U.S. residents; or (ii) if a well known seasoned issuer, 10% of its public float is held by U.S. residents provided that 5% or less of worldwide trading volume ins in the Untied States. *See* Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports under Section 15(d) of the Securities Exchange Act of 1934, Release No. 34-53020; International Series Release No. 1295; File No. S7-12-05, *at* http://www.sec.gov/rules/proposed/34-53020.pdf (February 28, 2006).

[2] *See* JOHN C. COFFEE, COMPETITION AMONG SECURITIES MARKETS: A PATH DEPENDENT PERSPECTIVE, at 18 (Colum. L. & Econ., Working Paper No. 192, 2002).

[3] *Id.* at 17. STIJN CLAESSENS ET AL., STOCK MARKETS IN TRANSITION ECONOMIES, at 17 (World Bank Financial Sector Discussion Paper No. 5, Sep. 2000).

[4] "ADRs were developed by JP Morgan in 1927 as a vehicle for investors to register and earn dividends on non-U.S. stock without direct access to the overseas market itself. U.S. depositary banks hold …overseas securities in custody in the country of origin and convert all dividends and other payments into U.S. dollars to receipt holders in the United States. Investors, therefore, bear all currency risk and indirectly pay fees to the depositary bank. Each depositary receipt denotes shares that represent a specific number of underlying shares in the home market, and new receipts can be created by the bank for investors when the requisite number of shares are [sic] deposited in their custodial account in the home market. Cancellations or redemptions of ADRs simply reverse the process." *See* Stephen R. Foerster & G. Andrew Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States,* 54 J. FIN. 981, 983 (1999).

[4] "ADRs were developed by JP Morgan in 1927 as a vehicle for investors to register and earn dividends on no-U.S. stock without direct access to the overseas market itself. U.S. depositary banks hold that overseas securities in custody in the country of origin and convert all dividends and other payments into U.S. dollars to receipt holders in the United States. Investors, therefore, bear all currency risk and indirectly pay fees to the depositary bank. Each depositary receipt denotes shares that represent a specific number of underlying shares in the home market, and new receipts can be created by the bank for investors when the requisite number of shares are deposited in their custodial account in the home market. Cancellations or redemptions of ADRs simply reverse the process." *See* Stephen R. Foerster & G. Andrew Karolyi*, The Effects of Market Segmentation and investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States*, 54 J. FIN. 981, 983 (1999).

[5] *See* Coffee, *supra* note 2, at 17.

The cross-listing phenomenon attracted a considerable amount of academic scrutiny, primarily among financial economists.[6] The endeavor was to determine the motivations

[6] Forrester & Karolyi, *supra* note 4; Carol A. Frost, Elizabeth Gordon, & Andrew Hayes, *Stock Exchange Disclosure and Market Development: An Analysis of 50 International Exchanges*, J. ACCT. RES. (June, 2006). Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?,* 75 J. FIN. ECON. 319 (2005); Magnus Dahlquist, Lee Pinkowitz, Rene M. Stulz & Rohan Williamson, *Corporate Governance and the Home Bias,* 38 J. FIN. & QUANTITATIVE ANALYSIS 87 (2003); Nuno G. Fernandes & Miguel A. Ferreira, *Does International Cross-listing Really Improve the Information Environment?*, EFA 2005 Moscow Meetings, *available at* SSRN: http://ssrn.com/abstract=676653 (January 2006); Craig Doidge, Andrew Karolyi & Rene M. Stulz, *Why are foreign firms listed in the U.S. worth more?,* Nat'l Bureau Econ. Res. *at* http://www.nber.org/papers/w8538.pdf; Shmuel Baruch, Andrew Karolyi & Michael Lemmon, *Multi-Market Trading and Liqudity*: *Theory and Evidence at* http://home.business.utah.edu/finsb/BaruchKarolyiLemmon%20_June%201_2005.pdf; KATHERINE SMITH & GEORGE SOFIANOS, THE IMPACT OF AN NYSE LISTING ON THE GLOBAL TRADING OF NON-U.S. STOCKS, (NYSE Working Paper 97-02, June 1997), *available at* http://www.nyse.com/pdfs/wp97-02.pdf; SERGI SARKISSIAN & MICHAEL SCHILL, ARE THERE PERMANENT VALUATION GAINS TO OVERSEAS LISTING? EVIDENCE FROM MARKET SEQUENCING AND SELECTION, (Working Paper July 26, 2005), *available at* http://neumann.hec.ca/cref/sem/documents/051007.pdf (an older copy is EFA 2004 Maastricht Meetings Paper No. 4491, Darden School of Business, Working Paper No. 03-03, July 25, 2003, *available at* SSRN: http://ssrn.com/abstract=395140); CRAIG ANDREW DOIDGE, GEORGE ANDREW KAROLYI, KARL V.LINS, DARIUS P. MILLER & RENÉ M. STULZ, PRIVATE BENEFITS OF CONTROL, OWNERSHIP, AND THE CROSS-LISTING DECISION, (NBER Working Paper No. W11162 March 2005), *available at* SSRN: http://ssrn.com/abstract=679321; Pamela Moulton & Li Wei, *A Tale of Two Time Zones: Cross-Listed Stock Liquidity and the Availability of Substitutes* (September 19, 2005), *available at* SSRN: http://ssrn.com/abstract=807704; LUZI HAIL & CHRISTIAN LEUZ, COST OF CAPITAL AND CASH FLOW EFFECTS OF U.S. CROSS-LISTINGS, (UPenn Wharton, Working Paper), *available at* http://finance.wharton.upenn.edu/weiss/conf_papers/HL%20ADRs%20Apr05.pdf; WARREN B. BAILEY, GEORGE ANDREW KAROLYI & CAROLINA SALVA, THE ECONOMIC CONSEQUENCES OF INCREASED DISCLOSURE: EVIDENCE FROM INTERNATIONAL CROSS-LISTINGS, (Dice Center, Working Paper No. 2002-4; AFA 2003 Washington, DC Meetings, February 2005), *available at* SSRN: http://ssrn.com/abstract=304560; Kent Baker, Jon Nofsinger & Daniel Weaver, *International Cross-listing and Visibility*, J. FIN. & QUANTITATIVE ANALYSIS 37, at 495, (2002); Rene Stulz, *Why are foreign firms listed in the U.S. worth more?,* 71(2)J. FIN. ECON., at 205 (2004); Vihang Errunza & Darius Miller, *Market segmentation and the cost of capital in international equity markets,* 35(4) J. FIN. & QUANTITATIVE ANALYSIS, at 577 (2000); Andrew Karolyi, *Why do companies list shares abroad? A survey of the evidence and its managerial implications*, vol. 7 Financial Markets, Institutions and Instruments, Blackwell: Boston, 1998; MICHAEL KING & DAN SEGAL, INTERNATIONAL CROSS LISTING AND THE BONDING HYPOTHESIS, (Bank of Canada, Working Paper No. 2004-17, May 2004), *available at* SSRN: http://ssrn.com/abstract=555953.; Dong Wook Lee, *Why Does Shareholder Wealth Increase When Non-U.S. Firms Announce Their Listing in the U.S.?* (August 2004), *available at* SSRN: http://ssrn.com/abstract=422960; Christian Leuz, *Discussion of ADRs, Analysts, and accuracy: Does Cross-lisitng in the Untied States improve a firm's information environment and increase market value?,* 41 J. ACCT. RES. 347 (2003); Darius Miller, *The market reaction to international cross-listings: Evidence form depositary receipts*, 51 J. FIN. ECON. 103 (1999); William Reese & Michael Weisbach, *Protection of minority shareholder interests , cross-listings in the United States, and subsequent equity offerings,* 66 J. Fin. Econ. 65 (2002); SERGEI SARKISSIAN & MICHAEL J. SCHILL, ARE THERE PERMANENT VALUATION GAINS TO OVERSEAS LISTINGS? EVIDENCE FROM MARKET SEQUENCING AND SELECTION, (Darden School of Business, Working Paper No. 03-03; EFA 2004 Maastricht Meetings Paper No. 4491, July 25, 2003), *available at* SSRN: http://ssrn.com/abstract=395140.

and significance of the marked surge in cross-listings. Why was there this sudden interest by non-US firms in listing in the United States? What was the significance for the U.S. markets? The home markets? International markets?

A number of explanations for the cross-listing phenomenon were posited, the most traditional of which is sometimes referred to as the "market segmentation" theory; by cross-listing, issuers increase liquidity and deepen the pool for their securities, leading to increased share valuations, both abroad and at home.[7] Other hypotheses linked product market expansion with the cross-listing of securities by a manufacturer or service provider. [8] Simple geographic proximity was also suggested as a reason [9] Sarkissian and Schill, in examining all cross-listed companies on the major world exchanges, found "strong evidence that cross-listing clusters regionally."[11] Although they were unable to discriminate among the underlying causes of their results, geographic, cultural, economic, and industrial proximity were all supported by their findings.[12] Coffee has, in retrospect, suggested that the rise in interest of cross-listings on NASDAQ during the 1990s might have been merely a side-effect of the technology bubble.[13] A more prosaic explanation of the exponential rise in foreign listings on the New York Stock Exchange during the same period might be the persuasive marketing efforts of the Exchange itself, which

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[7] *See* DP Miller, *The Market Reaction to International Cross-listings: Evidence from Depository Receipts*, 51 J. FIN. ECON. 103 (1999); *see* Stephen R. Foerster & G. Andrew Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States*, J. FIN. 54 (3), 981-1013 (1999).
[8] Foerster & Karolyi also found support for such a theory, id. at 4.
[9] Sergei Sarkissian & Michael J. Schill, *The Overseas Listing Decision: New Evidence of Proximity and Preference,* 17(3) THE REVIEW OF FIN. STUDIES 769 (2004).
[10] *See, e.g.,* LINDA L. TESAR & INGRID M. WERNER, HOME BIAS AND THE GLOBALIZATION OF SECURITIES MARKETS (Nat'l Bureau of Econ. Research, Working Paper no. 4218, 1992).
[11] Sarkissian & Schill, s*upra* note 9, at 3.
[12] Id. at 54.

together with accommodations provided to non-US issuers to the listing rules (discussed *infra)* made cross-listing a more attractive proposition. [14]

Among the copious literature on the cross-listing phenomenon, the bonding hypothesis was one of the more intriguing theories to surface.[15] "A newer interpretation is today emerging that cross-listing may also be a bonding mechanism by which firms incorporated in a jurisdiction with weak protection of minority rights or poor enforcement mechanisms can *voluntarily* subject themselves to higher disclosure standards and stricter enforcement in order to attract investors who would otherwise be reluctant to invest (or

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[13] *See* Coffee, *supra* note 2, at 54.

[14] In the late 1980s, the New York Stock Exchange set about identifying non-U.S. issuers, particularly Canadian issuers, which would meet its listing criteria in an effort to promote new listings. Conversation with Robert G. Britz, New York Stock Exchange, New York, NY (1989). Recognizing the functional equivalence of foreign corporate governance mechanisms, The New York Stock Exchange has provided regulatory accommodations for non-U.S. issuers which continue to this day. The relevant rules are to be found in s. 303A of the NYSE Listed Company Manual. Foreign private issuers, as defined by rule 3b-4 under the Exchange Act, are permitted to follow home country practice instead of the provisions listed in 303A with the following exceptions: such companies are required to comply with the requirements of s.303A.06 (must have an audit committee that satisfies the requirements of 10A-3 of the Exchange Act), 303A.11 (must disclose any significant ways that their corporate governance practices differ from those required by domestic companies under NYSE listing standards), 303A.12(b) (the CEO must promptly notify the NYSE in writing after any executive officer becomes aware of any material non-compliance with the applicable provisions of 303A), and 303A.12(c) (must submit an executed written affirmation annually to the NYSE, and an interim affirmation whenever a change occurs to the board or any committees subject to 303A). Additionally, in 1994 a longstanding debate over "one share/one vote" was resolved by SEC Rule 19c-4 which required stock exchange rules to preclude *domestic* listed issuers from *creating* disparate voting structures. However, the rule did not preclude initial public offerings of dual class shares nor the initial listing of companies with existing dual class shares listed elsewhere. "Most other jurisdictions around the world seem to have few restrictions on issuing dual-class stock." *Second Class Investors – The use and abuse of subordinated shares in Canada,* Shareholder Association for Research and Education, Vancouver, Canada, April 2004, at 10; *See* ALSO ANETE PAJUSTE, DETERMINANTS AND CONSEQUENCES OF THE UNIFICATION OF DUAL-CLASS SHARES*,* (European Central Bank, Working Paper Series No. 465, March 2005), *available at* http://www.ssrn.com/abstract_id 683158 and http://www.ecb.int. The dual class share structure is now making its appearance in U.S. *domestic* listed companies; Google is a prime example.

[15] *See* Coffee, *supra* note 2; Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U.L. REV. 641 (1999). *See also* Rene Stultz, *Globalization, Corporate Finance and the Cost of Capital*, 12 J. APPLIED CORP. FIN. 9 (1999); OWEN FUERST, A GAME THEORETIC ANALYSIS OF THE INVESTOR PROTECTION REGULATIONS ARGUMENT FOR GLOBAL LISTING OF STOCKS (Working Paper, 1998); MICHAEL R. KING & DAN SEGAL, INTERNATIONAL CROSS-LISTING AND THE BONDING HYPOTHESIS (Bank of Canada Working Paper No. 2004-17, May 2004).

who would discount such stocks to reflect the risk of minority expropriation)".[16] The bonding, or corporate governance, hypothesis for cross-listing was "consistent with a new academic literature that argues that liquid and deep securities markets can develop only in jurisdictions that protect the rights and expectations of minority shareholders".[17]

As the bonding hypothesis was picked up and examined, it came to stand for the proposition that the "principal motivation for cross-listing is investor protection."[18] Firms "from countries with poor protection of minority shareholders signal their desire to respect rights of shareholders by listing in a jurisdiction with higher scrutiny, tougher regulation and better enforcement."[19] And so, the bonding hypothesis became inextricably linked to an important and influential body of academic literature often referred to as the "law and finance" literature.[20]

As intriguing as the bonding hypothesis is, this article argues that it offers only a partial explanation for the cross-listing phenomenon in the United States in the 1990s. Largely overlooked was the main motor driving the exponential growth of cross-listings on the

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[16] *See* Coffee, *supra* note 2, at 11. "Bonding" is a term of art in modern institutional law and economics. It refers to the costs or liabilities that an agent or entrepreneur will incur to assure investors that it will perform as promised, thereby enabling it to market its securities at a higher price. The paradigmatic example would be the surety bond purchased by the agent and protecting its shareholder principals. The term was coined in Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure,* 3 J. FIN. ECON. 305 (1976); *see* Coffee, *supra* note 2, at fn. 22.

[17] *See* Coffee, *supra* note 2, at 4-5. "The seminal work of La Porta, Lopez-de-Silanes, Shleifer & Vishny ("LLS&V") has established the existence of two rival structures of share ownership – dispersed ownership and concentrated ownership, and that the structure of share ownership in a given jurisdiction correlates with significant differences in the legal protection provided to minority shareholders." *See also* Coffee, *supra* note 2, at fn. 10.

[18] *See* King & Segal, *infra* note 21, at 1.

[19] *Id*. An interesting analogy, brought to the author's attention by Professor Thomas Cotter, is to the U.S. patent system. Clarisa Long has written about patents as signals; companies want to convey credible private information about their value by registering a patent in the United States. *See Patent Signals*, 69(2) U. CHI. L. REV. 625 (2002).

NYSE and NASDAQ in the 1990s: Canadian-based interlisted corporations (CBIs, in the jargon of the Toronto Stock Exchange).[21] The bonding hypothesis does not explain CBIs easily. Rather than "bonding", CBIs have been adroitly exploiting what financial economists have described as the "home bias" of U.S portfolio investors.

This article will look at what makes CBIs different from most other interlisted companies and why the bonding hypothesis may not be explanatory of their behavior. In doing so, the article questions some of the underlying assumptions of the law and finance literature which supports the bonding hypothesis. Finally, the article considers implications of the CBI experience which may merit further consideration going forward.

II. Beyond the Bonding Hypothesis

CBIs form the largest single group of interlisted foreign corporations in the United States, by a huge margin: 189 corporations at the end of 2004 representing over 25% of all interlistings on the NYSE, NMS-NASDAQ and AMEX.[22] In fact, Canadian issuers form the largest single group of foreign private issuers (FPIs)[23] in the United States,

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[20] *See* Coffee, s*upra* note 2; *see also* La Porta, Lopez-de-Silanes, Shleifer, & Vishny, *Law and Finance,* 156(2) INT'L. LIBRARY OF CRITICAL WRITINGS IN ECON. 435 (2003).

[21] This paper, in fact, originated as a commentary to one of the few academic articles to look specifically at CBIs. MICHAEL R. KING & DAN SEGAL, INTERNATIONAL CROSS-LISTING AND THE BONDING HYPOTHESIS, (Bank of Canada, Working Paper No. 2004-17, May 2004), available at SSRN, http://ssrn.com/abstract=555953; *See* Sarkassian, *supra* note 6; s*ee* Usha R. Mittoo, *infra* note 27.

[22] NYSE 18.6%; AMEX 86.6% ; NMS NASDAQ 22.4%. For the Nasdaq Stock Market –Small Cap Market and Over-the-Counter market, the percentages represented by Canadian FPIs are even more striking: 48.9% and 63.6%, respectively. *Foreign Companies registered and reporting with the U.S. Securities and Exchange Commission,* SEC, Office of International Corporate Finance (December 31, 2004).

[23] "Foreign private issuer" ("FPI") is defined in Rule 3b-4 under the Exchange Act (17 CFR 240. 3b-4) and Rule 405 under the Securities Act (17 CFR 230. 405) to include all foreign issuers other than (i) foreign governments, and (ii) foreign issuers that have more than 50 percent of their outstanding voting securities

period. In 2004, there were nearly five times as many Canadian FPIs as the next largest national group, United Kingdom issuers.[24] Four hundred and ninety-seven (497) Canadian corporations were SEC reporting issuers at the end of 2004, representing 40% of FPIs registered and reporting in the United States.[25] Over the period 1990 to 2003, Canadian issuers accounted for 40 % of public offerings in the United States by non-U.S. issuers.[26]

None of this might be surprising, given the geographic proximity of the two countries and the increasing degree of economic integration. But in the literature examining the cross-listing phenomenon, the role of CBIs has been often overlooked. [27] There are some reasons for this.

It is actually surprising, though, that cross-listing in the United States is such a recent phenomenon for CBIs, given the geographic proximity to the United States (which has not changed over the past two centuries). [28] Economic integration is not a completely new development either. Be that as it may, between 1928 and 1976, only four Canadian

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held of record by U. S. residents and that also have: U. S. citizens or residents making up a majority of their executive officers and directors; more than 50 percent of their assets located in the United States; or their business administered principally in the United States. *See* 17 CFR 240, 3b-4; 17 CFR 230.450.

[24] *Supra* note 22. Interestingly, Israeli issuers form the third largest national group of FPIs, and, for purposes of this paper, demonstrate the greatest similarity with Canadian issuers.

[25] *Id.*

[26] Canada represents over 40% of English common law cross-listings. *See* W.A. Reese, Jr. & Michael S. Weisbach , *Protection of Minority Shareholder Interests, Cross-listings in the United States, and Subsequent Equity Offerings,* 66 J. FIN. ECON. 65, at Table 2 (2002).

[27] *See* King & Segal, *supra* note 21; Usha R. Mittoo, *Globalization and the Value of U.S. Listing: Revisiting Canadian Evidence, 27:9 J. BANKING & FIN. 1629;* JORDAN I. SIEGEL, CAN FOREIGN FIRMS BOND THEMSELVES EFFECTIVELY BY RENTING U.S. SECURITIES LAWS? (AFA 2003 Washington DC Meetings, March 2004).

[28] *See* Sarkissian & Schill, *supra* note 9.

corporations listed on the NYSE .[29] In the 1980s, that number doubled (nine NYSE listings); NASDAQ saw 12 "listings" during that period [30]. In the 1990s the pace of cross-listing accelerated: there were five times as many listings by CBIs on the NYSE as in the 1980s (forty-five) and forty-three listings on NASDAQ. In the period of 2000 to 2005, forty-five CBIs were listed on the NYSE and twenty-nine on NASDAQ.[31]

So, why does the bonding hypothesis not adequately explain this sudden interest by CBIs in cross-listing in the United States? CBIs are unlike other foreign issuers for which the bonding hypothesis has been developed. [32] The case of CBIs, however, also throws into relief some of the assumptions which have supported, not just the bonding hypothesis, but a wider variety of theories about the nature and behavior of non-US issuers, and in particular, the level of protections afforded their investors.[33] These assumptions merit, and have been receiving, a closer look[34], and not just as they may be applicable (or inapplicable) to CBIs.

III. Uniquely Canadian

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[29] The four Canadian listings on the NYSE are: (1)Inco. Ltd. in 1928, (2)Alcan Inc. in 1950, (3)Nortel Network Corp. in 1975, and (4)BCE Incorporation in 1976. (Data obtained from the NYSE websites.) *See infra* Appendix 1.

[30] At the time NASDAQ was a quotations system, not an exchange.

[31] Data obtained from the NYSE and NASDAQ websites. *See infra* Appendix 2.

[32] Israeli companies are, on the other hand, quite like CBIs. Amir Licht has documented the practices of Israeli companies; *see* Licht, *infra* note 145.

[33] These assumptions arise out of the now prolific works by Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer, & Robert Vishny. ("LLS&V"). *See e.g.,* Rafael La Porta, et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 1 (2000); Rafael La Porta, et al., *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147 (2001).

[34] *See* Djankov, et al, *infra* note 147.

In addition to their dominating presence among non-U.S. issuers listing in the United States, CBIs are unique in a number of other ways. CBIs have almost never used American Depositary Receipts (ADRs) in order to enter the U.S. markets.[35] There is seamless, instantaneous, currency conversion between the Canadian and U.S. dollar; currency conversion is one of the marketing features associated with the use of ADRs. Canada is the dominant trading partner with the United States under the North American Free Trade Agreement (NAFTA);[36] the level of integration of trade in goods and services is very high. Finally, and for purposes of this analysis, perhaps most importantly, CBIs, unlike other issuers, have the benefit of regulatory choice in entering the U.S. market.[37]

A. ADRs and Canadian Issuers

ADRs are a form of derivative security developed by bank intermediaries based in the United States to facilitate U.S. trading in foreign securities.[38] Canadian issuers have virtually never used ADRs as a trading or listing vehicle. Difficulties associated with clearing and settlement procedures and currency conversion, both major factors originally justifying the expense and additional complexity of ADRs, were not compelling in the case of Canadian securities. In addition, the long familiarity of both Canadian issuers and

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[35] In fact, there have been two issues of ADRs by CBIs according to NYSE statistics; *see infra* Appendix 1.
[36] In 2003, the total trade between the United States and Canada amounted to 391,523.4 million dollars. The total trade between the United States and Mexico (the United States' second biggest trading partner) for the same year came to 231,471.8 million dollars. For 2004, as of June, the trade in goods between the United States and Canada made up 20.0 % of the United States' total trade in goods while trade between the United States and Mexico made up 11.8 % of this total. These statistics come from the U.S Census Bureau website. *See* Usha Mittoo, *supra* note 27.
[37] *See*, e.g., Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 Theoretical Inquiries L 387 (2001); Merritt B. Fox, *The Issuer Choice Debate,* Theoretical Inquiries L 563 (2001); Mary S. Head & Roberta S. Karmel, *Barriers to Foreign Issuer Entry into U.S. Markets*, 24 LAW & POL'Y. IN INT'L. BUS., at 199 (1993).

their financial intermediaries with the U.S. market meant that the ADR product held little attraction for them.

There are two implications for this paper which arise from the fact that Canadian issuers do not use ADRs. The first implication is that many of the studies looking at FPIs in the U.S. markets and cross-listing, in particular, have simply overlooked the most important subset of the market, Canadian issuers, because the data supporting the research is based on the existence of an ADR program.[39] The use of ADRs by foreign issuers in the United States has been so widespread, and the data associated with their use so visible, that some studies assume that ADRs represent the entire, or at least, most significant, universe of foreign issuers in the United States. [40]

The second implication goes directly to the heart of the bonding hypothesis. Because Canadian issuers do not use ADRs to list or trade their securities in the United States, their securities are, on their face, indistinguishable from those of domestic U. S. issuers. There is no “ADR” moniker to raise the red flag of “foreign private issuer”; the securities do not “signal” to the market.

Furthermore, CBIs deliberately avoid signaling. Distinguishing features in the corporate names of the older, established CBIs tend to disappear upon entry into the U.S. market; Bell Canada Enterprises becomes BCE; Bank of Montreal becomes BMO Group;

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[38] *See supra* note 2.
[39] *Id. See generally* Jerry Feigen*, Potential Exiting Through ADRs (and/or GDRs?) for International Private Equity Investor,* 13 AM. U. INT’L L. REV. 109 (1997); Joseph Velli: *American Depository Receipts: An Overview*, 17 FORDHAM INT’L L. J. 38 (1994); Bruce L. Hertz, *American Depository Receipts*,

Toronto Dominion Bank becomes TD (as in TD Waterhouse, now TD Ameritrade). As for more recently established corporations, national or geographic identifiers are not there; RIM did not choose to call itself "BlackBerry of Canada". [41] The CBIs are deliberately opting for a strategy of blending into the woods of the U.S. domestic marketplace.

This chameleon-like behavior is one factor which undermines the bonding hypothesis, in so far as it might have been applicable to CBIs. CBIs are not signaling to the market in a way predicted by the bonding hypothesis; quite the contrary.[42]

B. Regulatory Choice

Unlike other FPIs, many Canadian issuers also have a greater choice of regulatory regime when it comes to entering the United States, through a listing or otherwise. Currently, there are three different regulatory options available to the larger Canadian issuers raising capital or listing in the United States. Over the decades, Canadian issuers

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PRACTISING LAW INSTITUTE, COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES, 600 PLI/Comm 237 (1992).

[40] *Id.*

[41] It is likely that only the unfortunate, and extremely high profile, encounter with the vagaries of the U.S. patent system brought public attention to RIM's country of origin. In this regard, there may be another interesting analogy to patent law. Moore's article discusses patents and xenophobia; foreign companies register a large number of patents in the U.S. but, proportionally, lose their infringement cases more frequently. *See* Kimberly Moore, *Xenophobia in American Courts,* 97 NW. U. L. Rev. 1497 (2003). RIM's very public woes over its patent disputes (any publicity is good publicity) may be leading to a change in strategy for subsequent CBIs listing in the United States. Tim Horton's, a donut/light meal chain, is an icon in Canada, but relatively unknown in the United States. It listed on the NYSE very shortly after RIM settled its infamous patent dispute in early 2006. The NYSE took out a full page ad in the Wall Street Journal to trumpet the Tim Horton listing. The headline ran: "THE NEW YORK STOCK EXCHANGE. NOW SERVING CANADA'S FRESHEST NEW LISTING". The layout and style of the ad was evocative of a similar full page ad published in the Wall Street Journal a few days earlier by RIM (which is listed on NASDAQ). Is the implication that that coffee and donuts are as essential to the functioning of the US economy as the ubiquitous BlackBerry? *See* WALL ST. J., Thursday, March 30, 2006, at A7.

have always been identified by the SEC as a case apart; foreign, yes, but not quite foreign enough[43]

1. The Canadian Issuer as U.S. Issuer

Canadian issuers can always choose to register and report as a domestic U.S. issuer, subject to the same rules and oversight as any other U.S. issuer. In fact, for decades, Canadian issuers were required to do so; they did not benefit from accommodations provided by the SEC to non-U.S. issuers.[44]

Some Canadian issuers have deliberately made this decision, despite the duplication and costs associated with compliance with different regulatory and accounting requirements. For some CBIs, the costs were outweighed by a possible marketing advantage of being perceived as a U.S. issuer.[45] Over the years, these Canadian issuers may even lose their status as a FPI, as the majority of trading in their equity securities migrates to the United States [46]

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[42] On the other hand, from an investor's rather than an issuer's point of view, by blending into the U.S. market, CBIs may be producing a similar effect to FPIs using ADRs to signal to the market.

[43] For many years after the introduction of the "F-series" forms, which provide certain exemptions to FPIs from U.S. disclosure obligations, Canadian issuers were excluded by an instruction in the 20-F Form and required to file as domestic U.S. issuers. *See also* Securities Act of 1933 Release No. 4708, 29 FR 9828 (July 9, 1964). Since 1991, Canadian issuers have been permitted to use the "F-series" forms *See* SEC Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, 56 Fed. Reg. 30,036 (July 1, 1991)(announcing the adoption of revisions to existing rules and forms to permit registration and reporting under the Securities Act of 1933 and the Securities Exchange Act of 1934 by Canadian foreign private issuers on the same basis as other foreign private issuers).

[44] *Id.*

[45] Nortel, for example, has never filed F-series forms.

[46] In 2004, twenty-one Canadian companies filed S-1 forms and sixty Canadian companies filed 10-K forms. These statistics are compiled from the U.S. Securities and Exchange Commission (SEC) website *at* http://www.sec.gov/cgi-bin/srch-edgar. *See infra* Appendix 3 and Appendix 4.

2. The Canadian Issuer as FPI

Since 1991, a second, previously closed, route is open to Canadian issuers registering securities with the SEC, the "F-series" of foreign issuer registration and reporting forms.[47] Usage of these forms clearly identifies the issuer as a foreign issuer and provides certain accommodations with respect to line item disclosure (for example, with respect to individual executive compensation), financial reporting (reconciliation to US GAAP), the use of home country reporting for continuous disclosure and an exemption from US proxy and short swing profit rules. Insofar as regulatory filings with the SEC, although not the actual form of the security, the decision to use the F-series forms would place a CBI on common footing with other foreign private issuers using ADRs as their US trading vehicle.[48] For investors not delving into the regulatory filings too deeply, however, the securities themselves, as listed or traded, would still not be "signaling" to the market, given that they are not identified as ADRs.

3. The Canadian Issuer as Canadian Issuer

The third registration and reporting option open to certain Canadian issuers is the Multijurisdictional Disclosure System (MJDS), specifically negotiated between the SEC and Canadian regulators over a five year-period and implemented in 1991.[49] Despite its name, the system is bilateral, not multilateral, and so exclusively available to Canadian

[47] *See supra* note 23.
[48] *Id.* In 2004, 252 Canadian companies filed 20-F forms. This statistic is from the SEC website at http://www.sec.gov/cgi-bin/srch-edgar. *See infra* Appendix 5.
[49] *See* 56 Fed. Reg. 30,036 (July 1, 1991).

issuers entering the U.S. capital markets (and *vice versa*).[50] The system had originally envisaged the participation of the United Kingdom which dropped out of negotiations at an early stage.[51]

The MJDS is based on principles of mutual recognition, similar to those operating between member states in the European Union and is largely supported by a high degree of harmonization of regulatory frameworks in the U.S. and Canada. Although based on principles of mutuality, which would envisage entry of U.S. issuers into Canada under the system as well as Canadian issuers into the United States, the system in operation has been virtually a one-way street, running north-south.[52]

Implementation of the MJDS coincides with the exponential growth of NYSE and NASDAQ listings by CBIs in the 1990s. Coincidence? However, the basic premise of the MJDS is somewhat at odds with the tenets of the bonding hypothesis. CBIs making use of the MJDS are not subjecting themselves to the rigors of SEC oversight and the entire panoply of U.S. investor protection mechanisms. They are not "bonding".

The whole thrust of the MJDS is to permit Canadian issuers to enter the U.S. market, using *Canadian* disclosure documentation and subject to the immediate oversight of

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[50] Only a handful of US issuers have entered the Canadian market using the MJDS; see *infra* note 52.

[51] The SEC indicated its intention to extend it to other foreign countries such as the United Kingdom and Japan. *See* EDWARD E. GREENE ET. AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS 8-5 (3d ed. 1995).

[52] In 2004, there were approximately 152 Canadian MJDS filers with the SEC, using the special form 40-F; in contrast, for the same period, there were only seven U.S. issuers filing MJDS to enter Canadian markets. Statistics are compiled from the SEC data on the SEC website *at* http://www.sec.gov/cgi-bin/srch-edgar. *See infra* Appendix 6.

Canadian regulators, not the SEC.[53] The purpose of the MJDS was to promote ease of access and to avoid the costs of regulatory duplication. Canadian issuers using the MJDS to enter the United States are neither intending to, nor in fact, "signaling" adherence to "higher" U.S. standards of investor protection , tougher regulation or higher regulatory scrutiny. [54]

There are two caveats, however, which modulate the MJDS system. The MJDS is a complex, bilateral, regulatory initiative which even at the outset demonstrated certain asymmetric features that detracted from principles of "pure" mutual recognition. For example, the SEC insisted on retaining the possibility of U.S. liability attaching to a disclosure document prepared under Canadian rules and subject to Canadian regulatory oversight. [55] This particular asymmetry clearly undermines operation of principles of mutual recognition which would have recognized the operation of Canadian liability under Canadian standards and interpretation. Another, similar, asymmetry was the requirement for full reconciliation of financial statements for certain offerings (primarily equity offerings), to U.S. GAAP.[56]

The second caveat arises from the first, at least in part. The potential for U.S. liability attaching to Canadian disclosure documentation left Canadian issuers particularly open to arguments (usually, of U.S. counsel) suggesting that, despite the ability to use Canadian disclosure in the United States, the more prudent course would be to meet *both* Canadian

[53] The SEC did retain a certain amount of discretion to exercise, on an exceptional basis, residual oversight of Canadian issuers' MJDS offerings.
[54] *See* Hal S. Scott, *The Future Content of the U.S. Securities Laws: Internationalization of Primary Public Securities Markets*, 63 LAW & CONTEMP. PROB. 71, 82 (2000) (describing SEC's attempts to eliminate the MJDS program and *quoting* Edward Alden, *Canadians Mobilise Over Loss of MJDS*, FIN. TIMES, Dec. 1, 1999, at 34).
[55] *See supra* note 49.

and U.S. disclosure standards. This argument further buttressed arguments (usually, of U.S. investment bankers) suggesting that Canadian-style disclosure be made to look more like U.S disclosure, for marketing, not regulatory, reasons. Thus, Canadian prospectuses used in MJDS transactions began to look more and more, in style and substance, like U.S. issuer prospectuses, despite the fact that, technically, they were not required to comply with U.S. line item disclosure. In an interesting twist, the reconciliation to U.S. GAAP requirement (where equity securities have been issued under the MJDS) has resulted in the major CBIs (the big Canadian banks) lobbying, successfully, for the acceptance of US GAAP *in Canada* in fulfillment of Canadian regulatory requirements, thus avoiding the expense and complications of reconciliation in the United States [57]

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[56] *See supra* note 49.

[57] Section 70 of the Regulations currently stipulates that the financial statements referred to in section 155 of the *Canada Business Corporations Act* ("CBCA") must be prepared in accordance with generally-accepted accounting principles (GAAP) as set out in the Handbook of the Canadian Institute of Chartered Accountants. Section 71 of the Regulations provides that the auditor's report referred to in section 169 of the *Canada Business Corporations Act* must be prepared in accordance with generally-accepted auditing standards (GAAS) as set out in the Handbook of the Canadian Institute of Chartered Accountants. In 2004, the Canadian Securities Administrators ("CSA") released the National Instrument 52-107: Acceptable Accounting Principles, Auditing Standards and Reporting Currencies, NI 52-107 (January 16, 2004). The regulatory amendments are designed to harmonize sections 70 and 71 of the Regulations with the rules established by NI-52-107. NI 52-107 allows corporations registered with the U.S. Securities and Exchange Commission (SEC) to use standards recognized in the United States, i.e. GAAP and GAAS, for the preparation and audit of their annual and interim financial statements. NI 52-107 applies to financial years starting January 1, 2003 and later.

The amendments would allow CBCA corporations registered with the SEC to prepare financial statements according to U.S. GAAP as established by the Financial Accounting Standards Board of the United States. CBCA corporations registered with the SEC changing from Canadian GAAP to U.S. GAAS would have to set relevant information in the notes of the financial statements for two years following the change. The notes would indicate significant differences between Canadian and U.S. GAAS concerning accounting, measurement and presentation. Also, these notes would include an assessment of the impact resulting from any significant difference between both countries' accounting principles, as well as information consistent with the requirements of the Canadian GAAP.

Corporations registered with the SEC that have produced financial statements according to both Canadian and U.S. GAAP for at least two years before changing to only U.S. GAAP would be required to include a note explaining the significant differences between the Canadian and U.S. GAAP regarding recognition, measurement and presentation as well as quantifying these differences. The amendments would also allow CBCA corporations registered with the SEC to prepare the auditor's report mentioned in section 169 of the CBCA according to the GAAS established by the Public Company Accounting Oversight Board of the United States. *See* Industry Canada website *at* http://strategis.gc.ca/engdoc/main.html.

IV. Canadian-based Issuers and the Bonding Hypothesis

Despite the asymmetries in the MJDS and their very practical consequences, the use of the MJDS by Canadian issuers does argue against the bonding hypothesis as an explanation of the exponential increase in cross-listings by Canadian issuers in the 1990s. Nevertheless, there has been some academic commentary wrestling to apply the bonding hypothesis to Canadian issuers [58] Two related assertions have been made in this context of applying the bonding hypothesis to CBIs: (i) the "level of investor protection in the United States is qualitatively higher than in Canada" [59]and (ii) the ownership structure of Canadian firms is more highly concentrated than in the United States.[60]

These two assertions are intertwined in the bonding literature. The bonding hypothesis assumes that the motivation for cross-listing is the issuer's desire to signal its voluntary compliance with a "stronger" regulatory regime which provides greater investor protection. An associated body of literature has observed that corporations coming from jurisdictions with "weaker" regimes of shareholder/investor protections tend to demonstrate a more highly concentrated form of ownership structure than corporations in the United States.[61] Since Canadian corporations demonstrate a concentrated form of ownership structure, this may indicate "weaker" corporate governance and shareholder protections, thus providing the motivation to cross-list and to "bond", the argument goes. Both of these assertions merit closer scrutiny.

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[58] *See* King & Segal, *supra* note 21.
[59] *Id.* at 1.
[60] *Id.* at 2.

A. Concentrated corporate ownership patterns

Beginning with the second assertion, Canadian corporations generally do demonstrate a more highly concentrated form of ownership than U.S. corporations.[62] However, in this regard, the United States is clearly the exception and not the rule across jurisdictions. To a greater or lesser degree, every country in the world, even the U.K. with its vibrant capital markets, [63] demonstrates greater concentration of corporate ownership than the United States. [64] By virtue of this fact, *any* corporation seeking to cross-list in the United States will likely demonstrate a more concentrated form of ownership than its similarly positioned U.S. peers.

The prevalence of a concentrated corporate ownership structure should not be automatically associated with "weaker" investor/shareholder protections. The United States does not have the regulatory monopoly on investor/shareholder protections, as discussed below. Concentrated ownership patterns definitely do present the danger of minority shareholder expropriation, at the hands of the majority shareholder. However, so does the widely dispersed pattern of corporate ownership usually associated with United

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[61] See Rafael La Porta, et al., *supra* note 33; Coffee, *supra* note 2.

[62] *See* R. Daniels & J. MacIntosh, *Towards a Distinctive Canadian Corporate Law Regime*, 29 OSGOODE HALL L.J. 863 (1991).

[63] In 2003, the London Stock Exchange had more listed companies than the New York Stock Exchange (NYSE) and only the NYSE and the NASDAQ had greater total values of share trading for that year. These statistics come from the World Federation of Exchanges website *at* http://www.fibv.com/WFE/home.asp?menu=315.

[64] For statistics regarding ownership concentration in Europe, *see* Torben Pedersen & Steen Thomsen, *European Patterns of Corporate Ownership: A Twelve-Country Study,* J. INT'L BUS. STUDIES 28(4), at 759-778 (1997); Marco Becht & Ailsa Roel, *Blockholding in Europe: An International Comparison,* 43 Eur. Econ. Rev. 1049 (1999) (discussing the size of block sharholdings in Europe and reporting that while ownership is much more dispersed in the U.K compared to continental Europe, it is still significantly more highly concentrated than in the U.S.); La Porta, Lopez-de-Silanes, Shleifer and Vishny, *Corporate*

States capital markets, the potential expropriators being management rather than majority shareholders. [65]

The important point to retain in any discussion of ownership patterns and shareholder/investor protection is that the *problem* may differ, depending on the prevailing ownership structure. As the problem differs, so may the solutions. In fact, the perception that there even is a *problem* may not be one that is universally shared. [66] With respect to CBIs in particular, the relationship between the pattern of concentrated ownership and shareholder/investor protection is discussed below.[67]

B. Investor protection in the United States is superior

The assertion that the ownership structure of Canadian firms is more highly concentrated than in the United States is demonstrably true.[68] The assertion that the level of investor protection in the United States is qualitatively higher than in Canada is not so demonstrably true. [69] Should the level of investor protection in Canada be equal to or better than in the United States, what are the implications for the bonding hypothesis and

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Ownership Around the World, 54 J. FIN. 471 (1999) (finding that only a few economies have many corporations that are widely held).

65 Under the "agency cost" theory, managers are "agents" for the shareholders. *See e.g.,* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1263-65 (1982). *See* Christopher J. Gulinello, *The Revision of Taiwan's Company Law: The Struggle Toward a Shareholder-oriented Model in One Corner of East Asia,* 28 DEL. J. CORP. L. 75, 94 (2003): "...if a concentrated-ownership system develops shareholder protections that deal exclusively with protection from controlling shareholder expropriation, then there will be risks of expropriation at the hands of management as ownership becomes more disperse and agency costs related to the monitoring of management increase."

66 Asian markets, eg Hong Kong. Some commentators note that investors may be compensated in other ways where dual class voting structures, and the concomitant opportunities for minority shareholder expropriation, are prevalent; higher dividends, for example, in European companies or lower valuations, indicating that investors are getting what they pay for. *See* Second Class Investors, *supra* note 14.

67 *See infra* note 128.

68 *See* King & Segal, s*upra* note 21.

CBIs? Going beyond CBIs, what may be the implications for other non-U.S. issuers listing on U.S. exchanges?

The level of investor/shareholder protection is key to the bonding hypothesis. It is also key to theories of corporate governance and the setting of international standards and practices associated with the bonding hypothesis. The following discussion will investigate the validity of the commonly held assumption that U.S. investor/shareholder protections should provide the benchmark against which all others are measured and the backbone of international standards. It will also investigate the Canadian shareholder/investor protections to determine if the bonding hypothesis is explanatory of CBIs.

V. Testing the Bonding Hypothesis

The validity of the bonding hypothesis is rooted in accepted notions of good corporate governance: mechanisms will be in place to deter expropriation of investor/shareholders, particularly at the hands of unscrupulous managers. An important body of economic literature, the LLSV studies,[70] has appeared over the last decade postulating indicia of investor protections and gathering and comparing data across a large number of jurisdictions.[71] The efforts have been impressive and the data accumulated formidable. These studies are some of the most widely cited in the area, and until very recently, their conclusions considered virtually self-evident and the starting point for numerous other

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[69] *See infra* Part IV.B.2.
[70] *See* Rafael La Porta, et al., *supra* note 33.

investigations. The findings of the LLSV studies have themselves played into the development of international standards of corporate governance.

The comparative analysis provided by the LLSV studies, though welcome, gave some financial economists and legal academics pause however, and the early work is now being reconsidered by certain of the original authors themselves.[72] The application of a little comparative legal theory may unearth the source of this unease with the early LLSV literature which supports the bonding hypothesis.

A. Complexity

"Legal systems are the result of a layered complexity… ."[73] Legal systems evolve over time, inventing, adapting, borrowing, having change thrust upon them. Statutory law, in particular, often contains redundancies, contradictions, and fossilized concepts or practices of no current significance.[74] Any one legal concept in any one system, at any one time, exists and operates in a complex relationship to a myriad of other concepts: "legal systems never are. They always become".[75]

Statutory law is perhaps the most visible and accessible layer of any legal system. It is not surprising then that financial economists, in searching for indicia of various kinds,

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[71] *Id.*
[72] *See* RAGHURAM G. RAJAN & LUIGI ZINGALES, THE GREAT REVERSALS: THE POLITICS OF FINANCIAL DEVELOPMENT IN THE 20TH CENTURY (CRSP Working Paper No. 526, June 2001); Mark Roe, *Corporate Law's Limits*, 31:2 J. LEGAL STUD. 233 (2002); Coffee, *supra* note 2.
[73] *See* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997). For a more detailed examination of these concepts as they are applicable to corporate governance mechanisms, *see* Cally Jordan, *The Conundrum of Corporate Governance,* 30 BROOK. J. INT'L L. 983 (2005); Cally Jordan & Mike Lubrano, *How Effective are Capital Markets in Exerting Governance on Corporations? Recent Lessons from Emerging Markets* in *Financial Sector Governance: The Roles of the Public and Private Sectors* (Washington: Brookings Press, 2002).

look primarily to statutory law. Statutory law, however, may only be the tip of the iceberg, indicating a large, complex, structure submerged beneath the surface. The true significance of statutory law, too, may not be what it seems; its role and importance in positing legal principles can vary from system to system. [76]

Adding to the complexity of the operation of "formal" normative propositions is another complex layer, sometimes referred to as "legal sensibilities". [77] Legal sensibilities consist not only of "rules and principles which can be cast in propositional form, but also of higher order understandings, received techniques, constellations of values, and shared ways of perceiving reality, which are pervasive, often subtle, and themselves deeply layered in complex and important ways"[78] .

This is not good news for the econometric analysis of legal concepts across a large number of jurisdictions, even with the use of reliable data bases and the cooperation of hundreds of volunteer gatherers and interpreters of data.[79] Despite the extraordinary

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[74] *See* Lucian Bebchuk & Mark Roe, *A Theory of Path Dependency in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

[75] *See* Mattei, *supra* note 73.

[76] *See* Jordan, *Conundrum of Corporate Governance*, *supra* note 73; KATHARINA PISTOR AND CHENGGANG XU, INCOMPLETE LAW - A CONCEPTUAL AND ANALYTICAL FRAMEWORK AND ITS APPLICATION TO THE EVOLUTION OF FINANCIAL MARKET REGULATION (Colum. L. & Econ., Working Paper No. 204, May 2002).

[77] *See* Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, *reprinted in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY*,* at 167-234 (Basic Books, 1983).

[78] *See* RUDOLF B. SCHLESINGER, ET AL., COMPARATIVE LAW: CASES, TEXT, MATERIALS*,* (Foundation Press, 6th ed., 1998).

[79] Djankov et al, *infra* note 147, at 4: "Our data are based on answers to a questionnaire completed by attorneys from Lex Mundi law firms. Lex Mundi is an association of international law firms with members in 108 countries. We invited Lex Mundi firms to participate in the project and received complete answers from 102 of them. After processing the authors' answers, we conducted follow-up conference calls to seek clarifications and asked respondents to confirm our coding of the data. The sample we use in this paper is based on the answers of 72 authors who have confirmed the validity of our data. The countries included in the sample represent 99.3% of total world market capitalization in 2003." Despite this impressive massing of resources, there are nagging difficulties associated with the collection and comparability of the data.

amount of information which is being made available with respect to corporate governance and investor protections around the world, isolating indicia of investor protection across jurisdictions is very hard.[80] A factor which may be highly significant in one system may be completely lacking in another, with little or no impact on the effectiveness of investor protection mechanisms.

Drawing indicia from corporate statutes, the easiest and most obvious source, may also be highly misleading, depending on the role of statutory law in a system (peripheral, supplemental, fundamental) or even, simply, the age of the statute. Purely as a matter of positive law, formally recognized normative rules, corporate law demonstrates its own "layered complexity".

In addition, each body of corporate law is highly path dependent,[81] retaining the imprint of the specific historical forces which have formed it. Also, the principles of corporate law have drawn and depend upon a variety of other, older and more fundamental areas of the law: property, contract, agency or mandate, trust law, status, procedural constitutional and administrative law. Each of these other areas of law varies from jurisdiction to jurisdiction, and differs in its importance in the operation of corporate law. Trust law, the source of the concept of fiduciary duties, for example, can be completely absent in many legal systems, to no ill effect. Constitutional law can play a key role in corporate law in some countries, in Latin America, for example.

One former securities regulator, whose law firm participated in the Lex Mundi project by devoting hundreds of hours of junior lawyer time to completion of the questionnaire, expressed serious reservations to the author as to the meaningfulness of the data collected and its comparability across a large number of jurisdictions. Very few law firm members of Lex Mundi, this participant noted, would have the capacity or resources to engage in such efforts, on an uncompensated and largely unacknowledged basis.

Digging at little deeper, the fundamental principles of corporate law may not be found in the "corporate law" at all, but rather in the Civil Code.[82] It is even possible to have corporate law without clearly established notions of private property. [83] In the United States, large swathes of corporate law are now subsumed under "securities regulation" [84] or left to the courts, the stock exchanges and corporations themselves. Then there is the legal, political and commercial context in which corporate law, in its wider and narrower senses, operates; corporate law is permeated by "legal sensibilities" .

These "interaction effects impede putting our finger on one or two key features as indicative of whether technical corporate law is overall good or bad". [85] Nevertheless, the influential early LLSV literature attempted to isolate indicia of investor protection [86] in formulating its analysis of shareholder and creditor rights in various jurisdictions. In particular, certain "anti-director" indicia, representing the presence of investor protection mechanisms, were isolated and an "index" formulated.

The anti-director indicia chosen as an indicator of the presence of meaningful shareholder rights, were: (i) one share/one vote or multiple voting shares; (ii) proxy

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[80] *See* Roe, *supra* note 72, at 28.
[81] *See* Roe & Bebchuck, *supra* note 74.
[82] The Dutch Civil Code (1992) is where you find Dutch corporate law, for a number of interesting historical reasons.
[83] *Eg* China, Vietnam
[84] *See* the Sarbanes-Oxley Act, 107 P.L. 204 (2002)("SOX"). *See also* Mark Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).
[85] *See* Roe, supra note 72 at 32.
[86] *See* Rafael La Porta, et al., *Law and Finance*, *supra* note 33. It should be noted here that certain of the LLSV authors, together with Simeon Djankov of The World Bank, have recently prepared a "revised" index; see Djankov et al*, infra* note 147.

voting by mail; (iii) shares not blocked before shareholders' meeting; (iv) cumulative voting for board of directors; (v) oppressed minorities mechanism; (vi) existing shareholders have preemptive rights for new equity issues; (vii) percentage of share capital (eg 5% or 10%) to call an extraordinary shareholders' meeting. LLSV indicates a "yes" for each of these indicia (except (iii)) for both the United States and Canada; each of the United States and Canada receives a 5 on the Anti Directors Rights Index (6 being high). Both Canada and the United States, according to the index are highly investor protective, and in the same way.

On their face, these indicia look familiar and straight-forward; they have been often repeated in the corporate governance literature in the intervening years. The indicia are taken, for the most part, from corporate statutes in the United States. However, as indicators of shareholder rights and the level of protection which investors in publicly – traded, listed corporations may expect, even in the United States, the indicia are more or less meaningless. Roe in *Corporate Law's Limits* (2002) tactfully pointed this out: "Wall Street lawyers might have reservations about heavily using preemptive rights, cumulative voting and the minimum percentage needed to call a special shareholders meeting – items not likely to be near the top of most American lawyers' lists of Delaware corporate law's most important legal protections …" [87]. But then, these "anti-director" indicia have little to do with listed corporations in the United States, Delaware or otherwise.

[87] *See* Roe, *supra* note 72, at 29, fn 37.

Here are some examples of how complexity undermines the "anti-director indicia" of econometric theory. The yes and no answers on the LLSV index are seriously misleading, even in the United States.

Although most (but not all) of the anti-director indicia are drawn from corporate statutes, not all U.S. corporate statutes have the indicia. There are fifty corporate statutes in the United States and great diversity of approach. The "oppressed minorities mechanism", for example, is not present in some state statutes (Florida, for example) and where it is present, may only be applicable in limited circumstances to shareholders in privately or closely-held corporations, providing no protection whatsoever for investors in publicly traded corporations.

It may be possible under all state statutes to create cumulative voting rights (a cumbersome, old-fashioned, procedural means of promoting, but not necessarily ensuring, minority shareholder representation on the board of directors). However, cumulative voting rights are rarely used (because they are not very effective), and certainly not for a listed U.S. corporation, if you can help it.[88]

[88] Some Korean issuers have been saddled with cumulative voting. FINAL REPORT AND LEGAL REFORM RECOMMENDATIONS to the Ministry of Justice of the Republic of Korea, 26 Iowa J. Corp. L. 546 (2001). The Final Report recommended making the practice of cumulative voting mandatory. That recommendation was not included in the Act. Korea established a voluntary cumulative voting system in 1998, but few companies have adopted it. As of late May 2000, twenty-two percent of KSE listed companies (155 out of 707) have adopted it. *See* Ministry of Finance and Economy, CORPORATE GOVERNANCE IMPROVEMENT PLAN FOR TRANSPARENT MANAGEMENT (Oct. 27, 2000), *available at* http://www.mofe.go.kr/cgi-pub/content.cgi?code=e fp&no=35 (last visited Nov. 5, 2001). *See also* Cho Young-sam, *Activist Group Moving to Legislate Cumulative Voting, Class-Action Suits*, Korea Herald, Oct. 17, 2000, *available at* 2000 WL 27394157.

Equally, the creation of preemptive rights (a means of avoiding dilution of existing shareholder equity positions) may be possible under all U.S. corporate statutes but would never be found in a listed U.S. corporation as a matter of course (whereas they might in a British company).

A statutory provision permitting a 10% shareholder to call an extraordinary meeting of shareholders, again, in the United States, would be irrelevant to most publicly listed corporations which are widely-held.[89]

These are provisions which, where applicable, are more likely used in close or privately-held corporations; in such circumstances there is usually an identity of management and ownership. Shareholders more or less take care of themselves through negotiated means, the statute providing a set of default rules that are easily avoided.

Corporate law, where it matters for public shareholders and investors, is mostly elsewhere, buried in layers of complexity.[90] Corporate law statutes in the United States have been twisted and gutted by initiatives of the Delaware legislature and the Delaware Court of Chancery on the one hand, and federal "securities" regulation and the SEC, on the other.[91] Contractual ordering (which breeds variation, specificity and, inevitably, complexity) dominates the corporate landscape: stock exchange listing rules, corporate

[89] Even the largest institutional investors in U.S. corporations usually hold no more than 2-3 % of the outstanding shares of any one issuer. For example, as of December 31, 2005, the fifteen largest institutional investors in Microsoft each held between 0.6% and 4.1% of the outstanding shares. *See* http://moneycentral.msn.com/investor/invsub/ownership/ownership.asp?Symbol=msft (3/22/2006).
[90] There has been much written about the great complexity of Sarbanes-Oxley. *See, e.g., The trial of Sarbanes-Oxley,* THE ECONOMIST, April 22, 2006, at 59.
[91] *See* Roe, *supra* note 84; *see also* Sarbanes-Oxley Act, *supra* note 84.

charters, customized share provisions, tailor-made by-laws .[92] The inadequacy of the "anti-director indicia" to capture the complex dynamic of public shareholder rights in the United States should be obvious at this point. Applying these indicia across jurisdictions to produce meaningful results is even more problematic. The premise is wrong [93] and the criteria for comparison irrelevant.

B. Hidden Assumptions

One of the objectives of comparative legal scholarship is to "unearth, by comparative study, the hidden assumptions of different legal systems…, particularly those legal assumptions that are so obvious that they are never discussed, or even noticed".[94] Uncovering and testing some of the assumptions underlying the bonding hypothesis may cast the hypothesis in a different light.

1. U.S. Investor Protection and Shareholder Rights are the Best

Key to the bonding hypothesis as explanatory of foreign cross-listing is the high level of investor protection in the United States. Effective, enforceable shareholder rights are usually viewed as a prime component of investor protection. The early LLSV literature, with its indicia of shareholder rights and "anti-director" index, has been frequently invoked in investigations related to the bonding hypothesis (and other aspects of financial

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[92] A simple by-law amendment put into effect by a short written consent of the majority shareholder was sufficient to disable the board of directors and set the cat among the pigeons in the Hollinger International disputes in 2004. Although completely in conformity with Delaware statutory law, the by-law amendment was subsequently overturned by Vice-Chancellor Leo Strine, exercising his equitable jurisdiction. *See Hollinger International Inc. v. Conrad M. Black, et al.* C.A. No. 183-N (Feb 26 2004).

[93] "Anti-director" based on agency theory, i.e. the management/shareholder conflict which may not be the actual dynamic operating; *cf Hollinger, supra* note 92 .

[94] *See* Mattei, *supra* note 73.

market development).[95] The United States (and Canada, for that matter) scored high.[96] These particular indicia of shareholder rights have become self-propagating, spreading, along with class actions and derivative rights of action, as effective corporate governance mechanisms, to the furthest reaches of corporate law around the world.[97]

The assumption appears to be that U.S. mechanisms for investor protection and shareholders rights are, if not the best, then, at the least, the benchmark against which all others should be measured. How else to account for such a vibrant financial market as exists in the United States? But, is this one of those pernicious "hidden assumptions", so obvious that it is "never discussed, or even noticed"? [98] This assumption bears some scrutiny as does its implications for the mechanisms of investor protections and shareholder rights in domestic legal systems outside the United States.

Many non-U.S. legal systems have been referred to as "weak legal systems"[99] if they do not score high on the LLSV "anti-director" index. This is the classic blunder of the amateur comparativist, confounding difference with deficiency. If an indicia, in this case, of shareholders' rights, is "missing" from a legal system, it must be a sign of a deficiency, contributing to a lower level of economic development, and an oversight to be remedied[100]. This is simply not the case.

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[95] *See e.g.* Coffee, *supra* note 2; King & Segal, *supra* note 21.
[96] *See* Rafael La Porta, et al., *Law and Finance*, *supra* note 33. See table 2.
[97] Recently proposed or enacted corporate legislation in places as different as Bahrain and China now contain or propose such provisions, likely to no great effect on corporate governance.
[98]Arguably not, since there is such a large body of legal analysis produced on an annual basis providing a blow by blow critique.
[99] *See* Rafael La Porta, et al., *supra* note 33.
[100] Rudolf B. Schlesinger, et al., *supra* note 78. *See*, e.g., John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. Rev. 641, 643-48 (1999).

As Roe remarks, "[n]ot only do corporate players in France, Germany, Scandinavia think their corporate law is fine, but they sometimes proclaim its superiority in some dimensions over the American variety" [101] Insofar as formal shareholders' rights are concerned, this is a claim to take seriously. Corporate law statutes in the United States provide shareholders, in particular shareholders of publicly-traded corporations, with paltry and basically illusory rights compared to most European statutes, [102] particularly since the legislative reaction to the 1985 Delaware decision in *Smith v. Van Gorkom*[103].

Noted for the already strong managerial bias in its corporate statute, Delaware acted shortly after the *Van Gorkom* decision to permit its corporations, by charter amendment, to alleviate the duty of care owed by managers to shareholders. In this, and other pro-managerial, initiatives[104], other state statutes followed suit, with two differences. In some cases, the state statutes went even further than Delaware in favor of loosening the remnants of shareholder fetters over management. Secondly, few states possessed a judiciary with the authority in corporate law matters of the Delaware Court of Chancery,

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[101] *See* Roe, *supra* note 72 at 28.
[102] A cursory perusal of the U.S. proxy materials for a European corporation, such as Nokia, for example, indicates the much wider array of matters on which shareholders in a European corporation may have direct oversight.
[103] *Smith v. Van Gorkom*, 488 A.2d. 858 (Del. Sup. Ct. 1985).
[104] The fact that Delaware corporate law is receptive to corporate management concerns and needs, often at the expense of shareholders, is well known. This intentional courting of business interests through legislative drafting and judicial decision making in Delaware has made it a haven for business and, consequently, rich in law concerning corporate activities. *See generally* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913 (1982); *Comment, Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969); James F. Ritter, Comment, Unocal v. Mesa Petroleum Co., 72 VA. L. REV. 851 (1986). Janet E. Kerr, *Delaware Goes Shopping for a "new" interpretation of the Revlon standard: the effect of the QVC decision on strategic mergers*, 58 ALB. L. REV. 609, 676 (1995).

ready at a moment's notice to redress potential imbalances between shareholders and management. Not that the Delaware Court of Chancery necessarily rushes to do so. [105]

Arguably, the fiduciary duty of managers (and possibly majority shareholders) is the greatest source of protection from expropriation to which U.S. shareholders can look. The fiduciary duty is not, strictly speaking, a shareholder right; it is a much more diffuse concept (despite attempts at various statutory formulations). As an equitable principle, based on notions of fairness, it is not amenable to bright line tests or econometric analysis. It is a creation of the courts of equity and dependent on these same courts for its vitality. Unhappily for shareholders of U.S. corporations, procedural and other bright line tests, now found in statutory law and guidance such as the ALI Principles of Corporate Governance, have provided U.S. courts (even Delaware courts, at times) a means to avoid hard questions associated with the exercise of their equitable discretion.[106] sapping the fiduciary duty of its normative vigor.

All this to say, that things are even worse than they might at first appear for shareholders in U.S. corporations. Enactment of the federal Sarbanes-Oxley legislation (technically, not "corporate" legislation) is a symptom of, not necessarily the solution to, the plight of the U.S. shareholder. In *Delaware's Competition,* Roe ponders whether the Enron and

[105] *See Nixon v. Blackwell,* 626 A.2d 1366 (Del. 1993): "The tools of good corporate practice are designed to give a purchasing minority stockholder the opportunity to bargain for protection before parting with consideration. It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court- imposed stockholder buy-out for which the parties had not contracted." *See also* Roe, *supra* note 84.

[106] *See* 1 AMERICAN L. INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994).

WorldCom debacles, which prompted Sarbanes-Oxley, might have been avoided, had U.S. corporate statutes taken a different turn in 1986. [107]

The Enron/WorldCom debacle has shaken somewhat the assumption of the superiority of U.S. investor protection and shareholder rights. The early LLSV literature, however, was written in the heady pre-debacle days and appears to have internalized the assumption of a high level of formal investor protection through the operation of shareholder rights found in state corporate statutes. As noted above, the "anti-director indicia" of the LLSV studies are not, in fact, a measure of vibrant shareholder rights, and never have been.

In the United States, shareholders' rights and investor protection have been decoupled. Investor protections continue to operate outside the sphere of corporate law *per se,* in the virtual absence of shareholders rights. At this point, it is unclear whether the non-corporate law mechanisms of investor protection (stock exchange listing rules, industry associations, securities regulation and the Securities and Exchange Commission) will be, or have been, able to fully compensate for the demise of basic principles associated with shareholders rights. Some of these non-corporate law mechanisms are, inevitably, skewed in favor of the interests of market intermediaries. And, the Byzantine maze of complex technicalities that we know as securities regulation has its own limitations.[108]

It gets worse. The passage of Sarbanes-Oxley is also indicative of the erosion of certain "legal sensibilities" that have complemented formal shareholders rights and investor

[107] *See* Roe, *supra* note 84.

protection. Is the corporate "Code of ethics" required by Sarbanes-Oxley a substitute for commonly held tenets of fair dealing as a moral conviction which goes beyond the diluted commercial standards now prevalent?[109] Are these legal sensibilities another hidden assumption which may no longer be operative?

2. *U.S. Investor Protection and Minority Shareholder rights are better in the United States than in Canada*

Assumption number two, that U.S. investor protection and minority shareholder rights are better in the United States than in Canada, must hold true for the bonding hypothesis to be applicable to CBIs. If assumption number one, the superiority of U.S. investor protections and shareholders rights, holds true, then assumption number two is axiomatic. But assumption number one is seriously flawed.

The "anti-director indicia" of the early LLSV studies[110] had Canada and the United States in a dead heat with an index rating of 5 out of 6. Responses to presence of indicia were identical, with the exception of percentage of share capital to call an extraordinary shareholders' meeting being lower (5%) in Canada than in the United States (10%). This

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[108] In the aftermath of the disappearance of the accounting firm, Arthur Andersen, the debate over the desirability of principles based accounting, rather than technical, rules based accounting, intensified.

[109] The American Law Institute *Principles of Corporate Governance*, Part V, *supra* note 106, proposed a commercial fair dealing standard. The NYSE also proposed rules requiring all listed companies to adopt a code of business conduct that addresses issues including fair dealing. *See* Corporate Accountability and Listing Standards Committee of NYSE*,* AMENDMENT NO. 1 TO THE NYSE'S CORPORATE GOVERNANCE RULE PROPOSALS, at 20, available at www.nyse.com/pdfs/amend1-04-09-03.pdf (last visited on Sept. 5, 2004.) *See also* Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 954, 961 (1993).

[110] *See* Rafael La Porta, et al., *supra* note 33; King & Segal, *supra* note 21.

would have indicated a marginally more shareholder-friendly environment in Canada. On their face, these results would not be surprising, there being a good degree of comparability in the corporate legislation in the two countries. The conclusion drawn from the table would be that the level of shareholder rights, and concomitantly, investor protection, in the two countries is similar.

As a very general proposition, this may be correct. If so, it would not lend strong support to the bonding hypothesis as explanatory of CBIs' cross-listing behavior. Digging a little deeper though, differences begin to emerge. As in the United States, cumulative voting and preemptive rights in Canada are fairly meaningless as a form of investor protection. However, given the more concentrated ownership structure of Canadian corporations, rights accorded to 5% shareholders (to call an extraordinary general meeting, for example) are very real. Not only is the absolute threshold lower (5% as opposed to 10%), it is not uncommon for an institutional shareholder in a publicly-traded corporation in Canada, alone or together with others, to meet the threshold.

Secondly, again unlike the United States, statutory oppressed minorities mechanisms are also very real in Canada. There are several reasons for this. Much of Canadian corporate legislation looks to both the United States and the United Kingdom as primary sources. The outlines of the U.S. Model Business Corporations Act [1968] (MBCA) are readily discernible in the Canada Business Corporations Act. [111] However, the Canadian legislation is based on the earlier MBCA, not the current Revised Model Business Corporations Act (1984) (RMBCA), The earlier MBCA is notably more shareholder protective than the current version [112] In addition, the Canadian statutes have not seen shareholders' rights, the ones that count, such as the fiduciary duty of managers, compromised as severely as they have been in the United States in the aftermath of *Smith v. van Gorkom.*

Most importantly, the oppression remedy[113] in the Canadian statutes derives from U.K., not U.S., law. It traces its origins back to the "great mother" of Commonwealth companies laws, the Companies Act of 1948 (U.K.)[114]. Unlike in the United States, this shareholder remedy is an extremely broad and flexible one applicable to all corporations, not just closely-held ones or in limited circumstances. It is thus a powerful weapon in the arsenal of investor protection.

In fact, of all the Commonwealth variations of the statutory oppression remedy deriving from the original one in the 1948 U.K. Act, the Canadian version is the broadest and most shareholder-friendly. There are no procedural hurdles (such as exist in the derivative action) and the action permits any aggrieved minority shareholder (as well as other corporate actors, even creditors) their day in court. In the face of the statutory oppression remedy of the U.K. variety, the U.S.-style statutory derivative action (also present in Canadian law), has withered away.[115]

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[111] Canada Business Corporations Act, R.S., c. C-44 (1985) .
[112] Henry F. Johnson & Paul Bartlett, Jr.*, Is a Fistful of Dollars the Answer? A Critical Look at Dissenters' Rights Under The Revised Model Business Corporation Act,* 12 J.L. & COM. 211 (1993); Douglas M. Branson, *Recent Changes to the Model Business Corporation Act: Death Knells for Main Street Corporation Law,* 72 NEB. L. REV. 258, 284 (1993); Douglas M. Branson, *Intracorporate Process and the Avoidance of Director Liability*, 24 WAKE FOREST L. REV. 97, 97-98 (1989).
[113] Sometimes referred to as the unfairly prejudicial remedy.
[114] *Companies Act, 1948* (U.K.),1948, c. 38.
[115] Brian R Cheffins, *Reforming the Derivative Action: The Canadian Experience and British Prospects*, COMPANY FIN. & INSOLVENCY L. REV., 1: 227-60 (1997).

The oppression remedy is a broad, equitable one though and it is dependent on a judiciary which shows no reticence in exercising its equitable jurisdiction. Like their U.K. counterparts, with which they continue to share many legal sensibilities, the Canadian courts have not hesitated to provide equitable relief in corporate law matters. [116] Given the concentrated ownership structures of Canadian corporations (and the possibilities for minority shareholder expropriation so presented), the courts have been highly solicitous of minority shareholder rights. [117]

Although not apparent on their face, certain of the "anti-director indicia" of the LLSV literature, are, in fact, correlated to higher levels of investor protection in Canada, although not in the United States. Shareholders rights under Canadian corporate law continue to support other investor protection mechanisms; they have not become "decoupled" to the extent they have in the United States. As for the formal investor protections found in listing rules and securities regulation, on their face, they are very similar in Canada and the United States thanks in part to the harmonizing forces of the MJDS.

King and Segal however, look beyond the LLSV "anti-director indicia" and convergence of the formal regulatory regimes, to question the level of investor protection in Canada

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[116] See e.g., *Ford Motor Co. of Canada, Ltd. v. Ontario Municipal Employees Retirement Board*, O.J. No. 191 (2004). Generally speaking, Canadian courts have "given the oppression remedy a very liberal interpretation, both with respect to standing and the types of remedies that can be awarded." Jeffrey S. Leon & Sarah J. Armstrong, *The Relevance of the Oppression Remedy as a Control on Corporate Governance in Canada* (2003); *see* Fasken Martineau website: http://www.fasken.com/WEB/fmdwebsite.nsf/AllDoc/CB3263AD655EA90D85256D500067E7C6/$File/CORPORATEGOVERNANCE.PDF!OpenElement.

[118] They look to two indicators, the incidence of insider trading in Canada and the number of investigations by the U.S. SEC of the activities of Canadian MJDS issuers. Neither of these indicators however is conclusive of a lower level of investor protection or shareholders' rights in Canada.

There is no denying the existence of insider trading in Canada.[119] In the past, the fragmented nature of provincial securities regulation in Canada may also have made prosecution of insider trading offences more problematic than in the United States.[120] But is insider trading more egregious or more prevalent in Canada than in the United States? Unclear. One industry participant (who was not convinced that insider trading in Canada posed greater risks to investors than in the United States) noted that abuses appeared concentrated in one particular natural resource industry, perhaps as many as 90% of them.[121] And, insider trading, of course, is only one form of potential investor abuse, albeit one which captures the public imagination with its resonances to Greek tragedy and the gratifying spectacle of the mighty laid low.

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[117] *Id.*
[118] *See* King & Segal, *supra* note 21.
[119] *See* King & Segal, *supra* note 21 at 9.
[120] *See* Cally Jordan, *Lessons from the Bennett Affair*, 38 MCGILL L.J. 1071 (1993). The Bennett Affair was a high profile insider trading case involving a former premier of the Province of British Columbia and his brother and the sale of certain shares over the Toronto Stock Exchange. Proceedings, judicial and administrative, dragged on for several years in both Ontario (the place of execution of the trades) and British Columbia (the place of residence of the initiators of the trades and where the trades were actually initiated), each under different legislation and regulators. Jurisdictional difficulties hampered cooperation among the various provincial regulators within Canada. Two large institutional investors reached a settlement early on, leaving small retail investors the losers. Ironically, at the time, several provincial regulators had entered into international Memoranda of Understanding regarding cooperation and information sharing with regulators outside Canada, meaning that there could have been greater cooperation internationally among regulators than there was domestically within Canada. Calls for a national securities regulator in Canada have gone unheeded for decades. *See* Cally Jordan, *Comment on 'An Alternative Regulatory Model for Canada': A View from Afar*, Queen's University Annual Business Law Symposium 2001, at 59 (Scarborough: Carswell, 2002).

The statistics quoted in the King and Segal paper on investigations by the SEC of wrongdoing by MJDS issuers are also not strongly persuasive.[122] Given the large number of Canadian issuers in the U.S. market, the number of investigations does not seem egregious and on a *pro rata* basis is no greater than for other FPIs. According to a senior Toronto practitioner, "[i]n today's environment it is difficult to imagine that the Canadian market is less efficiently regulated than the United States market given that most of the really egregious behaviour of late has taken place in the United States. Mr. King's theory may have had more legs some years ago but not now I think".[123]

A more controversial proposition may be whether Canadian minority shareholder/investor protection is *better* than that in the United States. As noted above in the context of the comparison of minority oppression mechanisms, shareholder protections are decidedly more robust in Canadian corporate statutes. The Canadian statutory oppression remedy is a powerful deterrent to managerial malfeasance, as well as a real and flexible tool for shareholder action. It is but one example of the way in which Canadian corporate law has remained more heavily weighted in favor of shareholder protection; there are other examples.[124]

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[121] Perhaps as an indication of how sensitive the issue may be in Canada, the industry participant making this comment to the author in the course of an interview in the spring of 2004, asked that this observation not be attributed personally to him.
[122] "Of the 13 cases of legal actions brought by the SEC against foreign firms between 1995 and 2002, 4 were brought against Canadian firms." *See* King & Segal, *supra* note 21 at 9.
[123] E-mail from Andrew Fleming, Senior Partner, Ogilvy Renault to Cally Jordan, Associate Professor Levin College of Law (February 26, 2004, 17:14 EST) (on file with author).
[124] Audit committees have been a statutory requirement of CBCA publicly traded companies since 1975.

There has also not been the decoupling of corporate shareholder rights and securities law investor protections that has occurred in the United States. In Canada, there has been an ongoing interaction and overlap between corporate statutes and securities regulation.[125] Jurisdictional competition there may be at certain levels, but the capital markets are centered in Toronto, Ontario, a longstanding fact, made even more obvious by the recent consolidation of all Canadian equity trading in the Toronto Stock Exchange (with one minor exception). [126] The capital markets are subject to the oversight of a provincial Ontario regulator and provincial securities regulation. Ontario has its own corporate statute[127] and the Ontario government can coordinate legislative initiatives in both corporate and securities laws. It is as though the New York Stock Exchange and the SEC both operated out of Delaware.

The regulatory environment has also been responsive to the concentrated ownership structure characteristic of the Canadian corporate world. The correlation between concentration of ownership and weak investor protection noted in the early LLSV literature does not hold true in Canada. The takeover bid regime offers better protections for public investors than in the United States. Many mergers and corporate reorganizations require majority of the minority shareholder approvals. Where there are dual class shares (often the case in concentrated ownership structures), mandatory

[125] As elsewhere, securities regulation has adapted more quickly to changing circumstances.
[126] In 2001, the Toronto Stock Exchange consolidated as Canada's major equity trading market.
[127] Canada has both federal and provincial corporate statutes, many but not all, showing a high degree of harmonization and affinities to the MBCA. There is no federal or national securities regulator, only provincial regulators, with some, like the Ontario Securities Commission which directly oversees the Toronto Stock Exchange, obviously being more important than others.

coattails or tag-along rights are usual.[128] In fact, these Canadian regulatory techniques have been emulated elsewhere as a means of improving corporate governance, increasing investor protection and promoting investor confidence in capital markets. [129]

In addition, securities law enforcement has demonstrated a different approach, proceeding as it did from a different regulatory tradition. Despite the very sharp convergence over the last decade and a half to a U.S.- style regulatory framework and associated institutions, securities regulators in Canada continue to pursue policies of intervention before or instead of prosecutorial or judicial action. Regulation of the financial sector generally has been impressed with the benign British influences of regulation by persuasion, the apocryphal "tea with the Governor of the Bank of England" approach to financial sector regulation.[130] Regulatory intervention is "prompt" and "focused".[131]

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[128] A coattail provision comes into play when there are 2 classes of shares: a voting class and a non-voting class. Basically a coattail provision provides that if an offer is made for all or substantially all of the voting shares and that offer is accepted, then the class of shares which do not have voting rights are granted voting rights unless they receive the same offer. A tag-along allows a minority shareholder the right to participate in a transaction at the same pro rata price of other owners where a threshold interest is being transferred. This allows a minority shareholder the opportunity to monetize her interests along with the majority owners. Where a dual class structure exists, the Toronto Stock Exchange listing rules specifically require coattails to be given to the subordinate shares, as well as notice of meetings, rights of participation in meetings, a right to receive information on an equal basis, and in the discretion of the Exchange, voting rights in certain circumstances. *See* TORONTO STOCK EXCHANGE COMPANY MANUAL, SEC. 624 (RESTRICTED SECURITIES); OSC RULE 56-501 (RESTRICTED SHARES) (Oct. 25, 1999), *available at* www.osc.gov.on.ca/en/Regulation/Rulemaking/Rules/56-501.

[129] For example, the BOVESPA, the Sao Paulo Stock Exchange, in creating its "Novo Mercado" or "corporate governance board", a listing segment requiring issuers to implement voluntarily certain corporate governance mechanisms in order to list, includes Canadian-inspired tag-along rights for minority shareholders. *See* Jordan & Lubrano, *supra* note 73.

[130] This approach is now becoming a thing of the past, especially in the United Kingdom, with the advent of more formal regulatory approaches and the change in the role of the Bank of England. However, it has been remarkably effective in its time. Emulated in Commonwealth Canada, it produced a remarkably stable banking system over the last century. Bank failures, of any kind, were virtually unheard of.

[131] *See* Fleming, *supra* note 123.

Then there is the big fish in a small pond effect. As in other small countries, such as the Netherlands or Scandinavia, which are also home to large international corporations, the reputational stakes are arguably higher in Canada. Nortel sinks and virtually every small investor in Canada gasps. There is nowhere in Canada for CBIs to hide, from regulators, analysts or the public investor; legal sensibilities at work.

The above discussion is not intended as a panegyric to Canadian corporate and securities regulation; like any other system, there are flaws, weaknesses, failures. And much to learn from the United States experience. However, the point is to belie certain of the hidden and not-so-hidden assumptions underlying the bonding hypothesis, as applicable to CBIs.

Which leaves us with the question. What did account for the sudden interest in cross-listing by CBIs, and the particular way in which they do it?

VI. Home Bias and the Chameleon Effect

It is likely that the more traditional reasons for cross-listing, rather than the bonding hypothesis, provide the motivation for the recent activities of CBIs. [132] In particular, the integration of product and capital markets is likely a significant factor in CBI cross-listing. And, different sectors appear to have different motivations. Canada has a high

[132] *See* Usha R. Mittoo, *Globalization and the Value of U.S. Listing: Revisiting Canadian Evidence*," 27:9 J. BANKING & FIN. 1629 (2003).

technology industry (think BlackBerry) and a NASDAQ listing provides comparability, as well as potential increased product visibility.

Rather than *why* CBIs are cross-listing, what may be of greater interest is *how* CBIs are cross-listing. The bonding hypothesis may have been seductive when looking at Latin American issuers, for example, [133] but CBIs appear to be adroitly making use of the "home bias" phenomenon instead.

A number of recent studies have observed the "home bias" effect. Stated simply, home bias means that U.S. investors tend to overweight domestic stocks in their common stock portfolio.[134] CBIs are not using a cross-listing to "bond", i.e. to signal to the U.S. market that they are voluntarily adhering to higher standards of corporate governance and submitting themselves to more rigorous regulatory scrutiny and oversight in the United States. Rather, CBIs are studiously avoiding any signaling effect whatsoever, [135] blending into the U.S. corporate woodwork. By passing themselves off as domestic U.S. issuers, CBIs take advantage of the home bias effect to sneak into U.S. domestic portfolios. This is a venerable tradition for CBIs, dating back to Nortel's New York Stock Exchange listing in 1975. [136] This is the "chameleon effect".

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[133] *See* Coffee, *supra* note 2 at 19-23.
[134] *See* Magnus Dahlquist, et al, *Corporate Governance and the Home Bias*, 38 JFQA 87 (2003); Tesar & Werner, *supra* note 10.
[135] As noted elsewhere, the very public patent woes of RIM may mark a reconsideration of this approach for Canadian issuers; it may become desirable to signal "Canadianess" if such is associated with innovative, essential gadgets.
[136] Nortel changed its name around the time of first listing, used domestic U.S. filing forms (which at the time it was obliged to use) and deliberately chose a "U.S." look for its information documents. Nortel

VII. Implications of the Chameleon Effect

The immediate implication of the chameleon effect is good news for U.S. investors. They are getting the best of both worlds, albeit perhaps unwittingly. They are buying what looks like U.S. domestic stock, which may be subject to the usual domestic judicial recourses, and in some cases, the oversight and protections of U.S. securities regulation and exchange rules. They are also getting the benefit of the oversight and penchant for early intervention of the Canadian securities regulatory regime. But even better, U.S. investors become Canadian shareholders, enjoying statutory and other rights and protections likely beyond their wildest imaginings. [137]

Over time, continued integration and deeper penetration of the U.S. market by a certain segment of Canadian issuers appears inevitable. As trading volume grows in the United States, some CBIs may lose their "foreign private issuer" status [138] and the current flexibility which they enjoy in terms of how they enter the market. Status as an FPI, for example, is a condition of use of the MJDS. Again over time, investors in the United States may lose some of the benefits of greater shareholder protections under Canadian law, as the chameleon effect is replaced by the Delaware/Canadian corporation. Hollinger International Inc. may have been a precursor: a Delaware incorporated, New

listed in November 1975 and changed its name from Northern Electric to Northern Telecom in early 1976. In 1995, it became NORTEL. Source: NYSE and NORTEL web sites.

[137] Recent large settlements in Canada by Nortel may be bringing this fact to the attention of US investors. Again, Nortel's recent financial difficulties may have resulted in US investors paying greater attention to the potential presented by Canadian remedies; in a recent representative action against Nortel in the United States, plaintiffs lost but have refiled in Ontario (motion not yet heard). *See Loc 302 and 612 International Union of Operating Engineers v. Nortel Civil Action No. 04-CV-05954* (AP) (Judge Preska, SDNY).

[138] One of the tests of FPI status is trading volume.

York listed corporation, majority-controlled by a Canadian incorporated, Canadian (and not U.S.) listed parent.[139]

In future, there may also be greater self-restraint on the part of Canadian issuers in making the decision to cross-list. Already, there is speculation that the surge in cross-listing activity in the 1990s was fuelled, in part, by the distortions of the tech bubble [141] As well, some sectors do not appear to benefit as much as others from cross-listing[142] giving support to the importance of product recognition and trade flows as determining factors in the cross-listing decision. [143] Real estate companies and the grocery business tend to stay home, tethered to local customers. And, finally, there is no doubt that the regulatory and financial burdens imposed by Sarbanes-Oxley give Canadian issuers pause, as they do their European counterparts. [144]

More interestingly perhaps, are the implications of the chameleon effect that go beyond CBIs. Where Canadian issuers have gone, will others follow? Is the Canadian experience the precursor? Going forward, will other FPIs emulate CBIs, or will CBIs remain a category apart. Israeli issuers, for example, also make use of the chameleon

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[139] In the recent Delaware reincorporation of Australian News Corp. in November 2004, a controversial issue among Australian shareholders, was the loss of the benefit of the more shareholder protective Australian corporate law regime. *See* THE SYDNEY MORNING HERALD *at* http://www.smh.com.au/.
[140] G. Andrew Karolyi, *The World of Cross-Listings and Cross-Listings of the World: Challenging Conventional Wisdom*, Fisher College of Business, Ohio State University (October 6, 2005), *available at* http://www.cob.ohio-state.edu/fin/faculty/karolyi/papers/The%20World%20of%20Cross%20Listings%20Survey.pdf.
[141] *See* Coffee, *supra* 2 at 54.
[142] *See* King & Segal, *supra* note 21.
[143] *See* Coffee, supra note 2.
[144] *See infra* note 150.

effect.[145] NAFTA, geographic proximity and cultural affinities are not explanatory in the case of Israeli issuers, yet there is a similar phenomenon.[146]

Will more FPIs (the Chinese, for example) consider direct cross-listings of equity securities (as they do in Hong Kong), without the additional expense and complexity of creating ADR programs. The traditional benefits of ADR programs (currency conversion, clearing and settlement services, information dissemination) are significantly less compelling in the wired (or more aptly, wireless) world of today. Mainland Chinese issuers listing in Hong Kong, for example, do not use a derivative form of security comparable to ADRs. Will interest in the use of ADRs fade, in favor of direct listing?

As argued above, the bonding hypothesis has never been strongly persuasive as a motivation behind cross-listing of CBIs. Of late, its explanatory force as a motivation for other FPIs has also diminished with the events of recent years. The Enron/Worldcom scandals seriously exposed the "hidden assumption" of the innate superiority of U.S. investor protections. [147] The early LLSV literature, based upon this assumption, is being

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[145] See, Amir Licht, *Managerial Opportunism and Foreign Listing: Some Direct Evidence* 22(2) U. PA. J. INT'L ECON. L. 325 (2000).

[146] Coffee, *supra* note 2 at 23-25.

[147] *See* DJANKOV, LA PORTA, LOPEZ-DE-SILANES, & SHLEIFER, THE LAW AND ECONOMICS OF SELF-DEALING (Nat'l Bureau of Econ. Research, Working Paper No. 11883, 2005), *available at* http://www.nber.org/papers/w11883. In the (Revised) Anti-director rights index (Table XII) the United States scores a 3 out of 6 as opposed to the United Kingdom and other Commonwealth countries which score 4 or 5 out of 6. As noted above, the anti-director indicia, as an indicator of shareholder protection in publicly traded companies are more or less meaningless. However, in this study at least, the authors have chosen a methodology likely to produce more meaningful results; the field of inquiry is narrower and the manner of soliciting information more open-ended (a fact pattern designed to elicit more accurate responses based on the particular analysis which the facts would evoke in each jurisdiction.)

critically revisited. [148] The Wall Street Journal has looked at how U.K. law gives shareholders greater direct oversight of managerial action, for example, with respect to executive compensation.[149]

The Sarbanes-Oxley legislation, the attempt to shore up U.S. corporate governance standards, is itself highly controversial both at home and abroad. Roberta Romano refers to it dismissively as "quack corporate governance". The great irony, for the bonding hypothesis, is that there has been no rush by FPIs to signal adherence to these "improved" corporate governance standards in the United States by flocking to U.S. markets. Rather, delisting from U.S. exchanges is the new phenomenon, much to the consternation of New York Stock Exchange officials.[150] Canadian issuers though are unlikely to follow the rest of the FPI pack in the rush to the exits. [151] CBIs are now a permanent, and largely indistinguishable, feature of the U.S. corporate landscape. The question here, from the

[148] *Id.* "Several authors have criticized [the director rights index] for both its ad hoc nature (which the creation of our anti-self dealing index is supposed to address) and for several conceptual ambiguities and outright mistakes in coding." at 4.

[149] *'No Excessive Pay, We're British – U.K. Reins In CEO Compensation as Shareholders Hold More Sway; Is It a U.S. Model, or Overrated?*, WALL ST. J., February 8, 2006 at C1, col. 1.

[150] "Companies that choose to list on the NYSE 'meet the highest standards of any market anywhere', says Noreen Culhane, executive vice president in charge of listings at the Big Board. She argues that it lets them sell their stock for a higher price, and therefore puts a higher value on their company. Companies tend to list in the market where they believe they [*sic*] shares will get the best price. In years when the U.S. market is rallying, New York tends to attract more foreign issuers, she says, because companies feel they get a better price for their shares when U.S. markets are hot". Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, WALL ST. J., January 26, 2006, at C1.

[151] *See also* SEC Commissioner Paul S. Atkins, Comments at the 4th Annual Financial Services Conference, *available at* SEC Website: http://www.sec.gov/news/speech/spch013106psa.htm. "Our mission to facilitate capital formation extends not just to companies headquartered in the United States, but to those from outside the country as well. I was therefore troubled to read … in The Wall Street Journal an article about a Bombay-listed company, Indiabulls Financial Services, which decided to list its shares on an overseas stock market but elected not to register in the United States. Their decision reportedly turned on the excessive time and cost required for a registration in the U.S. compared with listing in jurisdictions in Europe. They made this decision despite the fact that many of the company's largest investors are U.S. money managers. If this story actually reflects a rising trend, it is not a welcome one from my perspective."

point of view of U.S. regulators, is whether the large Canadian presence justifies continued "special status" for CBIs, or on the other hand, militates in favor of "domestic" treatment (especially if they are seen as masquerading, for purposes of taking advantage of the home bias effect, as U.S. issuers).

For all FPIs, however, the recent questioning of the "hidden assumption" of the superiority of U.S. governance mechanisms should lend credence to greater regulatory deference in the United States to "home country" corporate governance.[152] The NYSE, and to a certain, more limited extent, the SEC, have both implicitly acknowledged "different but equivalent" non –U.S. corporate governance mechanisms.[153] On this basis, the SEC has given non-U.S. issuers accommodations with respect to compliance with certain aspects of the Sarbanes-Oxley requirements.[154] In the glare of considerable

[152] Former SEC General Counsel, Ed Greene, and his colleagues at Cleary Gottlieb, have argued for greater deference on the part of the SEC for over a decade; *see* Ed Greene, et al *Hegemony or Deference: U.S. Disclosure Requirements in International Capital Markets* 50 THE BUSINESS LAWYER 413 (1995).

[153] "On the occasion of the visit of EU Internal Markets Commissioner Charlie McCreevy to Washington DC, SEC Chairman Christopher Cox and Commissioner McCreevy took stock of progress on and affirmed their commitment to eliminating the need for reconciliation between International Financial Reporting Standards (IFRS) and US Generally Accepted Accounting Principles (GAAP). Chairman Cox believes the use of IFRS has the potential to produce significant benefits for US investors through enhanced comparability of financial information about investment choices around the world. He congratulates Commissioner McCreevy on the strides made by the European Union toward implementing IFRS, and further notes the work accomplished by the International Accounting Standards Board (IASB), the independent body charged with establishing high-quality-global accounting standards. Chairman Cox reaffirms his commitment to the 'roadmap' to eliminate, by 2009 at the latest, the SEC requirement for foreign private issuers to reconcile IFRS-based financial statements to US GAAP." Press Release, SEC, *Accounting Standards: SEC Chairman Cox and EU Commissioner McCreevy Affirm Commitment to Elimination of the Need for Reconciliation Requirements* (Feb. 8, 2006), *available at* http://www.sec.gov/news/press/2006-17.htm. The US SEC reconciliation requirement to US GAAP has been a long-standing irritant for non-US issuers entering the US market as it necessitates additional costs and administrative efforts in an already costly exercise. The NYSE has also provided "waivers" of certain corporate governance requirements for non –U.S. issuers for a number of years. *See supra* note 14.

[154] Audit committees and independence of members, for example. The audit committee requirements of Sarbanes-Oxley have been some of its most criticized provisions. In response to this, although the legislation itself makes no distinction between domestic and foreign issuers, the U.S. SEC has issued rules that create "[t]ailored exemptions and guidance where the requirements of Exchange Act Section 10A(m) could result in a direct conflict with home country requirements". *See Standards Relating to Listed*

publicity, the SEC also acted very speedily to provide relief for FPIs wishing to delist in the wake of Sarbanes-Oxley. [155]

The bonding hypothesis is not explanatory of the largest and most important segment of cross-listed foreign issuers in the United States, Canadian issuers. Even more significantly, perhaps, looking below the surface of the bonding hypothesis reveals the hidden assumptions about the nature of shareholder rights and investor protection in the United States. These assumptions are worth questioning.

Company Audit Committees, 17. C.F.R. 240 (2003), *available at* http://www.sec.gov/rules/final/33-8220.htm#>P392-120623.

[155] *See SEC set to ease rules for foreign groups,* FINANCIAL TIMES, December 5, 2005, at 1, col. 2: "Alan Beller, director of the SEC corporation finance division, told the Financial Times that the commission was considering the reform because "we do not believe companies should feel trapped in our markets.""

Appendix 1. Canadian Corporations Listed on the New York Stock Exchange (2004)

Canadian Companies Listed On NYSE	Original Date of Listing	Industry	Issue Type	IPO	ADRs
Inco Ltd. (N)	12/20/1928	Non-ferrous Metals	Common Stock		
Alcan Inc. (AL)	5/31/1950	Aluminum	Common Stock		
Nortel Network Corp. (NT)	11/10/1975	Communications Technology	Common Stock		
BCE Incorparation (BCE)	8/18/1976	Fixed-line Communications	Common Stock		
Moore Wallace Incorporated (MWI)	11/13/1980	Furnishings & Appliances	Common Stock		
Zarlink Semiconductor, Inc. (ZL)	5/18/1981	Semiconductors	Common Stock		
TransCanada Corporation (TRP)	5/30/1985	Pipelines	Common Stock		
Barrick Gold Corp (ABX)	2/25/1987	Precious Metals	Common Stock		
Abitibi-Consolidated, Inc. (ABY)	7/1/1987	Paper Products	Common Stock		
Placer Dome Inc. (PDG)	8/13/1987	Precious Metals	Common Stock		
Domtar Inc. (DTC)	9/22/1987	Paper Products	Common Stock		
Intertan Inc. (ITN)	11/1/1988	Specialty Retailers	Common Stock		
Potash Corporation of Saskatchewan Inc. (POT)	11/2/1989	Specialty Chemicals	Common Stock	X	

Magna International Inc. (MGA)	10/9/1992	Auto Parts	Common Stock		
Glamis Gold Ltd. (GLG)	1/20/1993	Precious Metals	Common Stock		
Masonite International Corpoation (MHM)	4/2/1993	Building Materials	Common Stock		
Bank of Montreal (BMO)	10/27/1994	Banks, Ex-s&l	Common Stock		
Agnico-Eagle Mines Limited (AEM)	11/22/1994	Precious Metals	Common Stock		
Goldcorp Inc. (GG)	6/16/1995	Precious Metals	Common Stock		
Petro-Canada (PCZ)	9/13/1995	Secondary Oil Companies	Common Stock	X	
RBC Financial Group (RY)	10/16/1995	Banks, Ex-s&l	Common Stock		
Canadian National Railway Company (CNI)	11/17/1995	Railroads	Common Stock	X	
Quebecor World, Inc. (IQW)	12/7/1995	Industrial Services	Common Stock	X	
Rogers Wireless Communications, Inc. (RCN)	1/11/1996	Wireless Communications	Common Stock		
Rogers Communication Inc. (RG)	1/11/1996	Broadcasting	Common Stock		
Cameco Corporation (CCJ)	3/14/1996	Mining	Common Stock		

Royal Group Technologies Ltd. (RYG)	4/2/1996	Building Materials	Common Stock		
Extendicare Inc. (EXEA)	5/16/1996	Healthcare Providers	Common Stock		
CanWest Global Communications Corporation (CWG)	6/4/1996	Broadcasting	Common Stock	X	
Meridian Gold Inc. (MDG)	7/31/1996	Precious Metals	Common Stock		
Oppenheimer Holdings Inc. (OPY)	8/28/1996	Investment Services	Common Stock		
Toronto-Dominion Bank (TD)	8/30/1996	Banks, Ex-s&l	Common Stock		
Agrium Inc. (AGU)	10/4/1996	Specialty Chemicals	Common Stock		
Precision Drilling Corporation (PDS)	11/15/1996	Oil Drilling, Equipment & Services	Common Stock	X	
Biovail Corporation (BVF)	12/12/1996	Pharmaceuticals	Common Stock		
Ipsco Inc. (IPS)	12/31/1996	Steel	Common Stock		
Four Seasons Hotels Inc. (FS)	2/7/1997	Lodging	Common Stock	X	
Intrawest Corporation. (IDR)	3/25/1997	Lodging	Common Stock	X	
Suncor Energy Inc. (SU)	4/18/1997	Secondary Oil Companies	Common Stock		

Suncor Energy Inc. (SUPRA)	4/18/1997	Secondary Oil Companies	Structured Product		
Talisman Energy Inc. (TLM)	10/16/1997	Secondary Oil Companies	Common Stock		
Canadian Imperial Bank of Commerce (BCM)	11/13/1997	Banks, Ex-s&l	Common Stock		
Ritchie Bros Auctioneers Inc. (RBA)	3/10/1998	Industrial Services	Common Stock	X	
Celestica Inc. (CLS)	6/30/1998	Electric Components & Equipment	Common Stock	X	
Shaw Communications Inc. (SJR)	7/1/1998	Broadcasting	Common Stock		
Shaw Communications Inc. (SJRPRA)	7/1/1998	Broadcasting	Structured Product		
Shaw Communications Inc. (SJRPRB)	7/1/1998	Broadcasting	Structured Product		
NOVA Chemicals Corporation (NCX)	7/6/1998	Commodity Chemicals	Common Stock		
NOVA Chemicals Corporation (NCXPR)	7/6/1998	Commodity Chemicals	Structured Product		
NOVA Chemicals Corporation (NCXPRA)	7/6/1998	Commodity Chemicals	Structured Product		
TransCanada Pipelines Limited (TCAPR)	10/5/1998	Pipelines	Structured Product		

CGI Group Inc. (GIB)	10/7/1998	Diversified Technology Services	Common Stock		
The Great-West Life Assurance Company (GWL)	5/28/1999	Investment Products	Structured Product		
Brookfield Properties Corporation (BPO)	6/2/1999	Real Estate	Common Stock		
Intertape Polymer Group Inc. (ITP)	8/16/1999	Containers & Packaging	Common Stock		
Gildan Activewear Inc. (GIL)	9/1/1999	Clothing & Fabrics	Common Stock		
Magna International Inc. (MGAPRB)	9/23/1999	Auto Parts	Structured Product		
Manulife Financial Corp. (MFC)	9/24/1999	Life Insurance	Common Stock	X	
Sun Life Financial, Inc. (SLF)	3/23/2000	Life Insurance	Common Stock		
MDS Inc. (MDZ)	4/7/2000	Advanced Medical Devices	Common Stock		
Corus Entertainment, Inc. (CJR)	5/10/2000	Broadcasting	Common Stock		
Canadian Natural Resources, Ltd. (CNQ)	7/31/2000	Secondary Oil Companies	Common Stock		
TELUS Corporation (TU)	10/17/2000	Fixed-line Communications	Common Stock		
	11/14/2000	Secondary Oil	Common		

Nexen, Inc. (NXY)		Companies	Stock		
Enerplus Resources Fund (ERF)	11/17/2000		Fund		
Brascan Corporation (BNN)	12/20/2000	Real Estate	Common Stock		
Noranda, Inc. (NRD)	6/27/2001	Non-ferrous Metals	Common Stock	X	X
Kingsway Financial Services Inc (KFS)	7/11/2001	Property & Casualty Insurance	Common Stock	X	
EnCana Corporation (ECAPRA)	7/15/2001	Major Oil Companies	Structured Product		
TransAlta Corporation (TAC)	7/31/2001	Electric Utilities	Common Stock		
Agrium Inc. (AGUPR)	9/15/2001	Specialty Chemicals	Structured Product		
Cameco Corporation (CCJPR)	9/15/2001	Mining	Structured Product		
Merrill Lynch Canada Inc. (HCH)	9/27/2001	Investment Products	Basket		
Canadian Pacific Railway Limited (CP)	10/3/2001	Railroads	Common Stock		
EnCana Corporation (ECA)	10/3/2001	Major Oil Companies	Common Stock		
Fairmont Hotels & Resorts, Inc. (FHR)	10/3/2001	Lodging	Common Stock		
	10/30/2001	Pipelines	Common		

Enbridge, Inc. (ENB)			Stock		
Pengrowth Energy Trust (PGH)	4/10/2002	Secondary Oil Companies	Common Stock		X
Bank of Nova Scotia (The) (BNS)	6/7/2002	Banks, Ex-s&l	Common Stock		
The Thomson Corporation (TOC)	6/12/2002	Publishing	Common Stock	X	
CAE Inc. (CGT)	7/29/2002	Aerospace	Common Stock		
Cott Corporation (COT)	7/30/2002	Soft Drinks	Common Stock		
PetroKazakhstan Inc. (PKZ)	9/12/2002	Secondary Oil Companies	Common Stock		
CHC Helicopter Corporation (FLI)	10/11/2002	Oil Drilling, Equipment & Services	Common Stock		
PrimeWest Energy Trust (PWI)	11/19/2002	Secondary Oil Companies	Unit		
Fairfax Financial Holdings Limited (FFH)	12/18/2002	Property & Casualty Insurance	Common Stock		
Kinross Gold Corporation (KGC)	2/3/2003	Precious Metals	Common Stock		
Fording Canadian Coal Trust (FDG)	3/10/2003	Investment Products	Common Stock		
MI Developments Inc. (MIM)	8/20/2003	Real Estate	Common Stock		
Nexen, Inc. (NXYPRB)	11/5/2003	Secondary Oil Companies	Structured Product		

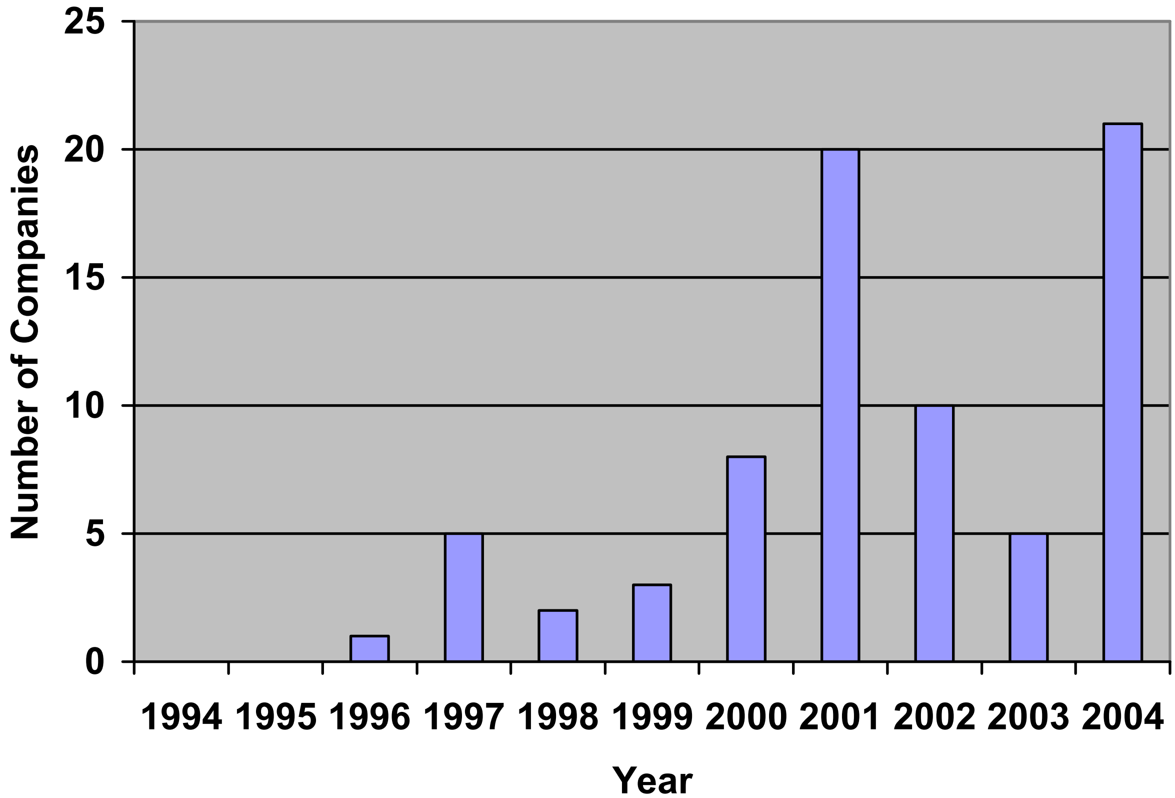
Pengrowth Energy Trust (PGH)	07/15/2004	Exploration/Production	Unit		
Lions Gate Entertainment Corp. (LGF)	08/09/2004	Broadcasting/Entertainment	Common Stock		
Gerdav Ameristeel Corp. (GNA)	10/15/2004	Gold Mining	Common Stock		
Kinross Gold Corp. (KGC)	12/06/2004	Steel	common		

Appendix 2. Canadian Companies Listed on the NASDAQ (1980-2003)

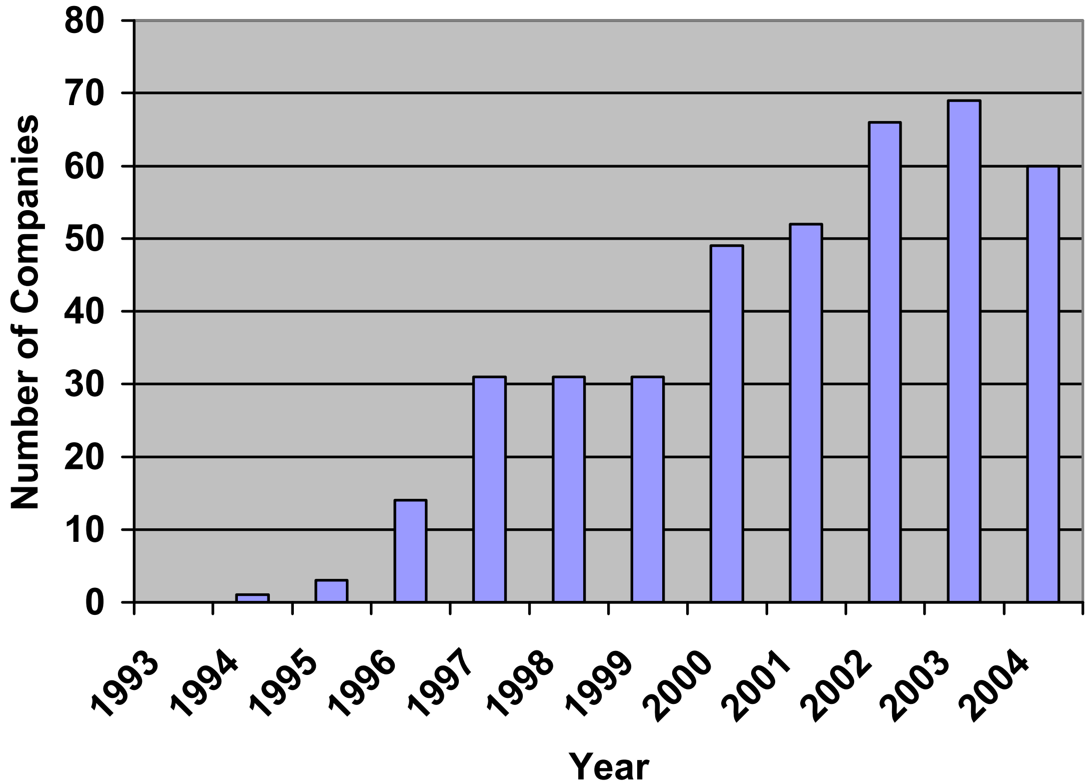
Symbol	Company Name	Date Listed	ADRs	TSO
STKL	SunOpta, Inc.	11/17/1981		52,578,000
NGAS	Daugherty Resources, Inc.	4/12/1982		9,960,000
LMLP	LML Payment Systems, Inc.	6/24/1983		19,606,000
SNDT	Sand Technology Inc	4/15/1985		13,164,000
CSLMF	Consolidated Mercantile Inc	8/22/1986		4,864,000
COGN	Cognos Incorporated	7/1/1987		89,936,000
QLTI	QLT Inc.	10/25/1988		68,870,000
MAMA	Mamma.com Inc	11/10/1988		6,139,000
QSND	QSound Labs, Inc.	1/20/1989		7,162,000
ABER	Aber Diamond Corporation	3/20/1989		54,637,000
DRAX	Draxis Health Inc.	8/8/1989		37,099,000
DYOLF	Dynamic Oil & Gas Inc.	10/19/1989		20,273,000
BIOM	Biomira Inc.	11/19/1991		53,796,000
MEOH	Methanex Corporation	5/19/1992		119,578,000
SSPI	Spectrum Signal Processing Inc.	6/10/1993		14,732,000
LBIX	Leading Brands Inc	8/2/1993		14,729,000
IDBE	ID Biomedical Corporation	8/3/1993		36,111,000
FBAY	Frisco Bay Industries Ltd.	10/13/1993		2,207,000
HUMC	Hummingbird Ltd	4/25/1994		18,042,000
IMAX	Imax Corporation	6/10/1994		39,261,000
ZICA	Zi Corporation	6/17/1994		38,089,000
CSPLF	Canada Southern Petroleum Ltd.	10/20/1994		14,418,000
WCST	Wescast Industries Inc.	10/25/1994		5,707,000
FSRV	FirstService Corporation	1/20/1995		13,507,000
CXSN	Counsel Corporation	4/24/1995		48,602,000
PAAS	Pan American Silver Corp.	6/12/1995		43,883,000
TSMA	Tesma International, Inc.	7/27/1995		18,110,000
BLDP	Ballard Power Systems, Inc.	11/8/1995		115,789,000
OTEX	Open Text Corporation	1/24/1996		40,322,000
AACB	Alliance Atlantis Communications, Inc.	1/26/1996		38,923,000
JCTCF	Jewett-Cameron Trading Company	4/12/1996		1,460,000
SSRI	Silver Standard Resources, Inc	8/1/1996		30,914,000
OPMR	Optimal Robotics Corp.	10/25/1996		14,936,000
MDSI	MDSI Mobile Data Solutions, Inc.	11/26/1996		8,207,000
TESOF	Tesco Corporation	12/2/1996		34,343,000
NGPS	NovAtel Inc.	2/4/1997		7,685,000
ALTI	Altair Nanotechnologies Inc.	3/24/1997		40,217,000
MXBIF	MFC Bancorp Ltd.	5/14/1997		12,832,000
TLCV	TLC Vision Corporation	7/2/1997		66,112,000
TONS	Novamerican Steel, Inc.	10/31/1997		9,700,000
NYMX	Nymox Pharmaceutical Corporation	11/28/1997		23,021,000
NICK	Nicholas Financial, Inc.	12/30/1997		5,061,000
DECA	Decoma International, Inc.	2/24/1998		51,599,000
DIIB	Dorel Industries, Inc.	5/8/1998		26,347,000

TIWI	Telesystem International Wireless Inc.	6/9/1998		93,434,000
MDCA	MDC Partners Inc.	10/2/1998		16,465,000
DECT	Dectron International, Inc.	10/6/1998		2,920,000
ATYT	ATI Technologies Inc.	11/24/1998		244,128,000
DSGX	Descartes Systems Group Inc. (The)	1/27/1999		52,225,000
RIMM	Research in Motion Limited	2/4/1999		91,720,000
GSLI	GSI Lumonics Inc.	3/24/1999		40,891,000
CERI	Capital Environmental Resource, Inc.	6/3/1999		38,445,000
CREO	Creo Inc.	7/29/1999		49,794,000
PVTL	Pivotal Corporation	8/5/1999		26,276,000
WSTM	Workstream Inc.	12/7/1999		22,446,000
SVNX	724 Solutions	1/28/2000		5,983,000
ANPI	Angiotech Pharmaceuticals, Inc.	2/17/2000		82,408,000
FMTI	Forbes Medi-Tech Inc.	3/17/2000		27,064,000
CRYP	Cryptologic, Inc.	3/21/2000		12,246,000
WEDX	Westaim Corporation (The)	4/19/2000		78,033,000
SWIR	Sierra Wireless, Inc.	5/5/2000		20,102,000
AELA	AEterna Laboratories Inc.	5/10/2000		45,202,000
ECGI	Envoy Communications Group, Inc.	6/6/2000		21,259,000
AXCA	Axcan Pharma Inc.	6/30/2000		45,004,000
EXFO	EXFO Electro-Optical Engineering	6/30/2000		25,181,000
IVAN	Ivanhoe Energy, Inc.	8/28/2000		156,693,000
HYGS	Hydrogenics Corporation	10/27/2000		53,056,000
EENC	Enterra Energy Trust	1/10/2001		18,484,000
DMCX	DataMirror Corporation	1/18/2001		11,429,000
HMSL	Hemosol, Inc.	3/1/2001		46,104,000
IAIA	Intier Automotive Inc.	8/9/2001		6,302,000
ONCY	Oncolytics Biotech, Inc.	10/5/2001		24,552,000
ALLSA	Allstream, Inc.	4/1/2003		1,091,000
SRXA	S R Telecom Inc	9/3/2003		10,445,000
NRMX	Neurochem Inc	9/18/2003		29,592,000
HUGO	Ivanhoe Mines Ltd	11/18/2003		249,373,000
VSGN	Vasogen Inc.	12/17/2003		62,022,000
GEAC	GEAC Computer Corporation Ltd.	3/2/2004		84,778,000
HMSL	Hemosol Corp.	5/5/2004		15,171,000
CRME	Cardiome Pharma Corp.	6/7/2004		50,839,0000

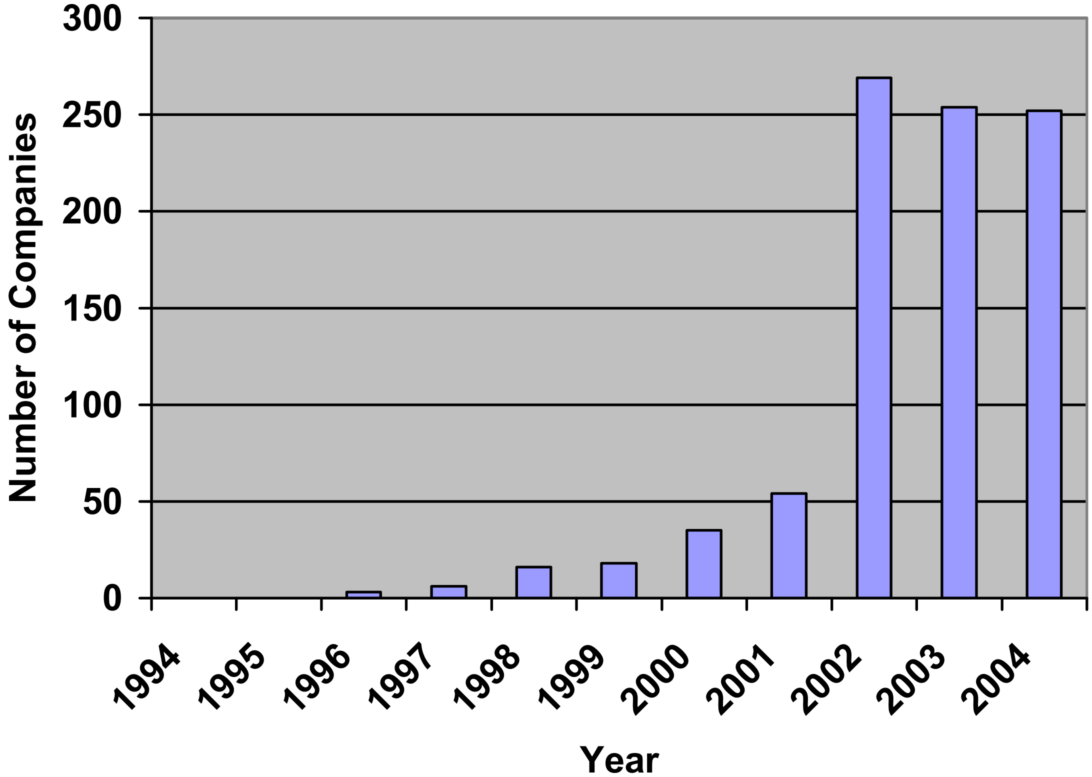
Appendix 3. Canadian Companies Filing S-1 (1994-2004)



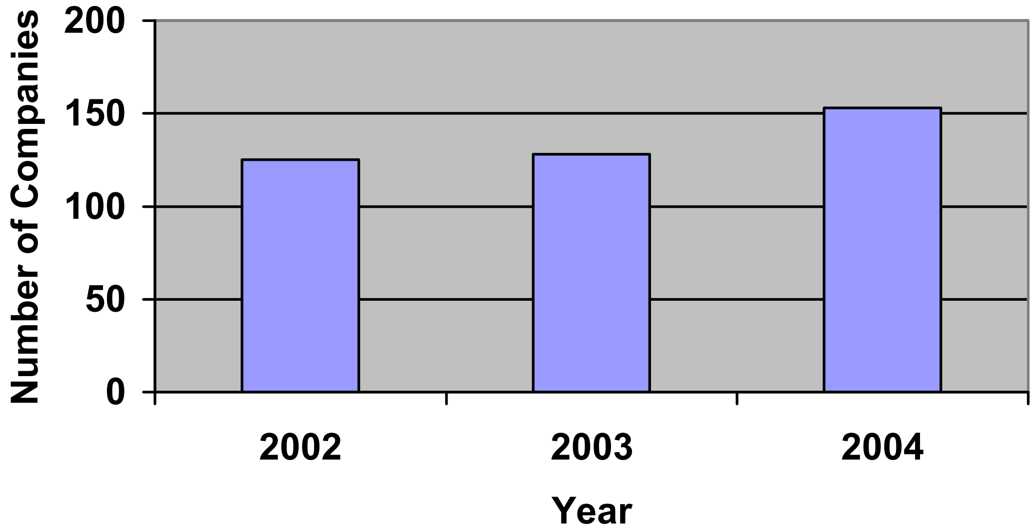
Appendix 4. Canadian Companies Filing 10-K (1994-2004)



Appendix 5. Canadian Companies Filing 20-F (1994-2004)



Appendix 6. Canadian Companies Filing 40-F (MJDS) (2002-2004)



Appendix 7. Canadian Companies Filing 40-F New Registration Forms (2002-2005)

Company Name	Province	Registration Date
Canadian Superior Energy Inc.	Alberta	07/16/2002
Pengrowth Energy Trust	Alberta	02/22/2002
Encana Corp.	Alberta	02/28/2003
Vermillion Energy Trust	Alberta	07/02/2004
Stantec Inc.	Alberta	08/03/2005
Norske Skog Canada Ltd.	British Columbia	04/16/2002
Northern Orion Resource Inc.	British Columbia	12/09/2003
Hummingbird Ltd.	British Columbia	02/19/2003
Novagold Resources Inc.	British Columbia	10/29/2003
Ivanhoe Mines Ltd.	British Columbia	11/17/2003
Nevsun Resources Ltd.	British Columbia	08/02/2004
Cardero Resource Inc.	British Columbia	11/03/2004
Formation Capital Corp.	British Columbia	05/27/2005
Silver Wheaton Corp.	British Columbia	04/22/2005
Gammon Lakes Resources Inc.	Newfoundland	07/17/2003
Bank of Nova Scotia	Ontario	05/03/2002
CAE Inc.	Ontario	07/25/2002
Iamgold Corp.	Ontario	11/01/2002
FNX Mining Co. Inc.	Ontario	06/04/2003
Research In Motion Ltd.	Ontario	07/18/2003
Orezone Resources Inc.	Ontario	11/06/2003
Yamana Gold Inc.	Ontario	10/31/2003
Gerdav Ameristeel Inc.	Ontario	04/28/2004
Cinram International Inc.	Ontario	05/19/2004
Banro Corp.	Ontario	12/30/2004
Glencairn Gold Corp.	Ontario	01/21/2005
Trizec Canada Inc.	Ontario	04/29/2005