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Foreword

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Foreword

Eight years after its establishment in 1976, the Canada-United States Law Institute¹ adopted a new form of conference structure designed not merely to impart information to the uninitiated or to identify transnational law issues for students and practitioners in both countries, but rather to explore the theory and empirics of a comparative law subject in substantial depth over a three and one half day period. By limiting attendance to a relatively small number of knowledgeable, active, and prepared paper presenters and nonpresenter discussants, the program structure enhanced the potential for genuine intellectual headway. The 1984 Comparative Corporation Law Conference that generated the articles in this volume has since served as a model for all subsequent multiday, residential, academically-oriented conferences undertaken by the Institute.

The Conference and this collection of updated and revised papers are, as far as we know, the first such efforts to make side-by-side comparisons of basic corporation law in Canada and the United States and, besides, to inject economic commentary into the two-nation legal context. The project was undertaken jointly with the University of Toronto Faculty of Law and Osgoode Hall Law School of York University. It brought together sixteen law and economics scholars to compare and critique the substantive principles and underlying policies associated with five significant corporation law questions. This examination was presented to, and involved the substantial participation of,² a group of nonpresenter participants from academic institutions, government agencies, corporate law departments, and private corporate law practice in both countries, as well as a small group of law students. Prior to the conference, the sixteen paper presenters submitted abstracts which were circulated in advance, in a preconference publication, among all participants. The preconference publication also contained "major-issue" or "focal" materials (cases, statutes, and commentary) which typify the prevailing Canadian and U.S. legal dialect and dialectic regarding each of

¹ The Institute is the joint creation of the law schools of Case Western Reserve University in Cleveland, Ohio, U.S.A., and the University of Western Ontario in London, Ontario, Canada. It undertakes a series of programs designed to explore the transnational and comparative law relationships of Canada and the United States. These programs include a system of student and faculty exchanges, conference organization and sponsorship, independent scholarly research, and publication of the *Canada-United States Law Journal*.

² The Institute has prepared a complete transcript of the original conference presentations, together with extensive commentary and discussion—not reproduced in this volume—contributed by both presenter and nonpresenter participants. Copies of the complete transcript are available for the cost of reproduction.

the five corporation law topics treated.³

This issue of the *Canada-United States Law Journal* contains revised and updated articles based on the papers initially presented at the Conference.

The two principal purposes of the Conference were (1) to focus and correlate Canadian and American insights on five corporate law questions, and (2) to examine the substance and rulemaking implications of positive and prescriptive economic perspectives relevant to those questions. In particular, the Conference was designed to consider the performance obligation of corporate managers (both directors and officers), in light of the wide discretion that they exercise in making firm decisions under an (investor-manager) institutional arrangement that is, in express terms, only incompletely specified. Within the more specific context of five corporation law questions, the conference examined the source and content of management's performance obligation, as well as the procedures and standards for testing and assuring conformity to it. One of the major objectives of the Conference was to identify the policies that explain, or should explain, prevailing or alternative legislative and judicial responses to management performance-obligation controversies in Canada and the United States. To this end, the Conference formally incorporated the insights of financial and managerial economists. For this reason it was subtitled (as this volume is also) *An Investigation of Canadian and U.S. Approaches to Selected Corporation Law Applications, within the Framework of Potentially Relevant Economic Insights*. In each of the five conference segments, three papers were delivered, presenting legal analyses from both Canada and the United States followed by economic commentary.

The five questions on which the Conference focused are:

I. May directors, in seeking to improve the welfare of noninvestors, sacrifice the wealth of investors?

II. Under what circumstances may controlling shareholders cause directors to make decisions that (1) furnish opportunities to controlling shareholders without allowing participation by noncontrolling shareholders, or (2) deprive noncontrolling shareholders of opportunities without imposing similar deprivations upon controlling shareholders?

III. What are the constraints on directors and officers in pursuing business opportunities for their own accounts?

IV. What are the constraints on a dominant shareholder's disposition of his holdings?

V. Why are shareholders afforded ad hoc voting participation and other impact-avoidance prerogatives in connection with certain firm decisions?

³ Copies of the preconference publication, which might be used along with this volume as teaching materials for a course in comparative corporation law, are also available from the Institute.

While, in some sense, this is a fairly narrow subset of the total array of traditional corporate law issues, it represents a radically significant selection, in the sense that, when probed deeply, these questions expose and test the outer boundaries of performance-obligation coverage as a function of core policies and assumptions. In order to evoke discussion of the fundamental body of performance-obligation theory and evidence, the analytical topography was laid out in a series of subsidiary issues in Conference planning documents.

Within the framework of the foregoing legal questions, the Conference discussion also drew upon, explicitly or implicitly, the theoretical and empirical insights of managerial and financial economics in the following areas:

- (1) Decisionmaking under uncertainty.
- (2) Portfolio theory and capital asset pricing models.
- (3) Agency and other management behavior costs.
- (4) Firm theory and delegation.
- (5) Wealth-shift decisionmaking by managers.
- (6) The economics of information production, acquisition, and dissemination.

The Institute acknowledges a special obligation to Professor Ronald J. Coffey of Case Western Reserve Law School, whose conceptual inspiration and determination provided the basis for the 1984 Conference and whose perseverance resulted in the successful collection of the updated and revised papers in this volume. He, together with Professor Philip Anisman of Osgoode Hall Law School and Professor Jeffrey MacIntosh of the University of Toronto Faculty of Law, provided the detailed planning and the analytical framework for this pathbreaking Institute effort. The efforts of Mr. Thomas J. Griffith, Case Western Reserve University Law School, Class of 1990, in completing the editing work of this volume are also appreciated by the Institute.

The Institute also acknowledges the invited nonpresenter participants whose expertise, preparation, and active discussion contributed substantially to the success of the Conference. A list of such participants is found preceding this foreword.

Finally, the Institute gratefully acknowledges the following organizations which provided funding for the conference and the publication of its product:

- Business Fund for Canadian Studies in the United States.
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