

Corporate Social Responsibility and NAFTA: down at the crossroads?

*For presentation at the Workshop “NAFTA
Negotiations: Exploring the Implications”*

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Social Responsibility*

Dr. Kernaghan Webb
Associate Professor
Department of Law and Business
Director, Ryerson CSR Institute
Ted Rogers School of Management
Ryerson University
Toronto, Ontario
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Outline of presentation

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- SCC's BCE decision
- BCE decision in practice
- Concentric Circles of Environmental Social and Economic (ESE) decision making
- NAFTA's environmental provisions
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- Conclusions

Basic message

- Constitutive laws for different entities confer these entities with distinctive structural characteristics and powers that have an important bearing on the decisions and risk orientations of those entities (be they corporations, governments, or otherwise).
- Laws/rules/decisions applying to these different entities further constrain/facilitate/influence the decisions/actions of these entities, acting within their sphere of influence (e.g., UN treaties, NAFTA, domestic constitutional laws, fed/prov envtal/other laws, etc.)
- Current NAFTA environmental & social protection provisions provide a basis for national measures on these issues if scientifically based, and provide some assurance that the measures will be enforced, while also providing “challenge capability” for citizens/NGOs and firms
- ***Given current uncertainty re: FTAs, firms have additional reason to adopt a CSR approach by proactively addressing E/S issues in long term best interests of firm, rather than reactively relying on governments, courts and FTA bodies to decide these issues for them***

CSR defined

- the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that:
 - Contributes to sustainable development, health and the welfare of society;
 - Takes into account the expectations of stakeholders;
 - Is in compliance with applicable law and consistent with international norms of behaviour; and
 - Is integrated throughout the organization and practiced in its relationships.

Per: ISO 26000 social responsibility standard

Sustainable development defined

- Sustainable development is development that meets the needs of the current generation without compromising the needs of future generations
 - Brundtland Commission

Concentric circles of ESE decision making

- Different legally recognized entities have **different structural characteristics and powers**
- The distinctive structural characteristics and powers of entities have an important bearing on **decisions and ESE risk orientations** of those entities. For example:
 - directors of for-profit, public corporations, as per Business Corporation legislation as interpreted by courts (e.g., the BCE decision), have the discretion to take into account various stakeholder interests as part of their “responsible corporate citizen” fiduciary duties to act in the best interest of the corporation
 - Similarly, the Parliament, provinces, municipalities, FN self govts and inter-governmental bodies all have different remits and powers, as set out in constitutive legal instruments
 - E.g., the remit and powers of UN to address global issues
 - E.g., the remit and powers of NAFTA to address regional issues
 - E.g., the remit and powers of Parliament pertain to the national interests of Canada
 - E.g., the remit and powers of the provinces pertain to provincial interests
 - E.g., the remit and powers of municipalities and FN self governments to address their interests

SCC's BCE discussion of CSR

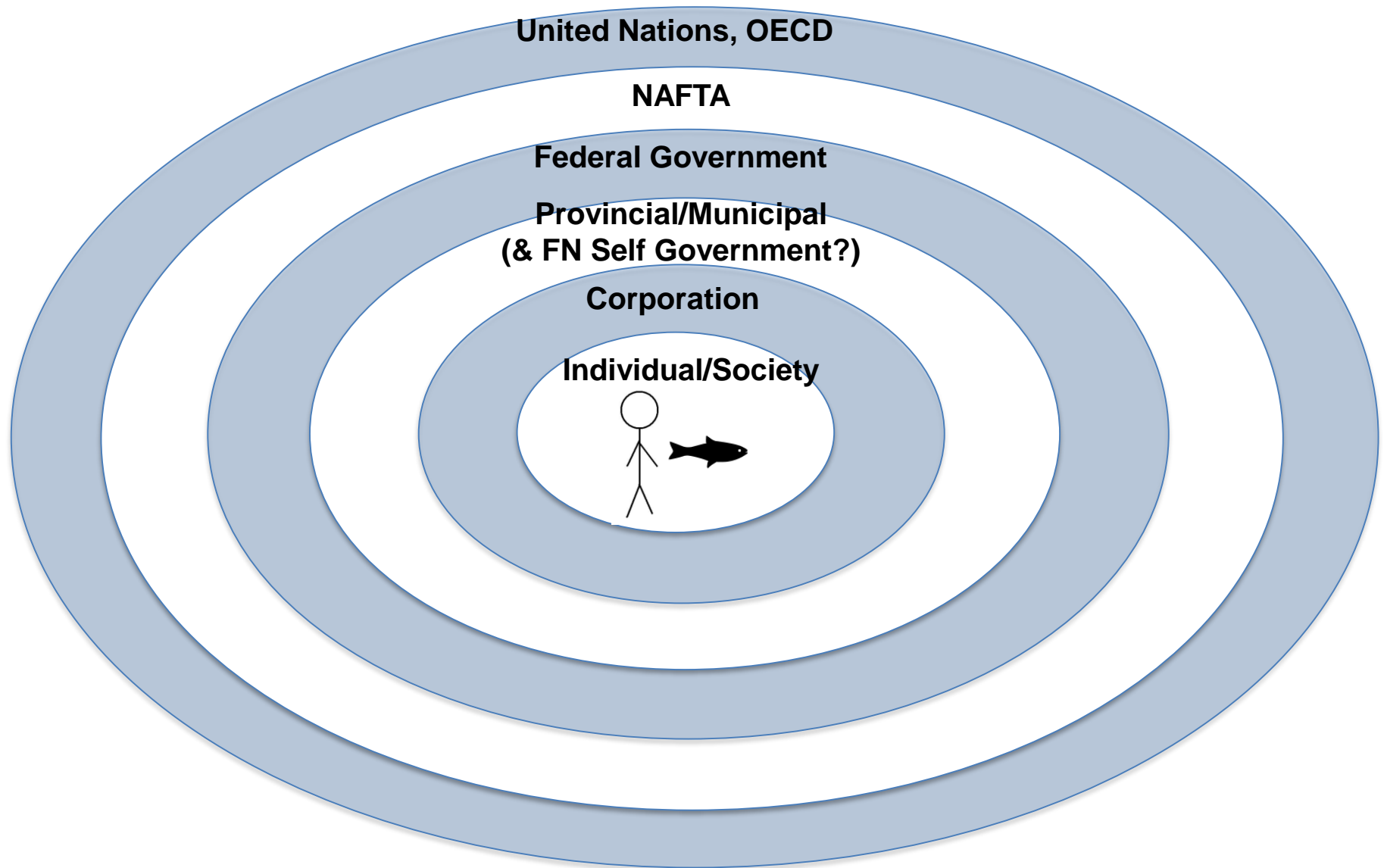
Directors have a....“fiduciary duty to act in the best interests of the corporation viewed as a **good corporate citizen**.”

The duty of directors to act in the best interests of the corporation “....comprehends a **duty to treat individual stakeholders** affected by corporate actions **equitably and fairly**. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, **commensurate with the corporation's duties as a responsible corporate citizen**....”

And in practice?

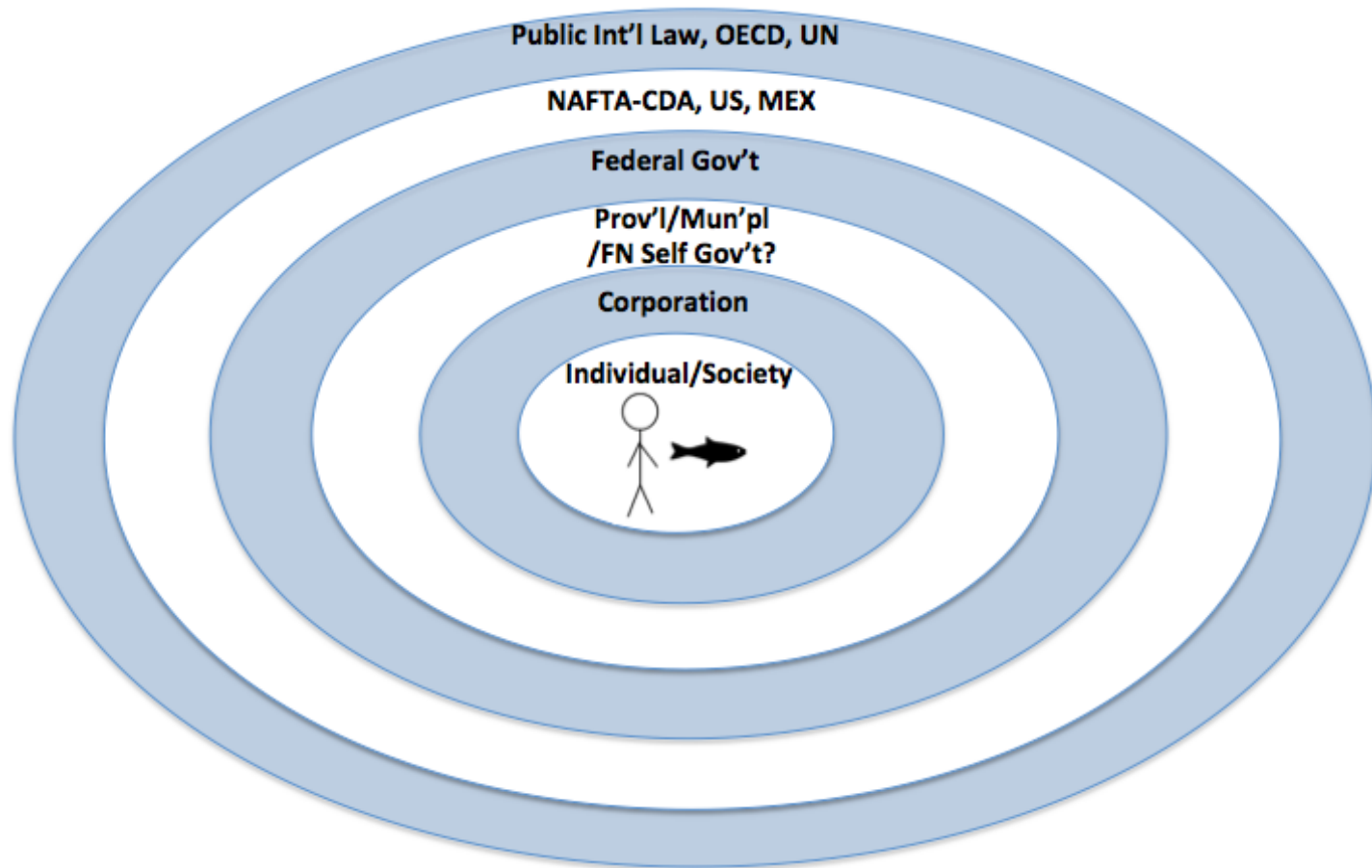
- *“From Canadian Natural’s perspective, our view is we have to do what’s in the best interest of our **stakeholders.**” (Murray Edwards, Chair, CNRL)*
- *“You might think that embracing corporate social responsibility is a matter of public relations, but there are practical legal reasons for ... [firms] to have a CSR strategy in place. Delivering on a promised CSR strategy may provide a defence to one of the growing number of lawsuitsThe Canadian government says that if [firms] don’t play by the standards...they could lose the diplomatic support of the federal government.” (Drew Hasselback, Fin Post, 2014).*
- Investor Lawsuits for failure to disclose material risks
- Community/NGO lawsuits: failing to exercise reasonable care, etc

Concentric circles of ESE decision making



Laws and norms bearing on ESE decision-making

ISO 26000
UN Global Compacy
UN Biz&HR
UNDRIP
Paris Agreement
Ozone Protocol
NAFTA Env'tal/Labour
ILO Con'vn 169
Constitutional Law (CDA)
CEAA and NEB Act (Fed)
EPA/EA (Prov'l)
Corp. Law (Fed Prov)
Municipal Bylaws
FN Self Gov't Directives



NAFTA environmental provisions

- reserves to each party the right to set its "appropriate level of protection" for human, animal, or plant life or health
- requires that measures be "based on scientific principles"
- Standards chapter gives parties right to establish level of protection considered appropriate, if "legitimate" objective
- Creates NAFTA Commission for Environmental Cooperation. Citizens/NGO can question enforcement, leading to tripartite panels. E.g., Cozumel Reef case. Complaint re: Mexican non enforcement led to creation of coral reef management plan
- Chapter 11 allows investors to challenge laws through arbitration panels if investors of participating parties not treated same as national parties (national treatment). E.g., Ethyl Corp v. Cda

Concentric circles, law (including trade law) & CSR: **Exhibit A**

Canada's Gran Colombia Gold (GCG) files \$700 million lawsuit against Colombia over Marmato project (Fin Post, April 10, 2017):

“....[GCG] has filed a US\$700 million lawsuit against Colombia under the Colombian-Canadian [FTA] after *the government ordered the company to cease operations* at the El Burro site in Marmato *until it has further consulted with local residents.*”

Concentric circles, law (including trade law) & CSR: **Exhibit B**

Copper Mesa Mining [CM] Awarded US\$24 M for Expropriation (Marketwire June 1, 2016)

“The Award upheld [CM]'s claims that Ecuador breached...the [Cda-Ecuador Investment Treaty] by failing toaccord...the project fair & equitable treatment & by unlawfully expropriating....”

“[In]... 2009, [community] members ...filed a lawsuit... alleging that they suffered injuries...by private security forces hired by Copper Mesa.” (Per: Business & Human Rights)

Concentric circles, law (including trade law) & CSR: **Exhibit C**

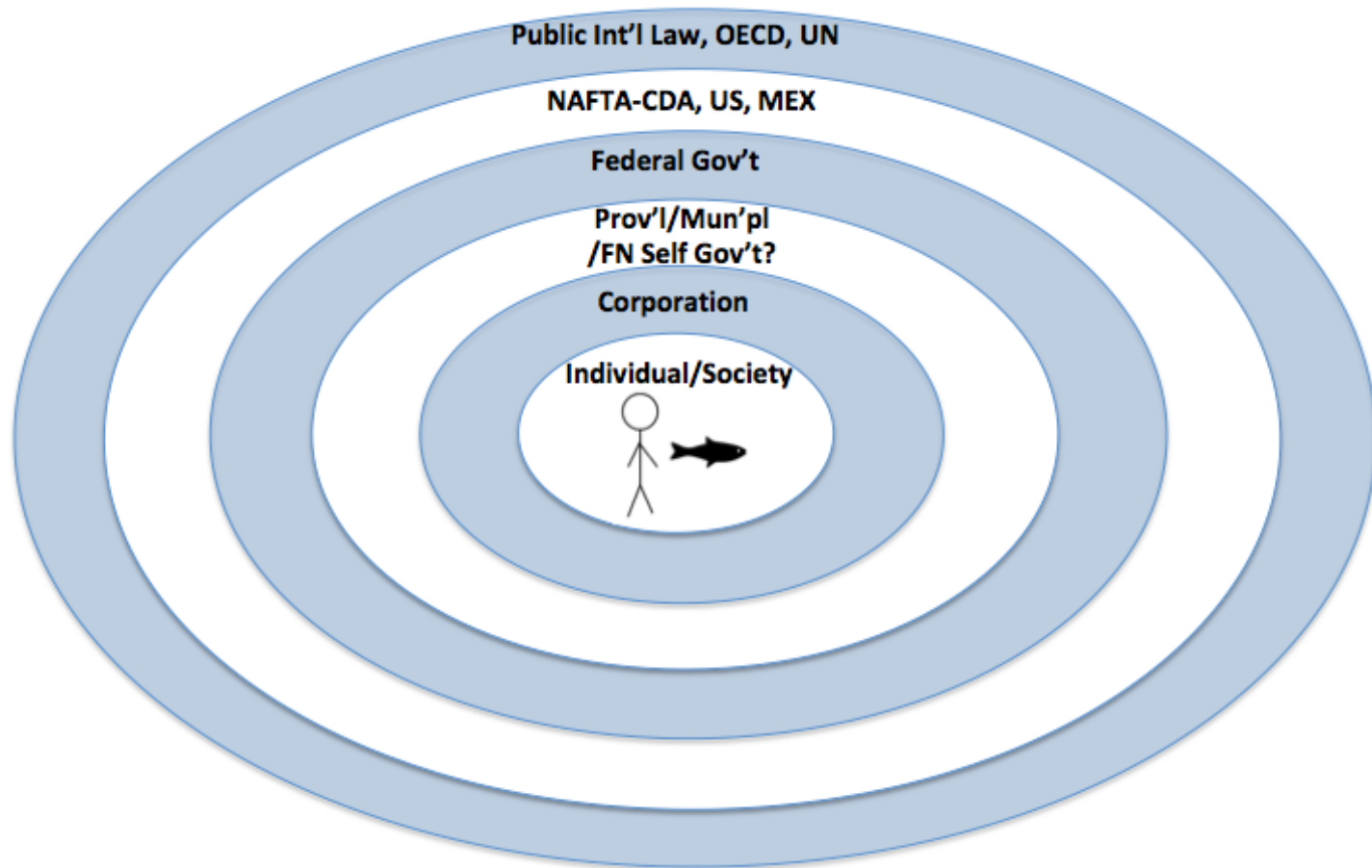
El Salvador Wins Dispute Over Denying a Mining Permit (NY Times, Oct. 14, 2016)

“The [arbitration] panel... accepted El Salvador’s argument that....[Vcr-based] Pac Rim Cayman, did not meet all the legal requirements to receive a permit.”

“What is clear is that investments are welcome if they respect institutions, if they respect the environment and health,” Lina Pohl, El Salvador’s environment minister.....”

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Municipal Bylaws
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Conclusions

- Constitutive laws for different entities confer these entities with distinctive structural characteristics and powers that have an important bearing on the ESE decisions and risk orientations of those entities (corporations, governments, etc.).
- Laws/rules/decisions applying to these different entities further constrain/facilitate/influence the decisions/actions of these entities, acting within their proper sphere of influence (e.g., UN treaties, NAFTA, domestic constitutional laws, fed/prov envtl/other laws)
- Current NAFTA E/S protection provisions provide a basis for national measures on these issues if the measures are scientifically based, & provide some assurance that the measures will be enforced, while also providing a modicum of “challenge capability” for citizens/NGO/firms
- Given current uncertainty re: FTAs, **firms have an added reason to adopt a CSR approach by proactively addressing environmental & social issues (as per BCE), rather than reactively relying on government, courts & FTA bodies to decide these issues for them.**

Questions/comments welcome!

- Dr. Kernaghan Webb, LL.B., LL.M., LL.D.,
- Associate Professor of Law and Business,
Ryerson University's Ted Rogers School of
Management
- Director, Ryerson University Institute for the
Study of Corporate Social Responsibility
- kernaghan.webb@ryerson.ca