

## Class Act: Considering Race and Gender in the Corporate Boardroom

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# CLASS ACT: CONSIDERING RACE AND GENDER IN THE CORPORATE BOARDROOM

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## INTRODUCTION—PROLOGUE

Canadians tend to pride themselves on their superior corporate governance, accountability, and the notable absence of scandals of the magnitude of Enron, WorldCom, or Adelphia. The premise is that principles-based governance is more effective than a rules-based paradigm, and that directors and officers are likely to be more accountable to investors and others where they truly embrace key principles of effective governance. The hallmarks of effective oversight by corporate directors include: independence, integrity, and commitment to ethics; effective oversight of managers; strategic planning initiatives, including ongoing assessment of risks; separation of CEO and board chair or the creation of a lead director position; clearly articulated directorial duties; in-camera meetings solely of independent directors; well-defined board committees with independent directors; ongoing evaluation of individual director and board performance; clear mandates; and transparent and accountable reporting structures. Best practice suggests that the majority of directors on any given board should be independent and committed to giving sufficient time to the board in order to ensure effective monitoring and oversight.<sup>1</sup> Yet a board can have

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<sup>1</sup> The Toronto Stock Exchange ("TSX") defines "unrelated directors" as: [D]irector[s] [that are] independent of management and [are] free from any interest and any business or other relationship which could, or could reasonably be perceived to, materially interfere with the director's ability to act with a view to the best interests of the corporation, other than interests and relationships arising from shareholding[s].  
TORONTO STOCK EXCH., COMPANY MANUAL § 474(2) (2005), <http://www.tsx.com/en/>

all of these traits and still not be maximizing value if the corporation is paying for costly litigation to defend discrimination complaints, has lower productivity due to problems of systemic discrimination, or is facing a loss of consumer goodwill because of a reputation for gender and/or race discrimination.

Canadian publicly traded corporations, for the most part, have human rights policies and proactive programs to redress both overt and systemic discrimination, and Canada has not experienced the same level of egregious behavior in respect to sex and race discrimination exhibited by some U.S. corporations.<sup>2</sup> Yet race and gender discrimination continue to persist.<sup>3</sup> In Ontario alone there were 735 complaints regarding race and color to the Ontario Human Rights Commission in 2004–2005, 67% of which were workplace related; comprising 30% of all complaints under the Ontario Human Rights Code.<sup>4</sup> There were 668 complaints in relation to sex and pregnancy, and 209 complaints of sexual harassment during the same period, 90% and 93%, respectively, involved employment discrimination.<sup>5</sup> There continue to be serious problems encountered by women and persons of color in their advancement in corporations, particularly at the highest managerial and directorship levels.<sup>6</sup>

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pdf/CompanyManual.pdf.

<sup>2</sup> See, e.g., CGI, FUNDAMENTAL TEXTS: CODE OF ETHICS 59–60, available at [http://www.cgi.com/cgi/pdf/cgi\\_gouvern\\_funttext\\_chap4\\_e.pdf](http://www.cgi.com/cgi/pdf/cgi_gouvern_funttext_chap4_e.pdf) (last visited Oct. 28, 2005) (explaining the Canadian company's policy on discrimination); SCOTIABANK, GUIDELINES FOR BUSINESS CONDUCT 26 (1997), available at <http://www.scotiabank.com/images/en/filesaboutscotia/8598.pdf> (indicating that "[t]he Bank will not tolerate any behavior . . . that conflicts with the spirit or the intent of the Canadian Human Rights Act or other human rights and anti-discrimination laws that apply to subsidiaries, or to the Bank's operations outside of Canada"); Shell Can., Code of Ethics, available at <http://www.shell.ca/code/values/commitments/ethics.html> (last visited Oct. 28, 2005) (noting that "discrimination in the workplace will not be tolerated"); see also Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1464–66 (2002) (recognizing the continued race discrimination that endures in large corporations).

<sup>3</sup> See Wade, *supra* note 2, at 1464.

<sup>4</sup> ONT. HUMAN RIGHTS COMM'N, ANNUAL REPORT 2004–2005, at 69 (2005), available at [http://www.ohrc.on.ca/english/publications/2004-2005-annual-report\\_11.shtml#\\_Toc106509093](http://www.ohrc.on.ca/english/publications/2004-2005-annual-report_11.shtml#_Toc106509093) [hereinafter ONT. HUMAN RIGHTS COMM'N].

<sup>5</sup> *Id.*

<sup>6</sup> See Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1526–27 (1995) (explaining that Title VII has not had the same level of success in eliminating discrimination at higher levels of employment as it has at lower levels within organizations); see also Tracy Anbinder Baron, *Keeping Women Out of the*

Discrimination often operates subconsciously or with little transparency, even where human rights programs are in place, creating an even greater challenge for effective governance. This Article considers how corporate boards and their current representation and practice perpetuate these problems through their own lack of diversity. It suggests that the issues touch not only on gender and race, but also on class, in the manner in which board selection and practice occurs in the Canadian corporate environment.

In the United States, Cheryl Wade has suggested that racially toxic corporate activity and the lack of board oversight of human rights compliance has led to enormous costs to investors from loss of civil anti-discrimination suits.<sup>7</sup> There have been several significant racial discrimination class action suits including those against Texaco, which paid \$176.1 million, and Coca-Cola, which paid \$192.5 million, to settle racial discrimination litigation.<sup>8</sup> Wade notes that absent diversity on boards, the ability to empathize on gender and race issues is problematic for directors where their work and social experiences do not instill empathy for the particular group alleging discrimination.<sup>9</sup> Steven Ramirez has observed that race imposes billions of dollars in macroeconomic costs annually on U.S. society.<sup>10</sup>

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*Executive Suite: The Court's Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 267 & n.1 (1994) (discussing the phenomenon called the "glass ceiling" that explains why women and people of color are disproportionately under-represented in higher level positions).

<sup>7</sup> See Cheryl L. Wade, *The Interplay Between Securities Regulation and Corporate Governance: Shareholder Activism, the Shareholder Proposal Rule, and Corporate Compliance with Law*, in CORPORATE GOVERNANCE IN GLOBAL CAPITAL MARKETS 156, 163 (Janis Sarra ed., 2003).

<sup>8</sup> See Wade, *supra* note 2, at 1463. The companies also agreed to change their employment practices in respect to workers of color, and to implement monitoring and enforcement mechanisms. *Id.*

<sup>9</sup> See *id.* at 1479–80. Wade has suggested that there is a role for empathy in corporate governance, and points to both judicial use of the business judgment rule to reflect empathy with directors in terms of the difficulties of corporate decision making and empathy used by special board committees assessing requests for derivative actions for alleged corporate wrongdoing as evidence that empathetic behavior already exists. *Id.* at 1479.

<sup>10</sup> See Steven A. Ramirez, *A Flaw in Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837, 839–41 (2003) (explaining how non-diverse boards submissively allowed executives to accumulate billions in options compensation, while the companies they were managing went bankrupt, and suggesting that cultural diversity on boards is a

Unlike the United States, Canadian corporate boards do not face costly civil suit damages for race and gender discrimination, as the human rights statutes in Canada are considered to be a "comprehensive system" of remedial human rights legislation.<sup>11</sup> The courts have prohibited civil suits where a comprehensive remedial scheme exists.<sup>12</sup> At least in principle, complainants have cost-effective access to enforcement of their rights, with human rights commissions having carriage of claims and bearing the cost of enforcement. The vast majority of human rights cases are settled through mediation and conciliation. For example, in Ontario in 2004–2005, the remedies paid from settled claims were a total of \$1,003,742 for race and color complaints, an average of \$6,922 per person; and \$575,437 to settle sexual harassment complaints, an average of \$7,018 per person complaining.<sup>13</sup> Some human rights legislation also has a cap on non-pecuniary damages, such as humiliation or other harm.<sup>14</sup>

Corporations that engage in gender and race discrimination will face the costs of litigation, possible reputational sanction, potential consumer boycotts, and the cost of remedies that place the individual complainant in the position she or he would have been in but for the discrimination. Yet the kinds of large

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means to combat these problems).

<sup>11</sup> See Joseph M. Kelly & Bob Watt, *Damages in Sex Harassment Cases: A Comparative Study of American, Canadian, and British Law*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 79, 132 (1996) ("[T]he levels of compensation awarded by the Canadian . . . courts [were] much lower than . . . U.S. decisions"); Gaby Oré-Aguilar, *Sexual Harassment and Human Rights in Latin America*, 66 FORDHAM L. REV. 631, 643–44 & n.81 (1997) (comparing the effects of human rights statutes in Canada, the United States, and Britain).

<sup>12</sup> See *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20, 28 (1980) (acknowledging that a comprehensive remedial scheme developed by Congress evidences a decision to preclude other remedies); *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403, 419 (M.D. Pa. 1999) (finding that the Family and Medical Leave Act evinced Congress's intent to foreclose a § 1983 action); *Desrochers v. Hilton Hotels Corp.*, 28 F. Supp. 2d 693, 695 (D. Mass. 1998). Generally, there are fewer class actions in Canada than the United States because, until recently, contingency fees were prohibited under the public policy of champerty. Moreover, Canada has a cost allocation system that awards litigation costs to the winner as part of the remedy, increasing the cost risks associated with bringing civil claims. See John E. Core, *The Directors' and Officers' Insurance Premium: An Outside Assessment of the Quality of Corporate Governance*, 16 J.L. ECON. & ORG. 449, 451 n.2 (2000).

<sup>13</sup> ONT. HUMAN RIGHTS COMM'N, *supra* note 4, at 70.

<sup>14</sup> See Kelly & Watt, *supra* note 11, at 115 (explaining that under the Human Rights Code, damage awards for humiliation and/or exemplary damages are capped at \$10,000).

settlements that corporations in the United States have faced will not occur in Canada. While costly civil suits are expensive for the U.S. corporation and its investors, their threat may act as a normative temper on discriminatory conduct; in turn, serving to keep corporate boards vigilant in respect of their human rights practices. Absent that threat, in some cases, sanctions for human rights violations may be viewed by the corporation as simply the cost of doing business. On the other hand, even where there are successful suits in the United States, it can have negligible impact on share price to serve as a normative temper on corporate activity.<sup>15</sup> A more robust public human rights system, such as exists in Canada, may foster greater settlement of claims. Moreover, human rights adjudicators can order systemic remedies that alter corporate practice.

This Article briefly examines five issues in turn: the challenges faced in creating more diverse corporate boards; the potential for the duty of care to encompass monitoring human rights compliance; the role of shareholders and regulators in changing current patterns of governance; the issue of how externalities may disproportionately affect women and persons of color; and how the multinational nature of firm governance and activity impacts on the issue of race, gender, and class. As with a theatre play, the Article touches only the surface of these questions and does not fully expose the challenges. There are many complex and critical questions requiring further research in respect to issues of race, gender, and the corporation.

### I. DRAMATIS PERSONAE<sup>16</sup>

In Canada, it is difficult to determine whether the issue of race and gender discrimination is “in the script” of corporate board planning. In part, this is a function of who is on Canadian corporate boards. Although there are no precise figures, a recent survey found that only 7.4% of Canadian corporate board seats are held by women, with 353 women holding 431 directorships.<sup>17</sup>

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<sup>15</sup> See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1251 (2003) (describing the insignificant effect of suits on firm value because of the limited effects on stock price and remedial changes that follow the settlements).

<sup>16</sup> 7 THE WORKS OF SHAKESPEARE 224 (A.K. Smith, ed., AMS Press 1968) (1733).

<sup>17</sup> CATALYST, PERSPECTIVE 2002: CATALYST TRACKS TRENDS WITH MEMBER BENCHMARKING SURVEY AND CANADIAN CENSUS (2002), available at

This is less than half the percentage in the United States and very well below the 47% participation rate of women in the Canadian workforce.<sup>18</sup> Women working full time continue to earn only 70.5% the average income of men.<sup>19</sup> Once public sector enterprises and non-profit corporations are included, women account for 16% of board members.<sup>20</sup> Yet two in seven Canadian boards are still all-male.<sup>21</sup> The number of racial minorities on Canadian boards is unknown, although one limited survey found that the figure was less than 2%.<sup>22</sup> U.S. statistics indicate that while African Americans and Latinos make up 30% of the U.S. population, they comprise only 4% of the 11,500 Fortune 1000 corporation directors.<sup>23</sup> Approximately 90% of Fortune 1000 senior executives are white men.<sup>24</sup> Of thirty-one corporate directors holding forty-six directorships in Canadian based issuers that were surveyed in 2002, 80% identified the need for more gender diversity on corporate boards and acknowledged that diversity of views can enhance governance as long as there is a shared goal of effective governance and a willingness to work together.<sup>25</sup> Over half of those surveyed advised that there had been no discussion during their board recruitment process of the need to attract persons of color to the board.<sup>26</sup>

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<http://www.catalystwomen.org/bookstore/perspective/april2002.pdf>.

<sup>18</sup> See Canadian Statistics, Employment by Age, Sex, Type of Work, Class of Worker and Provinces (Monthly), <http://www40.statcan.ca/101/cst01/labr66a.htm> (last visited Oct. 28, 2005). In the United States women hold 14% of board seats. Ramirez, *supra* note 10, at 838.

<sup>19</sup> Canadian Statistics, Average Earnings by Sex and Work Pattern (Full-Time Workers), <http://www40.statcan.ca/101/cst01/labor01b.htm> (last visited Oct. 28, 2005).

<sup>20</sup> DAVID BROWN ET AL., A QUANTUM LEAP: CANADIAN DIRECTORSHIP PRACTICES (1997); DAVID BROWN & DEBRA BROWN, SUCCESS IN THE BOARDROOM 4 (1998).

<sup>21</sup> BROWN & BROWN, *supra* note 20.

<sup>22</sup> U.B.C. LAW GOVERNANCE SURVEY, 45 BOARDS OF CANADIAN BASED ISSUERS (2002) (on file with author) at 56 [hereinafter U.B.C. LAW GOVERNANCE SURVEY].

<sup>23</sup> Ramirez, *supra* note 10, at 838; Thomas W. Joo, *A Trip Through the Maze of 'Corporate Democracy': Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 736 (2003) (explaining that "[p]eople of color make up a growing proportion of corporations' labor force but not of their directorial and executive class").

<sup>24</sup> Ramirez, *supra* note 10, at 838.

<sup>25</sup> Janis Sarra, *Oversight, Hindsight and Foresight: Canadian Corporate Governance Through the Lens of Global Capital Markets*, in CORPORATE GOVERNANCE IN GLOBAL CAPITAL MARKETS, *supra* note 7, at 40, 68 (citing UBC LAW GOVERNANCE SURVEY (2002)).

<sup>26</sup> *Id.*

In considering the issue of race and gender on Canadian corporate boards, it merits note that the capital structure of Canadian corporations differs from the United States, with the majority of corporations closely held, even when publicly traded.<sup>27</sup> There are a number of publicly traded corporations that are dominated by family holdings or a small group of shareholders.<sup>28</sup> The capital structure suggests that the close control may work to prevent persons of color from accessing boards, as family members control board membership in a number of situations. Women have fared slightly better as daughters and partners of powerful shareholding families, keeping control and holdings tightly held. There are also forty-five Canadian based issuers on the S&P/TSX Composite Index with dual shares structures, providing unequal weighting to the exercise of share voting power.<sup>29</sup> In such circumstances, absent the controlling shareholders having a commitment to redressing gender and race discrimination, the composition of these boards is unlikely to change. Moreover, it is estimated that one third of the shares of Canadian corporations are now owned by institutional investors in the form of pension funds, mutual funds, and independent money managers.<sup>30</sup> The rapid growth of institutional investors in the past two decades has started to lessen this familial hold on the corporate board;<sup>31</sup> yet institutional investors for the most part have not championed board diversity, although they are increasingly measuring effective governance by a series of factors that includes compliance with human rights law.

## II. RAISING THE CURTAIN ON BOARD COMPOSITION

Good governance practice should be an objective of corporate boards. There have been numerous studies that show a

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<sup>27</sup> CANADIAN COALITION FOR GOOD GOVERNANCE, CORPORATE GOVERNANCE GUIDELINES FOR BUILDING HIGH PERFORMANCE BOARDS 4 (2005), *available at* [http://www.ccg.ca/web/ccgg.nsf/web/ccgg\\_guidelines\\_v1\\_january\\_2005/\\$FILE/CCGG\\_Guidelines\\_v1\\_January\\_2005.pdf](http://www.ccg.ca/web/ccgg.nsf/web/ccgg_guidelines_v1_january_2005/$FILE/CCGG_Guidelines_v1_January_2005.pdf) [hereinafter CANADIAN COALITION FOR GOOD GOVERNANCE].

<sup>28</sup> *But see id.* (indicating a shift in corporate ownership as institutional investors have acquired significant ownership positions in Canadian publicly traded corporations).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; *see also* BROWN & BROWN, *supra* note 20.

<sup>31</sup> CANADIAN COALITION FOR GOOD GOVERNANCE, *supra* note 27, at 4.



correlation between effective governance practice, measured by an active and independent board engaged in stewardship, monitoring and accountability, and maximizing enterprise value.<sup>32</sup> Strategic planning and an ability to foresee and manage risk are important governance qualities, and risk management and planning is enhanced by ensuring a diverse set of perspectives at the board. The homogeneity of existing directors creates a barrier to boards being able to fully engage in strategic planning and risk assessment, given that the lack of diversity in perspectives means that directors are less likely to be able to foresee the full range of both upside and downside risks to corporate decisions.<sup>33</sup>

Diversity on the corporate board can enhance corporate governance, in turn increasing enterprise wealth maximization.<sup>34</sup> The Conference Board of Canada has reported that there are both practical and symbolic reasons to have diverse boards.<sup>35</sup> Using gender as a proxy for diversity, it conducted a study aimed at measuring the results of gender diversity on boards. The Conference Board tracked corporations for six years and found that boards with two or more women directors in 1995 were far more likely to be industry leaders in profits six years later.<sup>36</sup> It found that 94% of boards with three or more women explicitly monitor the implementation of corporate strategy, compared with 66% of all-male boards; 74% of boards with three or more women explicitly identify criteria for measuring strategy, compared with 45% of all-male boards; and 86% of boards with three or more women adopted a corporate code of conduct, compared with 66% of non-diverse boards.<sup>37</sup> Where corporations had three or more women on the corporate board, the study found that 94% of boards ensured compliance with internal conflict of interest

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<sup>32</sup> BROWN & BROWN, *supra* note 20. See generally Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1298–1309 (1998) (discussing the correlation between board independence and corporate performance as well as several empirical methods of tracking that statistical relationship).

<sup>33</sup> See *infra* notes 40–50 and accompanying text.

<sup>34</sup> See Ramirez, *supra* note 10, at 839–41, 845–56.

<sup>35</sup> See DAVID BROWN ET AL., CONFERENCE BD. OF CAN., WOMEN ON BOARDS: NOT JUST THE RIGHT THING . . . BUT THE BRIGHT THING (2002), available at <http://www.conferenceboard.ca/documents.asp?rnext=374>.

<sup>36</sup> *Id.* at i.

<sup>37</sup> *Id.* at 5–6.

guidelines compared with 68% of all-male boards.<sup>38</sup> Seventy-two percent of boards with two or more women conduct formal board performance evaluation, compared to 49% of all-male boards.<sup>39</sup> These boards are more likely to have formal orientation and training programs and formal written limits to authority.

Overall, the Conference Board concluded that an increased number of women on corporate boards is likely to enhance the oversight and monitoring activities of corporate boards.<sup>40</sup> Its research found that “[d]iversity on boards . . . does change the functioning and deliberative style of the board in clear and consistent ways” and that “[g]ood governance improves organizational performance over the long term, financially and non-financially.”<sup>41</sup> Important from an enterprise wealth maximization perspective, the Conference Board found that 86% of boards with three or more women have two-way communication between the corporation and its stakeholders, compared with 71% of all-male boards.<sup>42</sup> It found that women are more likely to consider measures of innovation, and social and community responsibility; and that there is a correlation between women on boards and higher levels of customer and employee satisfaction.<sup>43</sup> Finally, it concluded that women directors make a practical difference to the independence and activism of boards, and are more likely to implement and monitor the indicia of good governance developed by international organizations.<sup>44</sup>

In Canada, board members are drawn from senior managers and executives on the basis that they have acquired skills and experience that allows for oversight. Larger organizations are more likely to have women directors than smaller organizations, and 34% of women directors are in the finance sector.<sup>45</sup> While the Conference Board clearly confirmed linkages between gender diversity, good governance, and financial performance, the causal effect was not determinative. The Board has speculated on

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<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *See id.* at 11 (“Boards with more women examine a wider range of management and organizational performance indicators.”).

<sup>41</sup> *Id.* at ii.

<sup>42</sup> *Id.* at 13.

<sup>43</sup> *See id.*

<sup>44</sup> *See id.* at 15.

<sup>45</sup> *Id.* at 7.

whether cause and effect might be in reverse order; specifically, that more women on boards resulted in more women executives being hired. The Conference Board found that organizations with women on their boards in 1995 had 30% more women executives by 2001 than organizations that had all-male boards in 1995.<sup>46</sup> It also observed that absent adding gender to the list of skills and qualifications used in choosing new board members, boards are unlikely to search for and thus find qualified women.<sup>47</sup> There is likely some merit in this observation, as the 7.4% women directors does not correlate at all with Statistics Canada reports that women occupy 35% of total management occupations in Canada.<sup>48</sup>

The Conference Board research also compared favorably with U.S. research in indicating that boards with women are more profitable than similarly situated all-male boards. Those corporations with all-male boards in 1995 ranked an average of seventeenth in their industry in terms of profits five years later compared with corporations with two or more women, which ranked tenth in their industry.<sup>49</sup> Again, while there are linkages, the causal connection is less clear. Boards of profitable firms may be more innovative in their governance practice and hence more likely to add women to their boards, or, on the other hand, more women may increase profits. Nevertheless, the Conference Board concluded that there is a consistent pattern of linkages between women directors and profits and revenues.<sup>50</sup>

The Conference Board statistics merit reflection because they are one of the few empirical studies in Canada that have measured both indicia of good governance and financial performance with gender representation. While it is not a direct proxy for racial diversity, it clearly establishes linkages between diversity of perspective, skills and performance, and consumer and employee satisfaction, themselves frequently viewed as a

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<sup>46</sup> *Id.* at 8.

<sup>47</sup> *See id.* at 10.

<sup>48</sup> *See* Canadian Statistics, Experienced Labour Force Fifteen Years and Over by Occupation and Sex, by Provinces and Territories (2001 Census), <http://www40.statcan.ca/101/cst01/labor45a.htm?sdi=management%20sex> (last visited Oct. 28, 2005) (reporting that women held 574,380 of the total 1,620,900 management occupations in Canada according to the 2001 Census); *see also supra* note 17 and accompanying text.

<sup>49</sup> *See* BROWN ET AL., *supra* note 35, at 12.

<sup>50</sup> *See id.* at i.

measure of board success. Yet, notwithstanding publication of these results, the percentage of women corporate directors in Canada remains extremely low.

#### A. *Interpretation of the Scene*

Scholars have observed that many recent corporate scandals in the United States were a function of group-think, whereby homogenous boards tended to be unquestioning in their oversight.<sup>51</sup> This occurs in part because of social and cultural ties, and the lack of diversity in outlook and experience that gives rise to like-mindedness. Given the influence of CEOs over the board selection process, CEOs are more likely to seek directors that will not challenge their managerial activity or strategic planning. In Canada, controlling shareholders are likely to seek out those related or similarly situated individuals, drawing on their own social circle and class. Even where there are board selection committees comprised of independent directors, there is a tendency to select people that come from the same range of experiences because they are familiar and reinforce the cultural norms of the board. While board members require some degree of compatibility, the creative energy that comes from different views brought to bear on a decision can be the key to effective governance.<sup>52</sup> Few boards set detailed criteria of the skills and experience sought for the board, given the particular markets in which the corporation operates and other factors that will affect governance.

The rationale used to exclude women and persons of color from Canadian boards is that directors require CEO experience. This is perpetuated by a culture that suggests that this was the required qualification of existing directors and that new directors need to “pay their dues.” Yet the cyclical effect of this is apparent: without diversity of views in the corporate boardroom, women and persons of color are unlikely to be internally promoted given strong cultural and behavioral norms of hiring

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<sup>51</sup> Marleen O'Connor has written on the problem of “group-think,” where board homogeneity creates an inability to critically assess the activities of corporate officers. See Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003); see also Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1365 (2002) (“[D]iverse perspectives on corporate boards of directors are likely to improve the quality of board decision making.”).

<sup>52</sup> See *supra* notes 40–50 and accompanying text.

those who resemble oneself. However, officer experience is only one of the skills that boards need to attract. If diverse boards do, as the studies suggest, enhance governance, then Canadian boards are missing an important opportunity to enhance the quality of their oversight.<sup>53</sup> Lynne Dallas has proposed relational corporate boards in which value is added to the corporation by extending board memberships to diverse groups, thereby improving access to advice and information, enhancing monitoring, and reducing environmental uncertainty.<sup>54</sup>

Steven Ramirez observes that initiatives under the Sarbanes-Oxley Act of 2002, to the extent that director selection power is shifted from the CEO to independent board members, creates fewer incentives for those directors to reproduce directors exactly like themselves and may result in an increase in board diversity where independent directors recognize the value that diversity contributes to enhanced governance.<sup>55</sup> The critical issue is whether independent directors recognize that value. It may not always be overt discrimination that is of concern, but rather the losses that can be associated with failing to have more fulsome representation by gender and race on corporate boards. Ramirez suggests that it is not skin color that gives rise to different and valuable insights on boards, but rather that cultural diversity leads to cognitive skills that can transcend race, and can lead to deeper thinking and more creative problem solving skills in conjunction with clearly articulated best practices.<sup>56</sup> The Conference Board has noted that the term diversity means more than the promotion of visible diversity, but means also "invisible" diversity, indicated by a range of different gifts, skills, experiences, views, and perspectives that individuals possess.<sup>57</sup> A Canadian survey also found that corporations may look increasingly at women for board seats post-Enron because of

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<sup>53</sup> *Id.*

<sup>54</sup> See Lynne L. Dallas, *The Relational Board: Three Theories of Corporate Boards of Directors*, 22 J. CORP. L. 1, 12 (1996).

<sup>55</sup> See Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1610-11 (2004).

<sup>56</sup> *Id.* at 1611.

<sup>57</sup> BROWN ET AL., *supra* note 35, at i (showing that the Fortune 500 firms with the best record of promoting women to senior positions, including directorships, are more profitable, with the twenty-five firms with the best promotion record posting returns on assets 18% higher and returns on investment 69% higher than the Fortune 500 median of their industry).

new requirements for financial literacy, an area in which women are occupationally represented in accounting and auditing fields.<sup>58</sup> However, women drawn from the ranks of the accounting profession are not necessarily going to fully address the issue of diversity in perspectives, where women are drawn from a class that is not reflective of the rich diversity of gender, race, and class that is implicated in corporate activity.<sup>59</sup>

As with women, even if racially diverse representation on corporate boards does exist, it still may not reflect the diversity of perspectives that can enhance governance. Devon Carbado and Mitu Gulati have suggested that racial minorities at the top of the U.S. corporate hierarchy will neither racially reform the corporation nor engage in discrimination-ameliorative activities.<sup>60</sup> They observe that corporate racism is often designed to achieve partial, as opposed to total, exclusion of non-whites by promoting those of color who are considered more palatable to corporate decision makers.<sup>61</sup> While there are benefits that can flow from first generation corporate diversity, such as stereotype negation, racial monitoring and accountability, and positive role-modeling, Carbado and Gulati suggest that there are strong incentives within the complicated micro-dynamics of corporate organizations for persons of color not to act to reduce discriminatory practices.<sup>62</sup> Central to their analysis is the notion that an employee's ability to climb the corporate hierarchy is based on more than qualifications and capability, and requires effective negotiation of the political landscape of the institution, the ability to make allies with powerful individuals and groups, and to undermine competitors.<sup>63</sup> They also warn of the risk of tokenism; specifically, that the cost of any failure reflects on the particular race, that tokenism may restrict the person's sense of autonomy, and that there are barriers to being mentored because

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<sup>58</sup> UBC LAW GOVERNANCE STUDY, *supra* note 22.

<sup>59</sup> See *infra* notes 60–61 and accompanying text.

<sup>60</sup> See generally Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1677–91 (2004) (arguing that corporations will only hire minorities that have perspectives similar to those of the majority and proposing that successful minorities will not help reduce discrimination because they achieved success by conforming).

<sup>61</sup> *Id.* at 1658.

<sup>62</sup> See *id.* at 1677–91.

<sup>63</sup> *Id.* at 1691.

after-work socialization tends to be same race.<sup>64</sup> They conclude that racial types that race their way to the top of the corporate hierarchy are not likely to exercise racial agency to lift others as they climb.<sup>65</sup> The acquiring of board seats by persons of color will result in cross-racial learning and eventually to the amelioration of unconscious discrimination, but Carbado and Gulati conclude that successful minorities cannot be expected to do the anti-discrimination work that law has performed, albeit imperfectly.<sup>66</sup>

### *B. Paid Performance*

A further issue is that structural barriers to board participation may exist from director compensation practices. A considerable amount has been written on the incentive effects of CEO and other executive compensation structures.<sup>67</sup> If the structure is geared toward maximizing short-term return, then there is incentive for officers to adopt strategies that maximize that return without necessarily balancing long-term value and sustainable strategies. The same incentive effects discourage investing in a more diverse workplace once the statutory minimum of human rights compliance is met, as dollars out of shareholders' pockets today are dollars out of the CEO's compensation package.

The compensation of directors may also create barriers to diverse boards. In Canada, directors are frequently considered to effectively represent shareholder interests if they themselves hold shares, as it creates incentives to devote the time and energy to proper oversight and to take remedial action where officers are engaged in shirking or other problematic behavior. A number of Canada's largest corporations require a specified level

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<sup>64</sup> *Id.* at 1668–72. They define tokenism as the situation whereby the firm hires a small number of persons of color and does little to integrate them into firm culture, with the institutional effect of legitimizing the existence of a predominantly white workplace and providing the firm with a defense against discrimination. *Id.* at 1668–69.

<sup>65</sup> *Id.* at 1692–93.

<sup>66</sup> *Id.* at 1693.

<sup>67</sup> See, e.g., Nathan Knutt, Note, *Executive Compensation Regulation: Corporate America, Heal Thyself*, 47 ARIZ. L. REV. 493, 493–95 (2005) (urging Corporate America to fix executive compensation on its own, without increased governmental regulation); see also Roger L. Martin, *Taking Stock*, 81 HARV. BUS. REV., Jan. 2003, at 19, 19 (concluding that compensating corporate managers with stock and stock options is ineffective because it creates an incentive for managers to increase the expectations of future earnings, but not actual earnings).

of shareholdings to signal that commitment, often five to six times the annual director fees.<sup>68</sup> This can create financial barriers to board participation that is representative of gender and race. This requirement clearly has a class component to it, as a potential director must have sufficient assets or income to participate on the board.

Canadian corporations are moving away from stock options as a form of director compensation, because there is no capital at risk and stock options tend to focus director attention on short-term value, to the detriment of long-term investor interests.<sup>69</sup> Deferred share units ("DSUs") or shareholdings are viewed as better incentives for directors to focus on long-term sustainability. The Canadian Coalition for Good Governance suggests as best practice that directors be required to own the equivalent of five years' annual fees in the form of shares or DSUs after five years on the board.<sup>70</sup> While this does not require assets up front, it assumes that the director has sufficient resources and income to work on the corporate board for five years without any immediate compensation, again, restricting the class of people from whom directorships can be drawn. This has a disproportionate effect on women and persons of color who have historically fewer assets and lower income. While the notion of aligning director interests with shareholder interests through shareholdings may well promote a level of diligence, it also results in a very narrow set of perspectives brought to the board table.<sup>71</sup>

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<sup>68</sup> See CANADIAN COALITION FOR GOOD GOVERNANCE, *supra* note 27, at 24 app.1 (2005) (noting that both the Bank of Montreal and the Canadian Imperial Bank of Commerce require directors to hold six times the value of the annual director retainer in company stock; TransCanada PipeLines Limited requires five times the amount of shares as the director retainer).

<sup>69</sup> See *id.* at 9–10 (explaining that "[s]tock options are an inappropriate form of compensation for the directors of large and established corporations"); Martin, *supra* note 67, at 19 (stating that "[m]otivating managers with company stock can do damage on a grand scale, encouraging them to pursue strategies that fatten their wallets at shareholders' expense"). The Coalition advocates that shares should be granted to directors at market value or in the form of deferred share units ("DSUs"), which are bookkeeping entries that are equivalent in value to a common share with dividend rights. It observes that DSUs are maintained until the director retires, at which time the director can claim the shares or the cash equivalent of their face value. See CANADIAN COALITION FOR GOOD GOVERNANCE, *supra* note 27, at 9.

<sup>70</sup> *Id.* at 10.

<sup>71</sup> See *supra* notes 17–26 and accompanying text (explaining how corporate boards are nearly homogeneous in race, gender, and values).



Directors could monitor compliance with human rights law and with corporate policies on diversity and human rights, and executives and senior managers could have a component of their compensation based on their success in implementing and managing diversity. Given the strong incentive effects in how compensation is structured, a corporate commitment to human rights should be reflected in how directors assess management of the corporation.

### *C. Board Understudy*

Even if there are not qualified women and persons of color in a particular sector (a highly arguable point), corporate boards could immediately address board diversity through either apprenticeship or understudy programs or the creation of board advisory committees on race and gender.

An understudy program could involve recruiting potential future board members from diverse groups with diverse perspectives and committing corporate resources for two years to have them as non-director members of the corporate board. The "understudies" could take the same orientation and ongoing training that board members receive, would attend all board meetings, receive materials, and informally participate in discussions. For the understudy period, the individuals would not have either the ability to vote or the legal liability that one assumes with a directorship. Confidentiality would be achieved through contractual arrangements, much as corporations currently ensure through their contracts with executives. Insurance and indemnification costs would be limited because the understudies would at best have normative suasion power, not real oversight power. While the women, persons of color, and other understudies are acquiring board-related skills and experience, they would contribute their insights and perspectives to board discussions on issues, thus enriching the board's decision making processes from the initiation of such an initiative.

This kind of model would also break down information asymmetries, in terms of both the information diverse members are exposed to, and the preconceptions by existing directors of the contributions that diverse board members would make. The costs to the board for travel and other expenses and an understudy stipend would likely be relatively small compared to

the costs already expended on director recruitment services. The understudy program would provide a roster of highly diverse and skilled potential directors. The benefits to other corporations would also be evident, as the understudies would be marketable to other corporations if their numbers exceeded the board seats that come open within a 2-5 year period that they are committed to participating in the processes of the sponsoring corporation. This would address both the risk of free-riding on the development of the director pool, while at the same time giving the sponsoring board the option of not making a full board appointment. Many other occupations have training, apprenticeship, and mentoring type programs. Once the confidentiality issue is addressed, there is no reason why directors should not undertake recruitment and training in a similar manner. Such a program would also signal to investors, employees, and consumers that the corporate board is innovative in its strategy to represent the diversity of its client base and society in general.

A less aggressive option would be to create gender and race discrimination advisory committees of corporate boards. In some instances, corporations have hired corporate ombudspersons, often reporting to the CEO on human rights and similar issues. While these are important developments, a staff person that is dependent on corporate officers for continued employment is unlikely to provide an independent assessment of corporate activities that may be overtly or systemically discriminatory. An advisory committee to the board, comprised of union representatives, consumers, human rights activists, and others, would provide that independent advice. In order to be effective, however, the committee would have to have periodic access to the entire board, and there must be sufficient reporting and follow up mechanisms to make any input meaningful. Such a committee could also serve to help identify future board members.

Given the much higher percentage of women directors on boards of non-profit corporations and Crown corporations (and possibly persons of color),<sup>72</sup> boards of issuing corporations could

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<sup>72</sup> See Aliza Pilar Sherman, *Woman on Board: In the Boardroom, There's Still Plenty of Room for Women*, ENTREPRENEUR, July 1, 2005, at 37 (noting that Catalyst, a businesswomen's advisory group, discovered only 13.6% of the board seats on Fortune 500 boards are occupied by women and that ION, the InterOrganization Network, found that there are more women sitting on nonprofit

be drawing on these boards for either dual appointments, understudy programs, or as a representative on an advisory committee.

These ideas present just two of many options for dealing with the myth that there are no qualified women and persons of color ready to step onto Canadian corporate boards. Given their oversight obligations, any strategies that encourage diversity of perspective will enable the corporation to fashion strategic business plans that minimize downside risks and enhance long term value. This includes not only gender and race representation, but the perspective of those from different classes who have encountered different types of problems in dealing with the corporation as a consumer, a client, a trade supplier, or an employee.

### III. ACT III, SCENE 1: THE DUTY OF CARE OF CANADIAN CORPORATE DIRECTORS

Efficiency in corporate activity is normatively defined and shareholder value maximization is the benchmark against which the conduct of directors is frequently measured. It needs to be recast away from a purely shareholder wealth maximization objective to one that maximizes benefits to all those with investments in the firm.<sup>73</sup> There is now some support for this notion with a recent judgment of the Supreme Court of Canada.<sup>74</sup> In late 2004, the Supreme Court of Canada, in determining the issue of fiduciary obligation for a financially distressed company, held that the duty of directors and officers under the Canada Business Corporations Act ("CBCA") does not change when the corporation is in financial distress and that directors and officers

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boards); see also Agnes Meinhard & Mary Foster, *Competition or Collaboration? Preliminary Results of a Survey of Women's Voluntary Organizations 2* (Ctr. for Voluntary Sector Studies, Working Paper No. 8, 1997), available at <http://www.ryerson.ca/cvss/WP08.pdf> (stating that 16% of board seats in voluntary nonprofit organizations are filled by women).

<sup>73</sup> Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. FOR SOC. JUST. 457, 460–61 (2002). I have suggested that once the normative content of the shareholder wealth maximization paradigm is evident, the debate regarding corporate governance becomes a matter of justifying one's normative choices rather than trying to justify interference in the operations of an allegedly neutral market. *Id.* at 461–62.

<sup>74</sup> See *Peoples Dep't Stores, Inc. v. Wise*, [2004] S.C.R. 461, 481 (explaining that "best interests of the corporation" should be read not simply as the 'best interests of the shareholders').

owe their fiduciary duties solely to the corporation at all times.<sup>75</sup> While the judgment leaves a number of unanswered questions for directors regarding the extent of their obligations, the Court did make one important finding. It held that the “best interests of the corporation” should not be read simply as the “best interests of shareholders” and that from an economic perspective, best interests of the corporation means maximizing the value of the corporation, and various factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation.<sup>76</sup> This finding by Canada’s highest court represents a clear departure from previous case law where a number of courts have equated best interests of the corporation with shareholder wealth maximization.<sup>77</sup> The Court held that in determining “whether [directors] are acting with a view to the best interests of the corporation, it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.”<sup>78</sup> The Court held that observing respect for interests beyond the company’s shareholders does not leave directors open to the charge that they have failed in their fiduciary duty to the company.<sup>79</sup>

The Supreme Court held that in some circumstances, directors owe a duty of care to creditors and other stakeholders and that the standard is an objective one in that the subjective motivation of directors will no longer be a factor in determining whether directors have met their duty of care.<sup>80</sup> Expressly allowing directors to take account of prevailing socio-economic

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<sup>75</sup> For a full discussion, see Janis Sarra, *Canada’s Supreme Court Rules No Fiduciary Obligation Towards Creditors on Insolvency: Peoples Department Stores v. Wise*, 15 INT’L INSOLVENCY REV. (forthcoming 2006). The Court did find that directors owe a duty of care to creditors, but no fiduciary obligation. The judgment changed the standard of assessment of the duty of care to a purely objective test, enshrined the business judgment rule in Canada, and may have provided greater access to the oppression remedy for creditors. See *Peoples Dep’t Stores*, [2004] S.C.R. at 483.

<sup>76</sup> *Peoples Dep’t Stores*, [2004] S.C.R. at 481.

<sup>77</sup> See, e.g., *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi, Inc.*, [2002] D.L.R.4th 496, 529; *CW Shareholdings, Inc. v. WIC Western Int’l Commc’ns Ltd.*, [1998] O.R.3d 755, 768; *Alberta Ltd. v. Producers Pipelines, Inc.*, [1991] Sask. R. 81, 101.

<sup>78</sup> *Peoples Dep’t Stores*, [2004] S.C.R. at 482.

<sup>79</sup> See *id.* at 481 (citing *Teck Corp. Ltd. v. Millar* [1972] D.L.R.3d 288, 314)).

<sup>80</sup> See *id.* at 492.

issues and stakeholder interest was also an important observation by the Court.<sup>81</sup> Yet any potential increase in access to claims based on the duty of care is tempered considerably by the low threshold set by the Court for deference to business judgments and the entrenchment for the first time in Canada of the business judgment rule.<sup>82</sup> "Directors . . . will not be held to be in breach of the duty of care . . . if they act[ed] prudently and on a reasonably informed basis. The decisions . . . must be reasonable business decisions in light of all the circumstances about which the directors . . . knew or ought to have known."<sup>83</sup> This observation will be a critical part of determining whether there is any real enhancement of director oversight.

Arguably, the duty of care could encompass an obligation to ensure processes in place for compliance with human rights law and corporate codes of conduct. Cheryl Wade has observed that large settlements in the United States for race discrimination reflect what should already be occurring under directors' duty of care to ensure that shareholder profits are not reduced as a result of non-compliance with anti-discrimination law.<sup>84</sup>

The apparent opening up of the duty of care under Canadian law also creates potential for investor claims of breach of directors' duty of care to ensure that programs and monitoring are in place to comply with human rights laws and company diversity policies. To date, no such actions have, to the author's knowledge, ever been filed in Canada. Canada prides itself on having a better record than its sister nation to the south in terms of human rights, employment and labor standards, and environmental and occupational health and safety. Remedial legislation in all of these areas is stronger, and enforcement more aggressive. In the environmental field, directors and officers are more likely to implement environmental protection and remediation, because courts and statutes have allocated a portion of personal liability on corporate decision makers where they have not been duly diligent in their oversight and monitoring activities. Arguably, the same case could be made for directors that are not duly diligent in their oversight of human rights related corporate activities. The Supreme Court judgment opens

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<sup>81</sup> *See id.* at 463.

<sup>82</sup> *See id.* at 492.

<sup>83</sup> *Id.* at 493.

<sup>84</sup> Wade, *supra* note 7, at 1463.

up possibilities for holding directors accountable for failure to be duly diligent in ensuring compliance with human rights laws.

Yet the Supreme Court's recasting of the duty of care away from a purely shareholder remedy is not sufficient, in itself, to address the issues posed by race, gender, and class in corporate activity. While such a discussion is beyond the scope of this Article, it is important to note that current corporate law reinforces pre-existing notions of ownership, which have historically been an imbalance in property relations by gender and race as a result of powerful political, cultural, economic, and political norms. Existing governance systems continue to shift property to those already propertied, primarily white males, without any express acknowledgment that there are distributional consequences to the existing corporate paradigm. The shifting of any control rights or imposing a stronger duty of care towards diverse stakeholders will be resisted as having distributional effects, without acknowledging the historical discriminatory distribution of property and wealth in Anglo-America.<sup>85</sup>

#### IV. PLAYING TO THE AUDIENCE—SHAREHOLDER ACTIVISM

While institutional shareholders in the United States have supported board diversity in order to enhance board independence and the contributions of diverse perspectives and skills,<sup>86</sup> such diversity has not been championed by Canadian institutional investors in the same way. The Canadian Coalition for Good Governance is an organization of institutional investors that together manage \$500 billion in assets.<sup>87</sup> The Coalition is dedicated to working with boards, particularly the boards of corporations on the S&P/TSX Composite Index, to adopt progressive governance practices that are aimed at enhancing long-term investment returns and reducing governance risk. It has published what it considers minimum standards and best

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<sup>85</sup> See Sarra, *supra* note 73, at 462–63.

<sup>86</sup> See, e.g., CA. PUB. EMPLOYEES' RETIREMENT SYS., CORPORATE GOVERNANCE CORE PRINCIPLES & GUIDELINES 6 (2005), available at <http://www.calpers-governance.org/principles/domestic/us/downloads/us-corpgov-principles.pdf>; TIAA-CREF, Policy Statement on Corporate Governance, [http://www.tiaa-cref.org/pubs/html/governance\\_policy/board\\_directors.html](http://www.tiaa-cref.org/pubs/html/governance_policy/board_directors.html) (last visited Oct. 28, 2005).

<sup>87</sup> See CANADIAN COALITION FOR GOOD GOVERNANCE, *supra* note 27, at 3.

practices.<sup>88</sup> While its model governance practices are aimed at ensuring high quality directors with integrity, competence, high ethical standards, financial accreditation or literacy, career experience and expertise relevant to the corporation's business purpose, and active listening, communicating, and influencing skills, there is no mention in its guidelines of diversity of perspective or background.<sup>89</sup> One footnote observes that in building an "evergreen list" of future board candidates with needed talents to fill vacancies, a UK report emphasized recruiting outside the "old boys" network.<sup>90</sup> Yet, that is the only reference to any need for diversity. The Coalition suggests that directors are responsible for setting the corporation's overall vision and long-term direction, including risk and return expectations and non-financial goals.<sup>91</sup> Hence it recognizes that oversight requires skilled insights, but does not identify how current board selection practice may prevent realization of this goal.

While Canadian institutional investors have not championed board diversity, there is some movement, as evidenced by 2005 proxy voting guidelines. The Ontario Teachers' Pension Plan, managing \$85 billion in assets, indicates in its proxy voting guidelines that "diversity in experience, education, attitudes and background" are important, although it does not expressly mention gender or race.<sup>92</sup> It also notes that effective governance should be measured by the quality of advice and counsel when the board has a diverse composition.<sup>93</sup> This is an important point. If diversity means that all directors do not have CEO experience, then the quality of professional support to the board becomes critically important, so that diverse perspectives can be brought to informed decision making. The Ethical Funds

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<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.* at 7–8.

<sup>90</sup> *Id.* at 8 (citing TYSON REPORT); see also THE COMBINED CODE ON CORPORATE GOVERNANCE 6 (2003), available at <http://www.frc.org.uk/documents/pagemanager/frc/combinedcodefinal.pdf> (noting that "[t]o ensure that power and information are not concentrated in one or two individuals, there should be a strong presence on the board of both executive and non-executive directors").

<sup>91</sup> See CANADIAN COALITION FOR GOOD GOVERNANCE, *supra* note 27, at 18.

<sup>92</sup> ONT. TEACHERS' PENSION PLAN, GOOD GOVERNANCE IS GOOD BUSINESS: CORPORATE GOVERNANCE POLICIES AND PROXY VOTING GUIDELINES 14 (2005), available at [http://www.otpp.com/web/website.nsf/web/corpgov\\_12\\_04eng/\\$FILE/Corpgov\\_12\\_04ENG.pdf](http://www.otpp.com/web/website.nsf/web/corpgov_12_04eng/$FILE/Corpgov_12_04ENG.pdf).

<sup>93</sup> *Id.* at 15.

Company, with \$1.5 billion in assets under management, in its 2005 proxy voting guidelines, specifies that it supports proposals to encourage companies to pursue diversity on corporate boards that “mirror[s] the diversity of the workforce and society” thereby bringing a variety of qualified viewpoints to corporation decision making.<sup>94</sup> It will “vote against the members of a nominating committee if there does not appear to be at least one woman or minority director on the board.”<sup>95</sup>

Institutional shareholders have rarely engaged corporations on a wider range of social issues such as gender and racial diversity or discrimination, in the same way that U.S. funds have engaged. Many pension funds in Canada delegate responsibility for voting to fund managers, who have incentives to vote with corporate officers and hence are unlikely to independently advocate change absent some pressure by their constituencies, the beneficial owners.<sup>96</sup> The Ontario Teachers’ Pension Plan proxy voting guidelines indicate the tension it sees in voting on issues broadly classified as social responsibility issues.

Our fiduciary duty is to obtain the highest return for the plan commensurate with acceptable levels of risk. Consequently, non-financial considerations cannot take precedence over risk and return considerations in the management of the pension fund. Nevertheless, we believe that careful consideration of social responsibility issues by companies and their boards will enhance long-term shareholder value. We encourage companies to develop policies and practices to address issues of social responsibility that are relevant to their businesses, including:

- the environmental impact of the company’s products and operations;
- the impact of the company’s strategies and decisions on the communities and constituencies directly affected by its products and operations;
- fair labour practices for all segments of the population; and
- employee training and development.

Our attention to these issues is not meant to be a substitute for the duties and actions that are the responsibility of regulatory

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<sup>94</sup> ETHICAL FUNDS CO., PROXY VOTING GUIDELINES 13 (2005), available at [http://www.ethicalfunds.com/pdf2/sri/proxy\\_voting\\_guidelines.pdf](http://www.ethicalfunds.com/pdf2/sri/proxy_voting_guidelines.pdf).

<sup>95</sup> *Id.*

<sup>96</sup> See Ronald B. Davis, *The Enron Pension Jigsaw: Assembling Accountable Corporate Governance by Fiduciaries*, 36 U.B.C. L. REV. 541, 566–67 (2003) (explaining that fund managers have little incentive to take any action to further the employee-beneficiaries’ interests).



agencies or the laws of the country in which a company operates.

Our focus is to obtain the highest return and to encourage the adoption of socially responsible policies and practices by companies as a means of maximizing long-term shareholder value.

....

We clearly recognize that to effectively manage a corporation, directors and management must consider not only the interests of shareholders, but the interests of employees, customers, suppliers, creditors, and the community as well. However, corporate officers and directors must fulfill their fiduciary duty and recognize that their first priority is to the owners of their corporation, its shareholders.

Stakeholder proposals often demand that directors consider the effects of their decisions on numerous other corporate constituencies at the expense of the company's shareholders. They are inconsistent with the directors' primary fiduciary duty and may serve to undermine the long-term value of the company. In our view, directors should not be put in the position of having to give equal or more consideration to the interests of "stakeholders" than to the long-term interests of shareholders.<sup>97</sup>

#### *A. Enter the Regulators, Stage Left*

Canadian securities regulators have now entered the market for corporate governance, driven in part by the corporate and securities scandals in the United States, the subsequent enactment of the Sarbanes-Oxley Act and the Securities and Exchange Commission's aggressive move into the area of corporate governance and increased enforcement. Given the number of large Canadian-based issuers that are cross-listed on U.S. exchanges and the existence of the Multijurisdictional Disclosure System ("MJDS"), there is considerable pressure on regulators to ensure that securities law requirements in Canada continue to align with the U.S. requirements in order that Canadian-based issuers have continued cost effective and timely access to U.S. capital markets. "Recent initiatives by Canadian securities regulators with respect to corporate governance can be categorized as both investor confidence and investor participation

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<sup>97</sup> ONT. TEACHERS' PENSION PLAN, *supra* note 92, at 4, 40.

measures.”<sup>98</sup> There are a series of reforms to securities law that are aimed at increasing the transparency of issuer decisions regarding effective governance and enhancing the participation rights of security holders.<sup>99</sup> These reforms have increased codification of governance, including audit committee requirements and officer certification. However, there are no requirements, nor is there any discussion of, the potential benefits of board diversity.<sup>100</sup>

Recent legislative amendments have opened up the governance process by allowing increased communication among security holders without activating the proxy solicitation requirements.<sup>101</sup> Corporate law amendments in 2001 were aimed, in part, at enhanced shareholder participation, including permitting corporations to have electronic shareholder meetings and voting through the use of new technologies, new provisions for shareholder proposals, and revised proxy rules aimed at facilitating shareholder communication.<sup>102</sup> The amendments removed some impediments to shareholder communication, thus

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<sup>98</sup> See MARY G. CONDON ET AL., *SECURITIES LAW IN CANADA: CASES & COMMENTARY* 391 (2005) at 391–432. For example, Multilateral Instrument 52-109, which became effective for all jurisdictions except British Columbia on March 30, 2004, provides for mandatory certification of disclosure in issuers’ annual and interim financial statements. The CEO and CFO must each certify that their issuer’s financial statements fairly present the financial condition of the issuer for the relevant time period. See Ont. Sec. Comm’n, Multilateral Instrument 52-109: Certification of Disclosure in Issuers’ Annual and Interim Filings, *available at* [http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule\\_20040326\\_52-109-cert.pdf](http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20040326_52-109-cert.pdf) (last visited Oct. 28, 2005).

<sup>99</sup> See, e.g., Ont. Sec. Comm’n, Multilateral Instrument 52-108: Auditor Oversight, *available at* [http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule\\_20040326\\_52-108-aud-oversight.pdf](http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20040326_52-108-aud-oversight.pdf) (last visited Oct. 28, 2005). One positive change is a new national instrument on disclosure that requires mutual funds to disclose their proxy voting guidelines and voting records. See Ont. Sec. Comm’n, National Instrument 81-106: Investment Fund Continuous Disclosure pts. 10.1, 10.21, *available at* [http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part8/rule\\_20050603\\_81-106\\_if-cont-disc.pdf](http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part8/rule_20050603_81-106_if-cont-disc.pdf) (last visited Oct. 28, 2005).

<sup>100</sup> See Ont. Sec. Comm’n, National Policy 58-201: Corporate Governance Guidelines, *available at* [http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule\\_20050415\\_58-201\\_gov-practices.pdf](http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20050415_58-201_gov-practices.pdf) (last visited Oct. 28, 2005).

<sup>101</sup> The proxy solicitation provisions are also designed to provide an alternative to “exit,” that is, selling shares if security holders are dissatisfied with the governance of the company.

<sup>102</sup> Canada Business Corporations Regulations SOR/2001-512 (Can.), C. Gaz. 2001.I.2683 at 2692, *available at* <http://canadagazette.gc.ca/partII/2001/20011205/pdf/g2-13525.pdf> (explaining in Part 5 that electronic shareholder meetings are allowed); see also Canada Business Corporations Act, R.S.C., ch. C-44, §§ 131–32 (1985).

promoting shareholder activism and accountability.<sup>103</sup> Solicitation has now been redefined to allow broader communication without triggering dissident proxy requirements, including a public announcement by a shareholder of how the shareholder intends to vote and the reasons for that decision, or a communication for the purposes of obtaining the number of shares required for a shareholder proposal.<sup>104</sup> The new communication provisions will allow shareholders that were previously distanced by proxy solicitation prohibitions to communicate and build support for particular governance strategies. If human rights are on investors' list of preferences, these changes may open up the governance debate in respect to board and workplace diversity.

The majority of Canadian citizens are now invested in the capital markets, although the majority of these investments are through pension plans, where women and racial minorities have little or no voice in the exercise of votes.<sup>105</sup> Women and many racial minorities earn less than similarly situated men and thus have far less disposable cash to either undertake equity investment or take advantage of employee stock ownership programs. The advent of book-entry or book-based securities record systems also means that the Canadian Depository for Securities and other depositories are frequently the registered holder of share certificates, creating a risk of diminution of smaller investors' ability to exercise "voice." The introduction of

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<sup>103</sup> See Janis Sarra, *The Corporation as Symphony: Are Shareholders First Violin or Second Fiddle?*, 36 U.B.C. L. REV. 403, 403 (2003) (focusing "on shareholders and whether the current regime affords them adequate protection and participation rights").

<sup>104</sup> Canada Business Corporations Act, R.S.C., ch. C-44, § 147 (1985). A person may now solicit proxies without sending a dissident's proxy circular, if the total number of shareholders whose proxies are solicited is fifteen or fewer. *Id.* ch. C-44, § 150. There is a further exception for solicitation of support by "public broadcast," where a person may solicit proxies without sending a dissident's proxy circular if the solicitation is conveyed by public broadcast, speech, or publication. *Id.* ch. C-44, § 150(1.1)–(1.2). The Regulations further codify solicitation, specifying that solicitation does not include a public announcement that is made by a speech in a public forum or a press release, an opinion, a statement, or an advertisement provided through a broadcast medium or by a telephonic, electronic, or other communication facility, or appearing in a newspaper, a magazine, or other publication generally available to the public. Canada Business Corporations Regulations SOR/2001-512 (Can.), C. Gaz. 2001.I.2683 at 2706, available at <http://canadagazette.gc.ca/partII/2001/20011205/pdf/g2-13525.pdf>.

<sup>105</sup> See ETHICAL FUNDS CO., *supra* note 94, at 13 (addressing the problem of board diversity).

computerized purchase and sale records, and the use of centralized depositories has assisted capital markets and reduced the transaction costs of trading. Yet there have been problems with the ability of beneficial shareholders whose shares are registered under the depository to exercise voting rights and survive challenges to the validity of proxies when they attempt to vote on their own behalf.<sup>106</sup> The recent National Instrument on Communication with Beneficial Owners of Securities of a Reporting Issuer is aimed at increasing shareholder communication, allowing for enhanced delivery of documents via the internet and facilitating the use of electronic communication in the proxy solicitation process.<sup>107</sup> It is likely to counter balance some of the deterrent effects of the registry system in regard to shareholder participation, but in itself is not sufficient to address problems of expressing investor preferences for compliance with human rights law and corporate diversity policies.

In an effort to harmonize regulatory approaches in Canada and the United States, the Canadian Securities Administrators in 2005 promulgated a National Policy on proposed best corporate governance practices that are based on the NYSE final corporate governance rules implemented after the U.S. Sarbanes-Oxley Act came into force.<sup>108</sup> Unlike the NYSE rules that are mandatory listing standards, however, the Canadian policy is not prescriptive.<sup>109</sup> It combines voluntary compliance with a mandatory disclosure requirement in terms of requiring companies to describe how they meet the objectives of a guideline if they have not implemented the specific governance standards suggested.<sup>110</sup> It applies to all reporting issuers, including business trusts, which are the fastest growing form of corporate

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<sup>106</sup> See, e.g., *Fama Holdings Ltd. v. Powertech Inds., Inc.*, [1997] B.C.L.R.3d 357; *In re Coral Gold Corp.*, [1999] B.C.L.R.3d 52; *Vella-Zarb v. Canhorn Chem. Corp.*, [1996] O.J. 2495.

<sup>107</sup> See Ont. Sec. Comm'n, National Instrument 54-101: Communication with Beneficial Owners of Securities of a Reporting Issuer, available at [http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule\\_20041126\\_54-101\\_comm-ben-owners.pdf](http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/rule_20041126_54-101_comm-ben-owners.pdf) (last visited Oct. 28, 2005) (explaining that "[t]he primary purpose of the Instrument is to ensure that beneficial owners of securities of a reporting issuer can receive proxy-related materials and provide instructions on how the securities they beneficially own are to be voted").

<sup>108</sup> See Ont. Sec. Comm'n, National Policy 58-201: Corporate Governance Guidelines, *supra* note 100.

<sup>109</sup> See *id.* pt. 1.1.

<sup>110</sup> See *id.* pt. 3.9.

entity in Canada.<sup>111</sup> Issuers are encouraged to consider the guidelines in developing their own corporate governance practices, including: maintaining a majority of independent directors; adopting a written board mandate that explicitly acknowledges responsibility for stewardship; developing a set of corporate governance principles and a written code of business conduct and ethics; adopting a process for determining what competencies and skills the board as a whole should have; and applying this result to the recruitment process for new directors.<sup>112</sup> It does not refer to board diversity at all.

Hence, the recent disclosure requirements by Canadian securities regulators are only a first step. Disclosure is premised largely on the assumption that investors will act, either through voice or exit, if the disclosed conduct of the corporation reveals discriminatory practices. While investors may be able to diversify their risk, employees, unsecured creditors, and others may be less able to act on corporate disclosures. Even investors are limited in their efforts to ameliorate corporate discriminatory activity through prohibitions on shareholder action based on size of holdings and length of time as an investor.

### *B. The Play's the Thing*

Derivative suits in the United States have been brought by shareholders to recover corporate losses that resulted from funds being expended to settle racial and sexual harassment suits and losses due to damaged corporate reputation.<sup>113</sup> Cheryl Wade suggests that judicial decision making in these instances prevents real accountability to shareholders when boards permit discrimination to continue.<sup>114</sup> A derivative suit alleging director breach of duty of care in the aftermath of the settlement of the Texaco racial discrimination suit by 1500 African American employees was settled, but Wade observes that the managers who had discriminated and the directors who failed to monitor did not personally bear any costs.<sup>115</sup> Wade suggests that the use

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<sup>111</sup> See *id.* pt. 1.2.

<sup>112</sup> See *id.* pts. 3.1, 3.4, 3.8, 3.12, 3.14.

<sup>113</sup> See Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213, 228–30 (2003).

<sup>114</sup> See *id.* at 227–30 (demonstrating that procedural hurdles often render derivative suits ineffective as well as providing an example of a suit that failed to make it over these hurdles).

<sup>115</sup> *Id.* at 229–30.

of the derivative mechanism may be a potentially significant strategy for improving workplace conditions for workers of color in that the demand on the board to act may open up a dialogue and foster settlement of claims, thus providing a mediating forum for gender and race discrimination.<sup>116</sup>

Derivative actions in Canada have not been used in a manner similar to the Texaco shareholder claim.<sup>117</sup> A study of more than 300 Canadian judgments on derivative actions found not a single claim in respect to an alleged breach of duty of care for failing to act on discrimination.<sup>118</sup> The statutory derivative action mechanism was enacted to overcome common law barriers to shareholders bringing complaints on behalf of the corporation for harms to the corporation where directors and officers failed to act in the interests of the corporation. The provisions confer broad discretion on the court to supervise conduct of a derivative action, and the remedy awarded almost always accrues to the corporation; hence it is amenable to consider systemic remedies to lack of managerial oversight of human rights issues. The vast majority of Canadian derivative actions do not proceed past the stage of the court granting leave.<sup>119</sup> This is because derivative action remedies are aimed at the delicate balance between ensuring that those responsible for harms to the corporation are held accountable for those harms and the court serving a gate keeping function in that claims should not be used to inappropriately extract value from the corporation by aggressive shareholders or other complainants seeking an advantage from the corporation. The derivative action remedy has both a remedial and deterrence function, with Canadian courts having held that the derivative action "helps to guarantee some degree

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<sup>116</sup> See CHERYL L. WADE, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 392, 402-03 (2002).

<sup>117</sup> See *infra* note 118 and accompanying text.

<sup>118</sup> Janis Sarra, *Review of the Derivative Action Provisions of the Canadian Business Corporations Act, Policy Implications and Options: Report to Corporations Canada* (Apr. 30, 2005) (on file with author).

<sup>119</sup> This is due, at least in part, to the procedural restrictions placed on these suits. Canadian corporate statutes require three criteria to be met before a derivative action can be brought: the complainant must give notice to the directors of an intention to apply to the court to commence an action if the directors do not bring, diligently prosecute, or defend an action; the complainant must be acting in good faith; and it must appear to be in the interests of the corporation that the action be brought. Canada Business Corporations Act, R.S.C., ch. C-44 § 239 (1985).

of accountability and to ensure that control exists over the board of directors by allowing shareholders the right to bring an action against directors if they have breached their duty to the company."<sup>120</sup> Hence, there may be potential for shareholders or others to bring a derivative action for failure to monitor human rights compliance, although the costs may be prohibitive given the existing mechanisms under the human rights remedial regime.

Another shareholder strategy to press decision makers to adopt meaningful human rights and diversity programs is the shareholder proposal. Shareholder proposals are at a nascent stage in Canada, particularly with respect to human rights issues. This is because until 2001, under the Canada Business Corporations Act, shareholders were prohibited from introducing any proposals that dealt with social issues, and the courts interpreted the exclusion very broadly.<sup>121</sup> With the repeal of these provisions, proposals could now ask that corporate boards implement or improve diversity and human rights programs and that they monitor and report on compliance. A recent report on the 2005 year-to-date proposals in Canada reported that there was only one proposal on implementation of human rights policy,<sup>122</sup> and one on increasing the gender diversity in senior positions.<sup>123</sup> While there were significant numbers of resolutions on environmental protection and sustainability, human rights and diversity proposals have yet to become a shareholder priority. With respect to the two proposals mentioned above, both were withdrawn because the board opened up a dialogue with the investors. Hence, shareholder proposals can have a normative effect of encouraging a corporation to act, even though they would not be binding on a corporate board, particularly where the corporation seeks to avoid public debate or embarrassment. Here there may be considerable potential. Yet the U.S. experience with shareholder proposals advocating an end to discrimination is that it can often take years before the

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<sup>120</sup> *Richardson Greenshields of Can., Ltd. v. Kalmacoff*, [1995] O.R.3d 577.

<sup>121</sup> Canada Business Corporations Act, R.S.C., ch. C-44, § 137 (1985).

<sup>122</sup> Petro-Canada, seeking reporting on implementation of human rights policy, filed by Ethical Funds, Inc. and withdrawn. Shareholder Ass'n for Research and Educ. (SHARE), <http://www.share.ca> (last visited Oct. 28, 2005).

<sup>123</sup> Cognos Inc., filed by Real Assets Investment Management, and withdrawn. Shareholder Ass'n for Research and Educ. (SHARE), <http://www.share.ca> (last visited Oct. 28, 2005).

corporation pays attention, indicating that at best it is a blunt tool for changing discriminatory corporate practices.<sup>124</sup>

One factor that militates against shareholder action is distance from the corporation's activities that may be discriminatory. For controlling shareholders, it may be the problem of class and race for many of the same reasons as they do not view board diversity as important. For those shareholdings that are more widely held, shareholders are frequently beneficial shareholders or have investments in pension funds and mutual funds, which spread their investment risks across many corporations. Without being directly invested or making conscious decisions regarding where their equity dollars are placed, other than to ensure long term security or pensions, shareholders are less likely to be aware of discrimination in a corporate workplace or may feel powerless to influence policy beyond compliance with law.

#### V. CHANGING THE SCENE—CORPORATE ACCOUNTABILITY FOR COSTS

In the Anglo-American conception of corporate activity, wealth is generated in part by the creation of externalities, those costs that the corporation does not have to bear and which are picked up by society in the form of unemployment, social welfare benefits, and health care costs. The corporation is rewarded for its creation of externalities because it can shed many real costs associated with its activities and report greater profits, in turn paying out greater dividends to shareholders and extracting increased personal compensation for officers. Absent a requirement to account for all costs of corporate activity, the cycle continually repeats itself, causing a further distribution of wealth in favor of the corporation and its investors. A normative conception of the corporation that takes account of gender, race, and class must meet the problem of externalities head-on.

Corporations are currently often free to externalize numerous costs of decisions that create market inefficiencies, but which may harm employees, communities, and public welfare.<sup>125</sup> Highly competitive capital markets create pressures to shed

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<sup>124</sup> See, e.g., Michael S. Markowitz, *New York City Employee Pension Fund Helps Change Cracker Barrel's Bias Policy*, *NEWSDAY* (N.Y.), Jan. 3, 2004.

<sup>125</sup> See Sarra, *supra* note 73, at 463.



labor and downsize in order to retain returns to equity investors. Externalities can have a gender and race effect, as women workers and workers of color are unable to diversify their risk, and as "last hired," are likely to be "first fired." Moreover, while egregious human rights practices at a corporation affect all workers, it is those with the least economic power, frequently working class women and workers of color, who are not easily able to exit the employment relationship. This is frequently due to the lack of savings or other economic cushions because wages are low in the first place, and hence these workers do not have assets to weather even temporary job loss. The inability to exit can mean that these workers do not have the power to either bargain for change to workplace practices or the power to file regulatory complaints and risk job loss from sanctions. While, technically, Canadian law protects workers from unjust dismissal due to the filing of a health and safety or human rights complaint, many people lose their jobs each year for seeking to enforce their rights. The delay in investigation and enforcement due to inadequate resources and heavy caseloads hinders the ability of this protection to be effective. Even where reinstatement is successful, the problems that were the cause of the complaint at the outset are often not remedied, and reinstated workers may face stigma from having sought to enforce their rights in the first place. While unions in Canada have been powerful advocates for workers in such situations, almost 70% of the Canadian workplace is not unionized.<sup>126</sup>

Similarly, where a corporation engages in economic activity that is environmentally harmful, the community often pays for the effects of that harm, first from direct health effects that are costly to the Medicare system, and second from the tax dollars required for remediation when the corporation exits the jurisdiction or goes bankrupt without having remedied its environmental harms. Those with greater assets may pay their share of taxes towards such remediation, but they are also better able to relocate away from hazardous areas that working class people, particularly women and persons of color, cannot. Women are also often less mobile because they are single parents and have care giving obligations. Hence, while the issue of

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<sup>126</sup> *Study: The Union Movement in Transition*, THE DAILY, Aug. 31, 2004, at 7, available at <http://statcan.ca/Daily/English/040831/d040831b.htm>.

externalities is a pressing issue for all corporate stakeholders, it disproportionately affects those who have no power to exit the corporate relationship and limited power to force corporate compliance with environmental standards.

There is also an assumption that public law in the form of social safety nets and legal mechanisms for enforcement of credit and other claims will protect stakeholder interests. The problem of externalities has been exacerbated by the dismantling of social safety nets, such as attacks on employment standards and regulatory resources, and by labor shedding due to merger activity or export of corporate productive activity without adequate public or private resources directed toward retraining, retooling, and job creation.

How does one take account of externalities? By regulatory change that requires corporations to internalize the direct costs of their corporate decisions, through adequate enforcement resources, and through corporate governance structures that comply with laws, create a culture of accountability for direct costs, and recognize the value of diverse interests and investments in the corporation. Elsewhere I have proposed a methodology whereby all of the diverse inputs of workers would be explicitly valued and recognized as claims on the corporation's assets.<sup>127</sup> When costs and claims on the value of corporate assets are accounted for, efficiency would be recast, as current externalities would be internally priced, with the corporation being required to make different kinds of economic and production decisions to maximize overall enterprise wealth. One could create a value that recognizes diversity within corporate economic activity. This could be measured not only through cost-savings from civil law discrimination suits in the United States or damage awards from regulatory prosecution of human rights violations in Canada, but also from quantifying the value of human dignity for women and workers of color, the costs of harm from discrimination, and the costs of equitable pay practices, all measured to create a new normative definition of efficiency.<sup>128</sup>

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<sup>127</sup> JANIS SARRA, CREDITORS RIGHTS AND THE PUBLIC INTEREST: RESTRUCTURING INSOLVENT CORPORATIONS (2003).

<sup>128</sup> See Sarra, *supra* note 73, at 468 (explaining that "workers . . . are . . . residual claimants to the value of the firm's assets, yet the nature of this investment is inadequately accounted for in corporate decision making . . .").

## VI. STAGE RIGHT—THE MNE

Today, very few large corporations operate purely within their domestic borders. Within this context, the issue of board diversity and reduction of human rights harms must take into account the international nature of Multinational Enterprises ("MNEs"). Globalization poses particular challenges to the ability of domestic governments to enforce specific human rights standards, particularly where corporations headquartered in the nation-state conduct economic activities elsewhere. It is increasingly evident that domestic law on its own is incapable of controlling the activities of MNEs, a concern where the exportation of production activities creates human rights harms. Moreover, the multinational nature of corporate activity limits the ability of domestic jurisdictions to tax corporations to generate revenue necessary to provide social services that could ameliorate the harms created by those corporations.<sup>129</sup>

What will be the long term impact of "regulatory chill" in terms of both the willingness of MNEs to situate themselves in jurisdictions with minimal human rights or labor standards and the inability of host or home nations to devise laws that protect their citizens from the harmful effects of unregulated discriminatory activity?<sup>130</sup> MNEs have been implicated in nations that engage in repressive human rights policies or police repression in order to engage in productive activities.<sup>131</sup> MNEs

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<sup>129</sup> See A. Claire Cutler, *Private Authority and International Trade Relations: The Case of Maritime Transport*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 283, 316 (A. Claire Cutler et al. eds., 1999); Ronald B. Davis, *Investor Control of Multi-national Enterprises: A Market for Corporate Governance Based on Justice and Fairness?*, in CORPORATE GOVERNANCE IN GLOBAL CAPITAL MARKETS, *supra* note 7, at 131, 131; Saskia Sassen, *The Spatial Organization of Information Industries: Implications for the Role of the State*, in GLOBALIZATION: CRITICAL REFLECTIONS 33, 33 (James H. Mittelman ed., 1996); Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 784 (explaining that "[t]he cost of compliance with a State's investment regulations will be factored into any investment decision" and that "[i]nvestors who face restrictions on equity ownership or on their ability to draw profits realized on funds invested in the country are likely to shift those funds to a more receptive country").

<sup>130</sup> The WTO has suggested that while the direct consequences of increased regulation may be overstated, regulatory chill may still hinder the competition for capital globally where some nations attempt to enact stronger domestic environmental protection policies. See WORLD TRADE ORG., TRADE AND ENVIRONMENT (1999), available at [http://www.wto.org/english/res\\_e/booksp\\_e/environment\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/environment_e.pdf).

<sup>131</sup> See Bennett Freeman, Deputy Assistant Sec'y of State for Democracy,

have allegedly engaged in human rights violations, activities harmful to the environment, child labor, anti-unionization activity, slavery, and dangerous health and safety conditions.<sup>132</sup> This has occurred particularly where the host nation is desperate for the economic activity offered by MNEs.

Unlike developed countries, where there exists a framework for tempering the unchecked activities of corporations through human rights law, many countries do not have the infrastructure to develop or enforce laws addressing the conduct of multinational enterprises. Moreover, corporate codes of conduct are aimed at ensuring transparency in governance and financial reporting, and securities and credit enforcement regimes that offer effective remedies for investors.<sup>133</sup> While these property protections are essential to fostering investor confidence and, consequently, healthy capital markets, they ignore the need to develop a host of other public policy measures in order to strike an appropriate balance between wealth creation and the protection of human rights. The growth of MNE activity across multiple jurisdictions, and international trade law that facilitates liberalized trade and limits the use of principles such as the national treatment principle, have diminished the domestic regulatory capability of the nation-state, raising troubling social and distributional issues.<sup>134</sup> It is important to examine the specifics of this regulatory diminution.

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Human Rights and Labor, Globalization, Human Rights and the Extractive Industries, Remarks to the Third Warwick Corporate Citizenship Conference (July 10, 2000) (transcript available at [http://www.state.gov/www/policy\\_remarks/2000/000710\\_freeman\\_warwicku.html](http://www.state.gov/www/policy_remarks/2000/000710_freeman_warwicku.html)); see also *Doe v. Unocal Corp.*, 248 F.3d 915, 920 (9th Cir. 2001) (adjudicating the alleged use of force to coerce residents to construct an oil pipeline); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000) (addressing allegations that Shell Nigeria utilized police and military to quash opposition to its development activity).

<sup>132</sup> See Sarra, *supra* note 73, at 463; Freeman, *supra* note 131.

<sup>133</sup> See ORG. FOR ECON. CO-OPERATION & DEV., OECD PRINCIPLES FOR CORPORATE GOVERNANCE 32, 49 (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf> [hereinafter ORG. FOR ECON. CO-OPERATION & DEV.] (stating that "[t]he corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company").

<sup>134</sup> See U.N. DEPT OF ECON. & SOC. AFFAIRS, REPORT ON THE WORLD SOCIAL SITUATION 2001, at 284, U.N. Doc. ST/ESA/277, U.N. Sales No. E.01.IV.5 (2001) [hereinafter U.N. DEPT OF ECON. & SOC. AFFAIRS] (explaining that "[a]s corporations extend their operations across national boundaries in a global market, their activities increasingly fall outside the regulatory reach of individual States").

MNEs are organizations, which, while created in one state, operate in several states through subsidiary corporate entities created in each country of operation through contractual links in supply and delivery chains, and/or through licensing and franchise agreements.<sup>135</sup> As private entities, MNEs are subject to the national law of the states in which they operate, and may also have been granted certain rights under treaties between states—rights that can be enforced in the courts of the applicable state.<sup>136</sup> Certain treaties also provide for the protection of investor rights against state action through binding international arbitration. Arbitration provides a dispute resolution mechanism for claims against the state by investors claiming that the state's regulatory or legislative initiatives have harmed their investments. Thus, a forum exists for private actors to hold public state actors accountable for decisions that harm equity investments. In contrast, however, there is no international forum in which these enterprises can be held accountable for their actions in breach of fundamental international law and conventions concerning human rights.<sup>137</sup> International law assigns this function to the courts of the various states, exercising their national jurisdiction over activities of the corporations that originate in, or affect their territory.

There are two issues that arise when dealing with a subsidiary of an MNE. The first is that a subsidiary has its own "legal personality," and is the legal entity to which liability will attach in the first instance. Thus, if there are human rights abuses, nothing automatically attaches liabilities on to the parent corporation for the acts of the subsidiary. Given this structuring of liability, the incentive on the parent corporation is to leave as few assets in the subsidiary as possible.<sup>138</sup> This leaves anyone harmed with the difficult task of establishing direct liability by claiming that the parent failed to properly supervise

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<sup>135</sup> See *id.* at 284, 289.

<sup>136</sup> See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 133, at 47 (describing how employee participation in corporate governance depends on national laws and practices).

<sup>137</sup> See Amnesty Int'l, Responsibilities Have No Borders, <http://web.amnesty.org/web/web.nsf/print/850889294F5FBDDDB80256FE700596388> (last visited Oct. 18, 2005).

<sup>138</sup> See Joseph Valof & Richard Menard, *Ethics and Compliance in Corporate America: Will the Sarbanes-Oxley Act Restore Confidence in Wall Street?*, at 19 (2005), available at <http://nanosft.com/igc/EthicsandCompliance.pdf>.

the subsidiary or vicarious liability for the acts of the subsidiary.<sup>139</sup> Thus, parent corporations have reason to transfer all of the subsidiary's surplus assets to themselves in order to limit the loss to the MNE overall. If they are successful in doing so, they will have lessened constraints on decisions to breach international human rights norms. Second, the use of unlimited subsidiaries as the vehicle for corporate activities internationally means that directors and officers of controlling parent corporations are not directly liable for the actions of the subsidiary, even where they act as the controlling mind of that subsidiary. The construction of domestic liability regimes, judicial reluctance to draw aside the corporate veil, and the practice of shifting corporate assets from the subsidiary to the parent to shield the assets from remedial claims in the host nation create considerable barriers to MNE accountability for international human rights harms.

Moreover, there is frequently reluctance of home and/or host governments to take action against MNEs because of their importance to the country's economy or because they are beneficiaries of the company's activities. Hence, while a separate legal entity has been formed for purposes of economic activity in the host nation, the host nation may be reluctant to enact legislation that may protect its citizens during the subsidiary's value-generating activity in the host nation. This is problematic because those who are harmed by the MNE's activities frequently cannot invoke proper standards of conduct or access enforcement mechanisms in order to redress or prevent harms.<sup>140</sup>

The beneficiaries of these trends are the MNEs. The liberalization of labor markets has meant that in the home state, the MNE can exert economic pressure to dismantle human rights standards and make the home nation "more competitive" in the market in which the MNE has generated the competition. Failure to accede to these demands results in plant and industry closures and exportation of the economic activity elsewhere, where the host nation is so anxious for jobs and economic activity that it undertakes to allow the corporation to operate relatively

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<sup>139</sup> See, e.g., *Lubbe v. Cape plc*, (2000) 4 All E.R. 268, 271 (H.L.) (handling plaintiffs' allegations that the defendant mining company, as the parent company, failed to take appropriate steps to ensure proper working practices and safety precautions).

<sup>140</sup> See *id.* at 279–80.

unfettered. This undermines the effective power of nations to regulate domestic human rights and social policy.<sup>141</sup>

Another issue is what corporations have called the political and cultural sensitivities of the host nation. An example would be nations where women or particular racial groups are not given access to employment, or, if they are, their compensation reflects highly discriminatory practices. Respecting the cultural norms of the host jurisdiction in such a case runs contrary to international human rights and is offensive to Canadian law regarding equality rights. The MNE's continued investment in a host nation that supports inequitable employment practices results in the perpetuation of gender and racial discrimination. While developed nations must be careful not to press for wholesale importation of their normative conceptions of human rights into emerging economies, it is appropriate to hold those nations to international norms set through democratic international efforts. Socio-cultural differences cannot be used, as they are now, to justify discriminatory labor practices. Yet, even as international NGO communities have identified this problem for years, corporations continue to engage in such global activity relatively unchecked and unscathed by these debates.

The Alberta Teachers' Retirement Fund, while recognizing that as a fiduciary under trust law it must put the financial interests of its beneficiaries first, expressly states that non-financial criteria should be part of its investment process and that the evaluation of any particular investment may include consideration of a number of social factors such as labor relations and environmental stewardship, where the portfolio manager believes, based on available information, that such factors should be properly considered in assessing the investment's overall risk and performance.<sup>142</sup> Its Proxy Guidelines specify that companies should be encouraged to adopt and operate within the Organization for Economic Cooperation and Development ("OECD") Guidelines for Multinational Enterprises, where practicable, including: working within the framework of host

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<sup>141</sup> See U.N. DEPT OF ECON. & SOC. AFFAIRS, *supra* note 134, at 284.

<sup>142</sup> See ALTA. TEACHERS' RETIREMENT FUND BD., PROXY VOTING GUIDELINES 23 (2005), available at <http://www.atrf.com/downloads/documentloader.aspx?id=768>. This may occur "where the portfolio manager believes, based on available information, that such factors should be properly considered in assessing the investment's overall risk and performance." *Id.*

nations; respecting collective bargaining; elimination of child and forced labor; ensuring that the operations of enterprises are in harmony with government policies; strengthening the basis of mutual confidence between enterprises and the societies in which they operate; and enhancing MNEs' contribution to sustainable development.<sup>143</sup> Given the barriers posed to domestic government regulation of the conduct of MNEs, this form of investor activism may assist in addressing some of the issues canvassed throughout this Article.

Internationally, the Council on Economic Priorities Accreditation Agency has promulgated an international social accountability standard, S.A. 8000, aimed at the independent assessment of corporations' labor and human rights practices.<sup>144</sup> The development of international standards, even where they are non-binding, is a start in trying to expose and remedy some of the most egregious corporate human rights harms.

#### CONCLUSION—CURTAIN CALL

Unlike many areas regarding the issue of corporate social responsibility, the duty of the corporation and its directors and officers not to permit or authorize discrimination based on race

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<sup>143</sup> See *id.* at 24.

<sup>144</sup> See SOC. ACCOUNTABILITY INT'L, SA8000 (2001), <http://www.sa-intl.org>. SA8000 is based on international workplace norms in the ILO conventions and the U.N.'s Universal Declaration of Human Rights and the Convention on Rights of the Child, which includes: no child or forced labor; provisions for a safe and healthy work environment through training and a system to detect threats to health and safety; freedom of association and right to collective bargaining; no discrimination based on race, caste, origin, religion, disability, gender, sexual orientation, union or political affiliation, or age; no sexual harassment; and no corporal punishment, mental or physical coercion, or verbal abuse.

The SA8000 standard and verification system covers all widely-accepted international labor rights; factory-level management system requirement for ongoing compliance and improvement; and independent, expert verification of compliance by independent auditing bodies accredited by SAI. Additionally, there are currently nine organizations accredited to do SA8000 certification. It requires participation by all key sectors, including workers and trade unions, companies, socially responsible investors, nongovernmental organizations, and government in the SA8000 system. This participation is required with the Advisory Board, drafting and revision of the standard and auditing system, conferences, training, and the complaints system. Furthermore, companies that join level two of the SA8000 Corporate Involvement Program (CIP) release annual progress reports verified by SAI. See Soc. Accountability Int'l, Overview of SA8000, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473> (last visited Oct. 28, 2005).



and gender in its employment or provision of services is clear. Any breach of those duties is contrary to law and serves as a clear basis for both enforcement by public authorities and legal action by shareholders. When it comes to the issue of diversity on the corporation's board, however, interested investors face the challenge of a lack of transparency concerning criteria and the use of an "experienced" benchmark that has a discriminatory effect on both women and persons of color because of their restricted access to the positions that generate the required experience. While disclosure of board recruitment criteria and succession plans is an important first step, the challenge will be to find a means to contest those plans and criteria that do not deal with the need for diversity with respect to gender and racial representation on the board.

In Canada, shareholder proposals challenging the failure to import diversity on the board may provide a means of commencing a serious discussion of the issue at certain corporations. Others may require legal actions or a complaint to the applicable human rights commission regarding systemic discrimination in board practices. With respect to MNEs, a major obstacle to an effective anti-discrimination program is a shortage of reliable information. Once disclosure is required or offered by the corporation, securities law could be used to overcome any misleading information about corporate practices. At this stage in the development of these issues in Canada, it is not possible to create a sufficiently dramatic conclusion to the issue of race and gender in corporate governance. The best one can do is to rely on the tried and true ending of a television series—"to be continued."