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# Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity

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### **Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity**

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**Aaron A. Dhir**

**TOWARDS A RACE AND GENDER-CONSCIOUS CONCEPTION OF  
THE FIRM: CANADIAN CORPORATE GOVERNANCE, LAW AND  
DIVERSITY**

**Abstract:** Recent scholarship in law and corporate governance has focused on the board of directors as a site of inquiry and noted a shift in the board's animating philosophy. It is argued the board's role is evolving from that of a passive stamp of acquiescence to an agent of reform. The current emphasis on the board raises a foundational question. In the context of a globally competitive marketplace and the transnational knowledge society, what are the appropriate characteristics of a corporate director? And more pointedly, has the dominant normative discourse surrounding this question resulted in an exclusionary cultural monolith? Has it served to preserve existing status hierarchies/structures of identity privilege?

This paper explores the intersections of Canadian corporate law/governance and race/gender. Part II illustrates the governance landscape in Canada *vis-à-vis* statistics on corporate board composition. In doing so, a culture of widespread homogeneity is revealed. Following this, I offer possible rationales for the figures with reference to the so-called "pool problem" and issues of implicit cognitive bias. With respect to the latter, I rely on psychological science literature in an attempt to explicate the cognitive processes and structures that inform corporate decision-making. Drawing on available identity narratives, I then consider how unconscious discrimination manifests itself in the everyday lives of subordinated groups within the corporation. In this section, I explore aspects of organizational socialization and the spaces in which identity-formation takes place.

Part III examines attempts by commentators to cast board diversification in terms of organizational performance; in other words, the argument that a heterogeneous board correlates to a more profitable, value-generating

business. I review the literature in order to establish whether this claim can, in fact, be empirically established. To the extent that it can, I suggest Canadian corporations may actually be perpetuating corporate cultures that stifle factors which might otherwise enable them to successfully leverage diversity. Further, while I acknowledge the market-based approach has value and is attractive as a political strategy, I also express reservations and contend that it should be employed with caution.

In Part IV, I canvass potential avenues for reform. Most importantly, I argue that aspects of the legal culture and practice that shape corporate activity should be revisited. The current system – as it relates to the director nomination process, shareholder proposals and existing governance principles – may ultimately serve to facilitate board homogeneity and to undermine future diversification initiatives. In Part V, I delineate four underexplored areas for future research and offer concluding remarks. I suggest that issues of board composition should be of concern not just to those who are preoccupied with corporate governance, but also to those who are concerned by the human rights-related impacts of Canadian transnational corporate activity.

Keywords: corporate governance, corporate law, gender/racial diversity

JEL classification: K22, K30

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# TOWARDS A RACE AND GENDER-CONSCIOUS CONCEPTION OF THE FIRM: CANADIAN CORPORATE GOVERNANCE, LAW AND DIVERSITY

Aaron A. Dhir\*

When I look to my left and I look to the right and I want to talk to a fellow sister or a fellow brother or get their analysis on something, there isn't one, and that's the reality of the [company] fabric and the culture.<sup>1</sup>

– Canadian Black female corporate manager/  
executive, 2008

[W]hen we are in a dominant group we must remember the power relations that regulate why those in subordinate groups would not want to look us in the eye.<sup>2</sup>

– Razack, *Looking White People in the Eye*

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\* Assistant Professor, Osgoode Hall Law School of York University. Aspects of this paper were presented at the 8th Annual Critical Race and Anticolonial Studies Conference titled “Race-ing Hegemonies, Resurging Imperialisms: Building Anti-Racist and Anti-Colonial Theory and Practice for Our Times” (Ryerson University, November 16, 2008). I am grateful to Ed Waitzer, Stephanie Ben-Ishai, Mihkel Voore & Vincent-Joël Proulx for their detailed comments on earlier drafts and to Peer Zumbansen, Poonam Puri, Doreen McBarnet, Carmela Murdocca, Allan Hutchinson & Sara Slinn for engaging in thoughtful discussions on topics related to this text. I acknowledge with appreciation the excellent research assistance of Reena Kotecha and Jessica DiFederico and the tremendous research contributions and dedication of Anna Gersh. This work is supported by a 2008 Border Ladner Gervais Research Fellowship.

<sup>1</sup> Catalyst, “Career Advancement in Corporate Canada: A Focus on Visible Minorities -- Workplace Fit and Stereotyping” (2008) at 20 (citation omitted) [Catalyst, “Workplace Fit”].

<sup>2</sup> S.H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 22.

## I. INTRODUCTION

Recent scholarship in law and corporate governance has focused on the board of directors as a site of inquiry and, in the aftermath of corporate scandals/governance failures, has noted a shift in the board's animating philosophy. In the "emerging board-centered system of corporate governance", it is argued the board's role is evolving from that of a passive stamp of acquiescence to an agent of reform.<sup>3</sup> Without question, a significant feature of corporate law is the managerial authority that is statutorily vested in the board.<sup>4</sup> While directors of public companies will, of course, delegate day to day management decisions to officers,<sup>5</sup> the board undertakes various essential tasks – the selection and appointment of officers, the establishment of compensation policies, monitoring of managerial performance, making fundamental determinations of corporate policy/strategic direction etc.<sup>6</sup> The board, in theory, serves to counteract the agency problem presented by the existence of a full-time class of administrative officials who may be tempted to pursue their own individual interests.<sup>7</sup> Further, under corporation legislation, certain functions are expressly prohibited from delegation to management<sup>8</sup> and

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<sup>3</sup> S. Bainbridge, *The New Corporate Governance in Theory and Practice* (New York: Oxford University Press, 2008) at 2 [Bainbridge, "The New Corporate Governance"].

<sup>4</sup> *Canada Business Corporations Act*, R.S. 1985, c. C-44, ss. 102(1) ("Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.") ["CBCA"]. This piece addresses the governance structures of companies in articles of incorporation jurisdictions, which are the most prevalent in Canada (e.g. Ontario, federal incorporation under the *CBCA*). It will not discuss memorandum and articles of association jurisdictions (e.g. British Columbia, Nova Scotia) or letters patent jurisdictions (e.g. Prince Edward Island). Further, my analysis focuses primarily on corporations that issue securities for public distribution/are the subject of securities regulation.

<sup>5</sup> *CBCA*, *ibid.*, ss. 121(a).

<sup>6</sup> Lucian A. Bebchuk, "The Myth of the Shareholder Franchise" (2007) 93 Va. L. Rev. 675 at 680 [Bebchuk, "The Myth"]. See also Bernard S. Sharfman & Steven J. Toll, "Dysfunctional Deference and Board Composition: Lessons From Enron" (2008) 103 Northwestern University Law Review Colloquy 153 at 155 ("the ultimate decisionmaking authority rests with the board of directors") (citation omitted).

<sup>7</sup> Bebchuk, *ibid.* at 679 (citation omitted).

recent studies suggest that boards “increasingly view delegation of authority to management as properly the subject of careful and self-conscious decision-making.”<sup>9</sup>

As observed by Professor Bebchuk, “[g]iven the central role of the board, selecting directors with the appropriate abilities and characteristics is important.”<sup>10</sup> In Canada, this sentiment carries particular resonance in light of the Supreme Court’s December 2008 reasons for decision in *BCE Inc.* The Court provides a strong re-affirmation of the business judgment rule in stating that “deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.”<sup>11</sup> This raises a foundational question – in the context of a globally competitive marketplace and the transnational knowledge society, what exactly are the “appropriate” characteristics of Canadian corporate directors whose decisions should be afforded deference? And more pointedly, has the dominant normative discourse surrounding this question resulted in an exclusionary cultural monolith? Has it served to preserve existing status hierarchies/structures of identity privilege?

This paper explores the intersections of Canadian corporate law/governance and race/gender. To date, the confluence of these fields

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<sup>8</sup> *CBCA*, *supra* note X, ss. 121(a) and ss. 115(3). I, of course, do not mean to overplay the director vs. senior management distinction. The dynamic between the two groups is quite nuanced and frequently, for example, senior executives will also sit on the board. This is allowed pursuant to ss. 121(b) of the *CBCA*, *supra* note X. That being said, non-management/outside directors “now comprise the majority of board memberships in Canadian public corporations...” See Robert Yalden *et. al.*, *Business Organizations: Principles, Policies, and Practice* (Toronto: Emond Montgomery, 2008) at 340 (citation omitted).

<sup>9</sup> Bainbridge, “The New Corporate Governance”, *supra* note X at 199 (citation omitted).

<sup>10</sup> Bebchuk, “The Myth”, *supra* note X at 675.

<sup>11</sup> *BCE Inc. v. 1976 Debentureholders*, (2008) S.C.C. 69, online: Supreme Court of Canada

<<http://scc.lexum.umontreal.ca/en/2008/2008scc69/2008scc69.html>> at para. 99 [“*BCE Inc.*”].



has garnered little attention in Canadian academic legal literature.<sup>12</sup> Traditionally, the two have lived in remote houses and had few occasions to speak to one another and to establish points of mutual concern.<sup>13</sup> And yet almost 25 years ago, Professor Lahey argued that “the impacts of corporate cultures are not...marginal to the experiences of women” and bemoaned “the relationship between patriarchal culture and the development of business corporations.”<sup>14</sup> And as further noted by Professor Haney Lopez, “[r]ace suffuses all bodies of law...even “the purest of corporate law questions within the most unquestionably Anglo scholarly paradigm.””<sup>15</sup>

My discussion proceeds in 4 subsequent parts. Part II illustrates the governance landscape in Canada *vis-à-vis* statistics on corporate board composition. In doing so, a culture of widespread homogeneity is revealed. Following this, I offer possible rationales for the figures with reference to the so-called “pool problem” and issues of implicit cognitive bias. With respect to the latter, I rely on psychological science literature in an attempt to explicate the cognitive processes and structures that inform corporate decision-making. Drawing on available identity narratives, I then consider how unconscious discrimination manifests itself in the everyday lives of subordinated groups within the corporation. In this section, I explore aspects of organizational socialization and the spaces in which identity-formation takes place.

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<sup>12</sup> Thoughtful exceptions include Janis Sarra, “Class Act: Considering Race and Gender in the Corporate Boardroom” (2005) 79 St. John’s L. Rev. 1121 [Sarra, “Class Act”] and Janis Sarra, “The Gender Implications of Corporate Governance Change” (2002) 1 Seattle Journal for Social Justice 457 [Sarra, “The Gender Implications”]. See also Allan C. Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Toronto: Irwin Law, 2005) at 252 (approaching the issue from the perspective of democratic theory).

<sup>13</sup> In the U.S. context, Professor Langevoort writes that the fields of corporate governance and employment/discrimination law “almost never talk to each other.” See Donald C. Langevoort, “Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament” (2004) 61 Wash. & Lee L. Rev. 1615 at 1615.

<sup>14</sup> Kathleen A. Lahey & Sarah W. Salter. “Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism” (1985) 23 Osgoode Hall L.J. 543 at 570, 571.

<sup>15</sup> Ian F. Haney López, “The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice” (1994) 29 Harv. C.R.-C.L. L. Rev. 1 at 4 (citations omitted).

Part III examines attempts by Canadian civil society organizations and other commentators to cast board diversification in terms of organizational performance; in other words, the argument that a heterogeneous board correlates to a more profitable, value-generating business. I review the economic/organizational/governance literature in order to establish whether this claim can, in fact, be empirically established. To the extent that it can, I suggest Canadian corporations may actually be perpetuating corporate cultures that actively stifle factors which might otherwise enable them to successfully leverage diversity. Further, while I acknowledge the market-based approach has value and is attractive as a political strategy, I also express reservations and contend that it should be employed with caution.

In Part IV, I canvass potential extra-legal and legal avenues for reform. Most importantly, in contemplating the “contours of a new (and more inclusive) governance architecture”,<sup>16</sup> I argue that aspects of the legal culture and practice that shape corporate activity should be revisited. The current system – as it relates to the director nomination process, shareholder proposals and existing governance principles – may ultimately serve to facilitate board homogeneity and to undermine future diversification initiatives. In Part V, I delineate 4 underexplored areas for future research and offer concluding remarks. Chief among these are areas 3 and 4, with the common denominator of both being the suggestion that issues of board composition should be of concern not just to those who are preoccupied with corporate governance, but also to those who are concerned by the human rights-related impacts of Canadian transnational corporate activity.

## II. A CORPORATE CULTURE OF HOMOGENEITY

### A. THE STATISTICS

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<sup>16</sup> Edward Waitzer, “Taking a Longer Term View: Why Pension Fund Managers Should Take the Lead” at 1 (unpublished, on file with author).

The representation of women and racialized persons on Canadian corporate boards is strikingly low and not reflective of Canada's current demographics and labour market availability. Women constitute just more than 50 percent of the Canadian population.<sup>17</sup> And yet, in 2007 they held only 13 percent of the director positions of Financial Post 500 companies. This was an improvement of just 1 percent from 2005. Further, in 2007 more than 40 percent of these corporations employed no female directors at all and just 3.4 percent had women chairing the board.<sup>18</sup> Another recent study found the volume of Canadian female board members to be "15% less than the comparable U.S. boards."<sup>19</sup> In fact, the reality is even more severe than these statistics indicate given that some women occupy multiple board seats.<sup>20</sup>

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<sup>17</sup> Statistics Canada, "Women in Canada: A Gender-Based Statistical Report" (5th. ed., 2006) at 11.

<sup>18</sup> Catalyst, "2007 Catalyst Census of Women Board Directors of the FP500 – Voices from the Boardroom" (2008) [Catalyst, "2007 Catalyst Census"] at 3. In the U.S., women occupy 14.8 percent of Fortune 500 director positions. In Europe, they hold 9.7 percent of FTSEurofirst 300 Index board seats. See Catalyst, "2007 Catalyst Census of Women Board Directors of the Fortune 500" (2007), online: <[www.catalyst.org/publication/12/2007-catalyst-census-of-women-board-directors-of-the-fortune-500](http://www.catalyst.org/publication/12/2007-catalyst-census-of-women-board-directors-of-the-fortune-500)> and European Professional Women's Network, "Third Biannual EuropeanPWN BoardWomen Monitor 2008" (2008) at 1, 7, online: <[www.europeanpwn.net/files/3rd\\_bwm\\_2008\\_press\\_release\\_1.pdf](http://www.europeanpwn.net/files/3rd_bwm_2008_press_release_1.pdf)>. For a discussion of the Australian experience, see Alison Sheridan & Gina Milgate "Accessing Board Positions: A Comparison of Female and Male Board Members' Views" (2005) 13 *Corporate Governance: An International Review* 847.

<sup>19</sup> Spencer Stuart, "Canadian Board Index: Board Trends and Practices at Leading Canadian Companies, 2006" (2007) at 17.

<sup>20</sup> Over the last 3 years, individuals who were existing members of FP500 boards filled approximately 33 percent of public corporation seats. Catalyst, "2007 Catalyst Census", *supra* note X at 3.

Racialized groups<sup>21</sup> account for over 16 percent of Canada's population. From 2001 to 2006, these groups grew at a pace that exceeded the overall growth rate by 5 times.<sup>22</sup> Further, persons born outside Canada represent 19.8 percent of the overall populace – the largest amount in the last 75 years.<sup>23</sup> Over the next 3 years, it is anticipated that immigrants “will account for 100 percent of Canada's net labour force growth”.<sup>24</sup> Most germane for present purposes, 75 percent of immigrants are racialized<sup>25</sup> with the majority of recent immigrants having been born in the Middle East and Asia.<sup>26</sup> Despite this, studies indicate that racialized directors occupy a dismal 1.7 percent of Canadian corporate directorships and that our firms are noticeably outperformed by comparable U.S. firms on issues of racial/ethnic board diversity.<sup>27</sup>

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<sup>21</sup> Federal legislation uses the term “visible minorities” and defines members of this group as “persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour”. See *Employment Equity Act*, S.C. 1995, c. 44, ss. 3. There are undoubtedly numerous complications associated with the categorization of racial/ethnic identity. Scholars have expressed trepidation with “visible minority” and a preference instead for the term “racialized”, which will be used most frequently in this paper. See Grace-Edward Galabuzi, *Canada's Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Toronto: Canadian Scholars' Press, 2006) at xvi – xvii (““visible minority”...implies permanence of minority status that is imposed on the population. Racialized denotes that process of imposition, the social construction of the category, and the attendant experience of oppression as opposed to the seemingly neutral terms “visible minorities” or “racial minorities,” which have the effect of masking the oppressions.”)

<sup>22</sup> Statistics Canada, “Canada's Ethnocultural Mosaic, 2006 Census: National Picture” (4 April 2008), online: <<http://www12.statcan.ca/english/census06/analysis/ethnicorigin/visible.cfm>>.

<sup>23</sup> Statistics Canada, “2006 Census: Immigration, Citizenship, Language, Mobility and Migration” (4 December 2007), online: <<http://www.statcan.ca/Daily/English/071204/d071204a.htm>> [Statistics Canada, “2006 Census”].

<sup>24</sup> Catalyst, “Workplace Fit”, *supra* note X at 2.

<sup>25</sup> *Ibid.* (citation omitted).

<sup>26</sup> Statistics Canada, “2006 Census”, *supra* note X.

<sup>27</sup> Spencer Stuart & Joseph L. Rotman School of Management, “The Canadian Board Index: Board Trends and Practices at Leading Canadian Companies – Building and Retaining Director Talent in Challenging Times” (2003) at 5. See also Conference Board of Canada, “Business Critical: Maximizing the Talents of Visible Minorities” (2005) at 1 (citing Christine L. Taylor/Conference Board of Canada, “Dimensions of Diversity in

A further study analyzed, *inter alia*, the top 50 of the Report on Business 1000 and/or the Financial Post 500, as well as firms listed in the S&P/TSX 60. Of the corporations reviewed, almost one-quarter had no female directors and three-quarters had no racialized directors.<sup>28</sup> Of the S&P/TSX 60 in particular,<sup>29</sup> the most current statistics indicate that 87 percent of firms (i.e. 52/60) have no racialized directors.<sup>30</sup> Perhaps most disturbing are the results of the latest Canadian Spencer Stuart Board Index. The annual report examines the governance practices of Canada's 100 most economically significant public corporations.<sup>31</sup> In addition to noting that the level of women directors "has not increased meaningfully since 2003", the 2007 study concluded that "[b]oard recruitment of visible minorities is not, presently, on the agenda of [the] surveyed companies."<sup>32</sup>

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Canadian Business: Building a Business Case for Valuing Ethnocultural Diversity (1995)). In the U.S., racialized individuals hold 15.4 percent of Fortune 100 director positions. See The Alliance for Board Diversity, "Women and Minorities on Fortune 100 Boards" (2008) at 5. In the U.K., a recent study surveyed the board composition of 543 companies, representing more than 90 percent of the overall market capitalization of London Stock Exchange-listed firms. The study gathered full data on race/ethnicity for 463 of these firms and found that the average board was made up of 8.7 white directors and only 0.2 racialized directors. See Stephen Brammer, Andrew Millington & Stephen Pavelin, "Gender and Ethnic Diversity Among UK Corporate Boards" (2007) 15:2 Corporate Governance: An International Review 393 at 396, 398.

<sup>28</sup> Melissa Shin, "Minority Report" (2007) Corporate Knights Cleantech Issue 34 at 35.

<sup>29</sup> The 60 largest corporations listed on the Toronto Stock Exchange in terms of overall market capitalization.

<sup>30</sup> Melissa Shin, "Best 50 Corporate Citizens" (2008) Corporate Knights Best 50 Issue 14 at 15. See also Press Release, "Shoppers Drug Mart Top Corporate Citizen in Canada" (20 June 2006), online: Corporate Knights <[www.corporateknights.ca/in-the-press/72-press-releases/257-shoppers-drug-mart-top-corporate-citizen-in-canada.html](http://www.corporateknights.ca/in-the-press/72-press-releases/257-shoppers-drug-mart-top-corporate-citizen-in-canada.html)> ("[a]t the board level, for a society as diverse as ours, Canadian companies have a stunningly low number of visible minorities").

<sup>31</sup> Spencer Stuart, "Canadian Board Index: Board Trends and Practices at Leading Canadian Companies, 2007" (2008) at 2.

<sup>32</sup> *Ibid.* at 16, 15. A recent survey of both public and private sector organizations in Canada found that 42 percent of respondents did not have a strategic plan aimed at diversity enhancement. Further, 25 percent felt their institution had insufficient capacity to properly train leaders in managing a diverse employee base. See Conference Board of Canada, "Priorities, Practices and Performance in Canadian Organizations" (November 2006) at 11, 19.

So then, as noted in studies regarding board diversity in other jurisdictions, there appears to be little questioning on the part of the dominant class of the structural inequality that maintains its dominance.<sup>33</sup> The racial and gendered aspects of this dominance are missing from the radar of those who are privileged by it.<sup>34</sup>

## B. POSSIBLE RATIONALES

The under-representation of women and racialized persons in the boardroom is puzzling from the perspective of business strategy. Why would firms actively “underutilize any segment of the talent pool” as opposed to attempting to harness the available potential?<sup>35</sup>

### 1. THE “POOL PROBLEM”

There appears to be a disconnect between the current state of the Canadian labour market and top corporate decision-makers’ *perception* of that market. Canadian firms have explained the low levels of representation on their boards and in senior management positions as a function of “a shortage of qualified women”<sup>36</sup> and “the lack of qualified visible minority candidates”<sup>37</sup> (i.e. the so-called “pool problem”). This response necessarily raises questions of what attributes are assigned value by Canadian businesses and whether the selection criteria currently

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<sup>33</sup> Alison Sheridan & Gina Milgate, ““She Says, He Says”: Women’s and Men’s Views of the Composition of Boards” (2003) 18:3 *Women in Management Review* 147 at 152 [Sheridan & Milgate, “She Says”].

<sup>34</sup> *Ibid.* at 153.

<sup>35</sup> Catalyst, “Workplace Fit”, *supra* note X at 1.

<sup>36</sup> Ronald J. Burke, “Women on Corporate Boards of Directors: Views of Canadian Chief Executive Officers” (1994) 9:5 *Women in Management Review* 3 at 8 [Burke, “Women on Corporate Boards”]. See also Elizabeth Church, “Women Still Missing at the Table” *The Globe and Mail* (23 October 2002), online: <http://www.theglobeandmail.com/servlet/story/RTGAM.20061023.wboardgames2003-gender/BNStory/bgames03/home?pageRequested=all> (“another common argument [is] that there are not enough qualified women to take board seats”).

<sup>37</sup> Conference Board of Canada, “Toward Maximizing the Talents of Visible Minorities: Potential, Performance and Organizational Practices” (2004) at 5 [Conference Board of Canada, “Toward Maximizing”].

applied are unduly restrictive (for example, being overly hesitant to consider candidates lacking C-suite experience instead of focusing on actual skills). Upon deeper consideration, however, it may not be necessary to resolve these issues as the statistical evidence does not appear to fully support the perception of a widespread pool problem.<sup>38</sup> On the contrary, a recent federal government study concluded for example that “less than half of the visible minorities who were qualified for senior manager positions were actually in those positions. Over half, while qualified, were not.”<sup>39</sup>

The overall proposition that racialized candidates are under-included in the upper echelons of certain sectors in comparison to their labour market availability has been confirmed in subsequent studies.<sup>40</sup> This lack of inclusion takes place within a broader context of the devaluation of immigrant skills and academic credentials in Canada (as previously noted, 75 percent of Canadian immigrants are members of racialized groups).<sup>41</sup> Empirical studies demonstrate that 1 year of foreign-obtained employment experience is valued at approximately 33 percent of the equivalent domestic experience. And on average, foreign university training obtained by a racialized immigrant yields a benefit that is less

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<sup>38</sup> It is interesting to note that a gender dimension is possibly at play. Studies in other jurisdictions indicate that when asked why men dominate corporate directorships, men tend to attribute the imbalance to a pool problem, whereas women are more likely to explain it as a function of the firm’s hostility towards female directors. See Sheridan & Milgate, “She Says”, *supra* note X at 150.

<sup>39</sup> Conference Board of Canada, “Toward Maximizing”, *supra* note X at 5 (citing Human Resources and Skills Development Canada, “The Annual Report – Employment Equity Act 2003” (2004)). While the Conference Board study uses the term “qualified” the Human Resources and Skills Development Canada report uses the term “labour market availability”. However, it should be noted that there is no dissonance between the two – i.e. “availability” refers to the number of individuals in the labour market that are qualified to perform a specific job. Further, government availability estimates actually tend to be quite conservative. Telephone conversation between Ms. Anna Gersh and Mr. Michel Lefebvre, Compliance Review Supervisor, Employment Equity – Canadian Human Rights Commission (15 July 2008).

<sup>40</sup> See, for example, Canadian Human Rights Commission, *2007 Annual Report of the Canadian Human Rights Commission* (Ottawa: Minister of Public Works and Government Services, 2008) at 26.

<sup>41</sup> See note X above.

than 33 percent of the benefit derived from a domestic degree earned by a Canadian-born individual.<sup>42</sup> This pattern creates a significant downward pressure on immigrant income levels and thwarts attempts at meaningful employment (and broader societal) integration.<sup>43</sup> Racialized persons are relegated to certain forms of work and economic sectors and face a systematic discounting of their human capital. The resulting marginalization has been described by one scholar as a form of Canadian “economic apartheid”.<sup>44</sup> Further, there is a significant gender dimension at play, as female newcomers in each immigration group realize “significantly worse” employment outcomes as compared to male newcomers who are similarly situated in terms of age and area of occupation.<sup>45</sup>

## 2. IMPLICIT COGNITIVE BIASES

If the pool problem is more a matter of perception than reality, what other barriers exist to the advancement of racialized persons and women to Canadian directorships? Psychological science literature in the area of implicit cognitive biases may shed some necessary light.

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<sup>42</sup> Naomi Abloim, Ross Finnie & Ronald Meng, “The Discounting of Immigrants’ Skills in Canada: Evidence and Policy Recommendations” (2005) 11:2 IRPP Choices at 13 – 14.

<sup>43</sup> *Ibid.* at 14. It has been estimated that remedying the lack of recognition of immigrant education “would enable Canadians to earn an additional \$4.1 billion to \$5.9 billion in income annually”. See Michael Bloom & Michael Grant, “Brain Gain: The Economic Benefits of Recognizing Learning and Learning Credentials in Canada” (Conference Board of Canada, 2001) at 1. See also Conference Board of Canada, “Performance and Potential 2004-05: How Can Canada Prosper in Tomorrow’s World?” (2005) at 120 (“Our national failure to recognize immigrants’ learning and learning credentials costs 340,000 immigrants in the range of \$3.4-5.0 billion annually in lost earnings due to unemployment and underemployment effects”).

<sup>44</sup> Galabuzi, *supra* note X at xiii - xiv. See also Catalyst, “Workplace Fit”, *supra* note X at 8 (“[m]any Canadian companies say that they overlook immigrants in their human resources planning; don’t hire immigrants at the level at which they were trained; and have difficulty integrating recent immigrants into the workforce”) (citation omitted).

<sup>45</sup> Lesleyanna Hawthorn, “The Impact of Economic Selection Policy on Labour Market Outcomes for Degree-Qualified Migrants in Canada and Australia” (2008) 14:5 IRRP Choices at 26.





The findings of this study resonate with the robust body of work on inter-group relationships which invariably reveals a human tendency towards in-group favouritism.<sup>53</sup> Not surprisingly, the predilection for one's own kind is "overwhelmingly" demonstrated by persons in groups that enjoy social privilege.<sup>54</sup> Professor Wade discusses a similar idea within the context of empathy. She cogently argues that White, male corporate managers/directors more customarily promote White males below them in the corporate hierarchy since they can easily empathize with this group, which is most akin to themselves (as opposed to, for example, racialized persons and women).<sup>55</sup> The idea that monolithic institutions will reproduce themselves with monolithic inheritors<sup>56</sup> has also been explained as a function of trust. The corporate sphere is inherently unpredictable and therefore pressure inducing. Appointing someone that is trusted to a leadership position serves to create a sense of predictability and order. However, because meaningful personal relationships are not always present in the firm hierarchy, trust is based less on inter-personal awareness and more on outward indicia of similitude, such as race.<sup>57</sup>

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Explanations" (2004) 51 *Social Problems* 505 at 506 ("Studies of race and gender differences in performance ratings tend to show that women and black men receive lower ratings from supervisors than do white men, suggesting supervisors' bias against these groups") (citations omitted).

<sup>52</sup> Rosette, "The White Standard", *supra* note X at 773. See also Erica Hayes James, "Race-Related Differences in Promotions and Support: Underlying Effects of Human and Social Capital" (2000) 11 *Organization Science* 493 at 500 ("as expected, race was significantly and positively related to reported promotion rate and psychological support [of corporate managers] in such a way that being black was associated with a lower reported promotion rate and less psychological support than was being white").

<sup>53</sup> Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, "Implicit Social Cognition and Law" (2007) 3 *Annu. Rev. Law Soc. Sci.* 427 at 433 (citations omitted) [Lane, "Implicit Social Cognition"].

<sup>54</sup> *Ibid.* at 435 (citations omitted).

<sup>55</sup> Cheryl L. Wade, "Corporate Governance As Corporate Social Responsibility: Empathy and Race Discrimination" (2002) 76 *Tul. L. Rev.* 1461 at 1473.

<sup>56</sup> Thomas W. Joo, "A Trip Through the Maze of 'Corporate Democracy': Shareholder Voice and Management Composition" (2003) 77 *St. John's L. Rev.* 735 at 742 [Joo, "A Trip"].

<sup>57</sup> *Ibid.* at 742 – 743 (citing Rosabeth Moss Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977) at 48 – 49).

That being said, notwithstanding the dominance of implicit social cognitions, these tendencies are not static or immune to development.<sup>58</sup> Rather, they are context dependent and capable of being modified through “[e]xposure to counterstereotypical outgroup members”.<sup>59</sup> In other words, similar to heuristics (psychological shortcuts or intuitive judgments that may result in patterns of mistake), subconsciously held biases may be abrogated and individuals left “debiased”.<sup>60</sup> The implication of this for corporate governance and board composition is as follows: the cognitive biases of the predominantly White, male class of corporate directors can be ameliorated as these persons are progressively acquainted with candidates that fall outside of their existing leadership paradigms and engage in cross-racial/gender learning. However, as I will argue in part IV below, the law and culture that inform the director election process may have the effect of stifling this progress.

### C. LIVED EXPERIENCES/IDENTITY NARRATIVES

If we accept the relevance of unconscious discrimination to board composition, the next logical question is how does this discrimination manifest itself in the everyday lives of the corporation’s subordinated groups? In order to fully appreciate the weight of the issue, and before considering possibilities for reform, it is necessary to explore issues of organizational socialization and the spaces in which identity-formation take place in the corporation. How does the firm manifest itself as a racial and gendered body through its identity-making practices?<sup>61</sup> How do firm processes influence women’s and racialized persons’ sense of place in the overall organizational structure? What are their lived experiences/identity narratives?

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<sup>58</sup> Lane, “Implicit Social Cognition”, *supra* note X at 437.

<sup>59</sup> *Ibid.* at 438 (citations omitted).

<sup>60</sup> Christine Jolls & Cass R. Sunstein, “The Law of Implicit Bias” (2006) 94 Cal. L. Rev. 969 at 973.

<sup>61</sup> See Devon W. Carbado & Mitu Gulati, “Race To The Top Of The Corporate Ladder: What Minorities Do When They Get There” (2004) 61 Wash. & Lee L. Rev. 1645 at 1657 – 1659.

In exploring these questions, I will draw primarily (though not exclusively) from the literature detailing the experiences of women and racialized managers/directors in the U.S. and Canada.<sup>62</sup> Before doing so, I offer two important preliminary points. First, I am mindful of the potential dangers in combining the corporate governance-related experiences of racialized persons and White women. In doing so, I do not mean to suggest that the two sets of experiences are capable of being conflated. Indeed, in addressing board diversity, Professor Fairfax has argued that “people of color appear to have experienced more significant barriers than women, while women of color appear to be experiencing the most formidable of such barriers”.<sup>63</sup> It is therefore essential to remain cognizant of the potential for race minimization and voice appropriation.<sup>64</sup> With that in mind, however, it has also been noted that many of the issues facing women in the boardroom are equally germane to racialized persons.<sup>65</sup>

Second, while the use of narrative is an integral tool in social theory (for example, Foucault’s suppressed/subjugated knowledge) and in critical race theory,<sup>66</sup> its use is anomalous in corporate law. Indeed, law

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<sup>62</sup> I should note that to date interview-based research does not appear to have been conducted with Canadian racialized directors. As such, I will rely on the experiences of racialized managers/executives.

<sup>63</sup> Lisa M. Fairfax, “Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color” (2005) 29 St. John’s L. Rev. 1105 at 1105 (citation omitted).

<sup>64</sup> Trina Grillo & Stephanie M. Wildman, “Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or other -isms)” (1991) Duke L.J. 397 at 399ff.

<sup>65</sup> Lissa Lamkin Broome, “The Corporate Boardroom: Still a Male Club” (2008) 33 The Journal of Corporation Law 665 at 679 (citation omitted). See also, for example, Ella L.J. Edmundson Bell & Stella M. Nkomo, *Our Separate Ways: Black and White Women and the Struggle for Professional Identity* (Boston: Harvard Business School Press, 2001) at 18 (“while black and white women’s professional experiences vary, there are essential similarities”) [Edmundson Bell, “Our Separate Ways”].

<sup>66</sup> See, for example, Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” (1989) 87 Mich. L. Rev. 2411 and Margaret E. Montoya, “Celebrating Racialized Legal Narratives” in Francisco Valdes *et. al.*, eds., *Crossroads, Directions, And A New Critical Race Theory* (Philadelphia: Temple University Press, 2002) at 243.

and economics scholars – ideologically dominant in the field – have issued scathing critiques of this vehicle. Consider the following comments of Judge Richard Posner, one of the law and economics movement’s most prominent voices: “[r]ather than marshal logical arguments and empirical data, critical race theorists tell stories...[they] teach by example that the role of a member of a minority group is to be paid a comfortable professional salary to write childish stories about how awful it is to be a member of such a group.”<sup>67</sup> The rejection of narrative as a discursive practice in favour of a wholly instrumental approach has rendered the discourse of corporate law a sort of “erasing discourse” which considers the personal stories existing inside the corporate form as immaterial.<sup>68</sup> And yet, when considering issues of corporate law and governance *vis-à-vis* board composition, I believe the use of narrative holds significant potential as a tool of consciousness-raising<sup>69</sup> that affords a richer, textured understanding of subordinated groups’ organizational experiences and as a form of counter-hegemonic resistance to prevailing constructions of their realities.<sup>70</sup> Further, at a more utilitarian level, I believe these stories are a useful piece of the puzzle in interpreting the empirical literature on board heterogeneity and organizational performance that is discussed in part III below.<sup>71</sup>

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<sup>67</sup> Richard A. Posner, “The Skin Trade” *The New Republic* (13 October 1997) at 42.

<sup>68</sup> Mae Kuykendall, “No Imagination: The Marginal Role of Narrative in Corporate Law” (2007) 55 *Buffalo L. Rev.* 537 at 541.

<sup>69</sup> Devon W. Carbado & Mitu Gulati, “The Law and Economics of Critical Race Theory” (2003) 112 *Yale L.J.* 1757 at 1785 (“[w]hen an outsider is trying to describe an experience to someone who cannot readily relate to it, an insider, narrative provides the detail that can help the insider empathize and relate to the experience”).

<sup>70</sup> *Ibid.* at 1786.

<sup>71</sup> Jean-Francois Gaudreault-Desbiens, “The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy, and Identity” (1993) 23 *Vt. L. Rev.* 793 at 798 (“for interpretive purposes...[identity] narratives are facts and not mere emotions to be discarded outright”).

## 1. RACIALIZED MANAGERS

U.S. studies indicate that Black managers who have passed the hurdles of “access discrimination” may, nonetheless, be subject to “treatment discrimination”. In other words, while deserving, they are afforded less in the way of incentives and employment opportunities as a result of their subordinate group status.<sup>72</sup> Correspondingly, these managers express diminished feelings of acknowledgment and approval as compared to their White counterparts and, overall, are more discontent with their employment.<sup>73</sup> The research further reveals that Black managers can be denied chances “for power and integration” within their firms and that this denial may have an adverse impact on their employment performance.<sup>74</sup> To the extent that demographic minority directors are able to overcome barriers that prevent them from exercising influence over corporate decision-making, this is done by creating a “perception of similarity to the majority” (e.g. through establishing relevant social connections or past experiences).<sup>75</sup> In commenting on issues of organizational socialization, one Black female manager of a Fortune 500 firm remarked as follows:

I had never felt so disadvantaged as a black woman...I entered a company where the whole world was the world of men. Everything was male culture. That's when I knew the feminists were right. There's a woman's culture and a

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<sup>72</sup> J.H. Greenhaus, S. Parasuraman & W.M. Wormley, “Effects of Race on Organizational Experiences, Job Performance, Evaluations and Career Outcomes” (1990) 33 *Academy of Management Journal* 64 at 64 – 65 (citation omitted).

<sup>73</sup> *Ibid.* at 76.

<sup>74</sup> *Ibid.* at 80. In one study, almost 100 percent of Black executives surveyed felt their career progress had been thwarted on account of racial discrimination. See Colin Leinster, “Black Executives: How They’re Doing” *Fortune* 117:2 (18 January 1988) 109, online:

<[http://money.cnn.com/magazines/fortune/fortune\\_archive/1988/01/18/70092/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1988/01/18/70092/index.htm)>

<sup>75</sup> James D. Westphal & Laurie P. Milton, “How Experience and Network Ties Affect the Influence of Demographic Minorities on Corporate Boards” (2000) 45 *Administrative Science Quarterly* 366 at 389.

man's culture. They used different language, had different mores. I had to learn white male culture. I had to learn the culture of baseball and football. None of my analogies, none of my metaphors were appropriate. They didn't understand what I said. They could not believe that I was good for the business. It was just a brutal environment...a lonely, demoralizing experience.<sup>76</sup>

Examinations of the Canadian corporate landscape reveal very similar findings. In a recent study surveying the experiences of South Asian, East Asian and Black managers/executives, members of the latter group were noticeably more prone to feeling that "being too identified with their visible minority group" was a significant impediment to their professional elevation, that they were excluded from networking opportunities<sup>77</sup> and that they were the subject of consistent contradictory standards *vis-à-vis* job performance and promotion.<sup>78</sup> Further, particular participants felt they were unable to establish an adequate workplace "fit" because of their racial/linguistic minority status. In addition to negative stereotyping,<sup>79</sup> some racialized managers in the first two groups felt they were cast as foreigners despite being Canadian-born<sup>80</sup> and others reported instances of accent discrimination.<sup>81</sup> Consonant with the results of the

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<sup>76</sup> Edmundson Bell, "Our Separate Ways", *supra* note X at 122 – 123.

<sup>77</sup> Catalyst, "Workplace Fit", *supra* note X at 18.

<sup>78</sup> Catalyst, "Workplace Fit", *supra* note X at 19. A Black women commented as follows: "It's not good enough to be just as good as the other person. Because the white boy's going to get promoted before you do, or the white girl's going to get promoted before you do...that's frustrating, but I think I've come to terms with it so it's just the way it is. It's the way the game is played." *Ibid.* at 20. In recounting these experiences, it is important to note that racialized firm members are not a monolith and that "[t]heir realities, their experiences and their opportunities differ." See Conference Board of Canada, "Toward Maximizing", *supra* note X at 5.

<sup>79</sup> Comments of two East Asian female managers/executives are instructive: "Being Chinese, you're [seen as] very good with numbers and things like that. Very hard-working, put in more hours. But...we're not [seen] as open or as sociable...", "You know how funny it is when people actually meet me for the first time and they say to me, "You don't sound Asian."" See Catalyst, "Workplace Fit", *ibid.* at 22.

<sup>80</sup> *Ibid.* at 4.

<sup>81</sup> *Ibid.* at 12.

leadership categorization study discussed above, some believed they were held back from leadership roles because senior colleagues were not culturally competent<sup>82</sup> and were more likely to give high-profile responsibilities to individuals from their own racial/ethnic group.<sup>83</sup> In order to be successful, many believed it essential to “conform to a “Canadian” identity”<sup>84</sup> in terms of altering “their style, language, and behaviour to better fit in with the dominant workplace culture”<sup>85</sup> and that “Canadianization” was an actual expectation of their White colleagues.<sup>86</sup> These beliefs were rooted in observations of the few racialized persons who had actually been accepted in the organizational structure and had reached the upper levels of the corporate hierarchy (i.e. they had successfully acculturated).<sup>87</sup>

This aspect of what is perceived to be necessary for successful socialization within the firm is striking given that Canada prides itself on being a multicultural, pluralistic society. Most importantly, the process of assimilation has not been without consequence for those who have had it thrust upon them. Some participants recounted the hurdles posed by attempting to “Canadianize” on one hand, and attempting to preserve their own ethno-cultural identities on the other. Further, despite having risen to

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<sup>82</sup> *Ibid.* at 10. One East Asian female study participant remarked as follows: “A leader who chooses...leaders will try to find...someone that can fit into their value system and their culture system. And it’s really difficult to choose somebody who comes from something that they don’t understand and they haven’t taken time to understand.” *Ibid.*

<sup>83</sup> Catalyst & The Diversity Institute in Management & Technology, “Career Advancement in Corporate Canada: A Focus on Visible Minorities – Survey Findings” (2007) at 22 (“Even after we controlled for a range of job, demographic, and human capital characteristics, visible minority respondents more frequently agreed that people tend to “recommend people of their own ethnicity for high-visibility assignments””) (citations omitted) [Catalyst, “Survey Findings”].

<sup>84</sup> Catalyst, “Workplace Fit”, *supra* note X at 4.

<sup>85</sup> Catalyst, “Survey Findings”, *supra* note X at 28 (“Several suggested they had encountered a “Canadian way of working” that was unfamiliar. This observation corresponded with a concern that this unfamiliarity exposed them to being perceived as incompetent. It also heightened their sense of being held to a higher standard of performance than their white/Caucasian peers”).

<sup>86</sup> Catalyst, “Workplace Fit”, *supra* note X at 9.

<sup>87</sup> *Ibid.*



the task and effectively acclimatized, some felt that they were *still* not accepted.<sup>88</sup> One female South Asian participant remarked as follows: “[i]t will be interesting to see how many years we and our offspring will be asked “[w]here are you from?”...You could be born here, but if you’ve got brown skin you’ll be asked forever and a day, “[w]here are you from?””<sup>89</sup> It was also noted that the demands of assimilation were intensified in situations where colleagues from dominant groups were unwilling to show reciprocity in terms of taking accommodation-related steps. One participant observed, “[y]ou embrace the Canadian culture as much as you can, but at the same time you don’t want to let go of your own values. But you’re trying to change yourself and you’re reaching out, trying to integrate...I think the same kind of effort is not coming from the other party...I think they really want you to totally Canadianize yourself.”<sup>90</sup>

## 2. WHITE FEMALE MANAGERS/DIRECTORS AND ISSUES OF INTERSECTIONALITY

In the U.K., female directors/managers working in male-dominated firm cultures have reported frequent feelings of loneliness and isolation and observed that their male colleagues were unwilling to take steps towards shaping a more inclusive, equitable atmosphere. On the contrary, they were intentionally deprived of support from male colleagues in order to see how they would cope, intentionally baited at meetings/put into traps or subjected to sexual harassment. They were placed in a typical catch-22 of power dynamics – i.e. how to exercise power in a constructive way while at the same time ensuring that male directors/managers were not left feeling threatened and vulnerable such that there might be a resulting adverse impact on (the women’s) future career possibilities. Correspondingly, an internal struggle was catalyzed where the women were forced to weigh the political risks of being too outspoken. Interestingly, in navigating this tension, the women reported a self-transformation process under which they gradually became “tougher” as a

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* at 16.

<sup>90</sup> *Ibid.*

means of self-preservation – but some characterized this transformation as regrettable.<sup>91</sup>

In Canada, this sort of self-transformation has been reported – and regretted – as well.<sup>92</sup> Further, female directors of Financial Post 500 companies have recounted experiences of social alienation which result both in feelings of desolation and in reduced entrance to networks that would provide key professional relationships and information. Surveyed board members feel that male directors view them as mere tokens and, correspondingly, that they must over-perform in order to gain legitimacy. This is set against a backdrop of the intimidation that accompanies occupying the role of sole female director.<sup>93</sup> It is also essential to note the importance of informal “meetings” that take place outside of the boardroom. Relationships and affiliations in the corporation are regularly forged in gendered spaces (“from the men’s washroom to the golf course”) which serve to exacerbate the exclusion of women’s voices.<sup>94</sup> One female director remarked:

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<sup>91</sup> Judi Marshall, “Working at Senior Management and Board Levels: Some of the Issues for Women” (1995) 10:3 *Women in Management Review* 21 at 23.

<sup>92</sup> B. Long & E. Morris, “Beyond Corporate Board Representation: Understanding the Experience of Female Directors in Canada” (2008) 5 *The Workplace Rev.* 10 at 12 – 13 (“one respondent stated, “On occasion I had to be more aggressive than my nature” and noted her discomfort with her own behavioural transformation in the boardroom...Others may have undergone a similar transformation as the product of an unconscious adaptation to male rules.”)

<sup>93</sup> Catalyst, “2007 Catalyst Census”, *supra* note X at 31. As one female director noted: “[i]t is challenging to be the only woman [who] sits around the board table...I’m a very confident woman. I’m very successful. I’ve worked with men most of my career...But to be the only woman that sits around the board table...it is intimidating.” *Ibid.* at 33. See also Mischa Thompson & Denise Sekaquaptewa, “When Being Different Is Detrimental: Solo Status and the Performance of Women and Racial Minorities” (2002) 2 *Analyses of Social Issues and Public Policy* 183 at 183 (“studies...indicate that members of socially disadvantaged groups, such as women and racial minorities, have more negative experiences as solos than do members of privileged groups, such as Whites and males”) (citations omitted) and Alison M. Konrad & Vicki W. Kramer, “How Many Women Do Boards Need?” *Harvard Business Review* 84 (1 December 2006) at 22 (“[s]olo women on boards often feel isolated and marginalized”).

<sup>94</sup> Catalyst, “2007 Catalyst Census”, *ibid.* at 35.

[The] “meetings outside the meetings” [are] an important element of understanding board dynamics...Those conversations ...take place in the washroom, during the coffee break. I noticed it...when I [first] sat on boards where there were women, and [when] you have a break...you’re hanging out in the washroom chatting with your fellow female board colleagues saying, “So what did you really think about [that]?”...*And it struck me that for all of those many years where I was in the bathroom by myself, there were other conversations going on next door...*<sup>95</sup>

Here, issues of intersectionality/the fusion of multiple statuses of oppression are particularly germane, with studies finding that racialized women experience more impediments than men in gaining access to informal social groups given the coupling of racial discrimination with gender discrimination.<sup>96</sup> Further, the differing experiences of White and racialized women should be noted. Studies reveal the latter group is less apt to view their firm’s aptitude recognition processes as equitable and to have been afforded chances for professional developmental. Rather, racialized women are more inclined: (1) to feel that promotions are based on connections rather than skills/substantive knowledge; (2) to experience a dearth of role models; (3) to report being held to heightened performance measures as compared with others; and (4) to feel that colleagues in positions of power are more prone to assigning high-profile responsibilities to individuals from their own racial/ethnic group.<sup>97</sup> Not surprisingly, they are also much more likely to be dissatisfied with their positions.<sup>98</sup>

It should also be noted that the business management literature on board committee membership reveals the “pervasive presence” of selection bias in terms of committee membership. Women tend to be placed on committees that are traditionally viewed as addressing

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<sup>95</sup> *Ibid.* [emphasis added].

<sup>96</sup> Catalyst, “Workplace Fit”, *supra* note X at 24 (citation omitted).

<sup>97</sup> Catalyst, “Survey Findings”, *supra* note X at 25.

<sup>98</sup> *Ibid.* at 24.

“soft”/peripheral governance topics (e.g. public affairs) while men are generally assigned to committees that tackle what are perceived to be “hard”/integral topics (finance, compensation etc.).<sup>99</sup> This is the case even after controlling for background/experience differentials and despite the fact that female directors are often equally qualified as their male colleagues or have superior qualifications.<sup>100</sup>

### 3. SILENCING DISSENT

Perhaps one of the most striking points of commonality that transcends race and gender is the trend of forced conformity and the resulting silencing of dissent. In addition to the experiences noted above, particular Canadian racialized managers/executives have reported feeling “less latitude to speak up or disagree with a dominant viewpoint for fear this would detract from perceptions of them as competent individuals.”<sup>101</sup> A smaller group of study participants felt that expressing contrary views might result in sanction or even job loss.<sup>102</sup> In the U.S., a survey of female inside directors of Fortune 1,000 companies reveals that particular business cultures entrench exclusionary processes that serve to marginalize and disempower women and to thwart their full engagement on the board (e.g. omission from key client meetings etc.). Moreover, comments received from male superiors/colleagues demonstrate a desire to stifle expression and encourage compliance:

“He [the CEO] said to me, you really irritate [a male director’s name] so the less said is probably the better...he basically told me I need to adapt my style for the time period with the board...just make my points and shut up.

...

Male colleagues early on said ‘the male minds actually think differently than you do and you need to be cognizant

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<sup>99</sup> Diana Bilimoria & Sandy Kristin Piderit, “Board Committee Membership: Effects of Sex-Based Bias” (1994) 37 *Academy of Management Journal* 1453 at 1465.

<sup>100</sup> *Ibid.* at 1469, 1471.

<sup>101</sup> Catalyst, “Survey Findings”, *supra* note X at 29.

<sup>102</sup> *Ibid.*

of the fact that if you put somebody down at a meeting, you're thinking that you're just saying no that's not right. But half the males in the room are thinking God darn that bitch. She's embarrassing me in front of the other males".<sup>103</sup>

...

Year after year...names of prominent, "highly qualified" women would be proposed, including, once, a Nobel Laureate. These women were rejected, our source said, typically because they were perceived as "too strong...[the other directors] wanted someone nice and non-controversial, someone who wouldn't rock the boat."..."They don't want someone who will shake the tree too much."<sup>104</sup>

As I discuss below, this trend has noteworthy negative repercussions for a firm's governance. As well, the requirement of having to silence one's own voice may contradict both a director's views on what is best for the corporation and his/her own personal beliefs. Carl McCall, while a member of Tyco International's board, counseled other Black directors that they had a duty to consistently raise concerns over boardroom equity.<sup>105</sup> While racialized directors may not wish to be typecast as the "minority voice", what are the implications for those who do wish to raise diversity issues but are effectively prevented from doing so? What are the resulting psychological processes and how do they effect the director's ability to perform his/her tasks and his/her sense of belonging in the overall organizational structure?

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<sup>103</sup> Deborah Dahlen Zelechowski & Diana Bilimoria, "The Experience of Women Corporate Inside Directors" (2003) 18:7 *Women in Management Review* 376 at 379.

<sup>104</sup> "Views from Women on Fortune 500 Boards" (1992) 1:9 *Dataline*, online: *Dataline* <<http://cyberwerks.com/dataline/mapping/womenonf.html>>.

<sup>105</sup> Cora Daniels, "Finally in the Directors Chair" *Fortune* 150:7 (4 October 2004) 42.

### III. DIVERSITY ADVOCACY: THE ORGANIZATIONAL PERFORMANCE RATIONALE

The startling statistics and troubling experiences outlined above have not gone unnoticed. Canadian civil society organizations and other commentators advocating in favour of board diversification have recently sought to buttress their arguments by casting the issue in terms of organizational performance. In other words, they advance the view that diversity should be at the top of the corporate agenda because a more heterogeneous board will invariably lead to a more profitable, value-generating business (for example, through better governance).<sup>106</sup> In some instances, we are encouraged to look beyond traditional considerations of racial/gender justice and to the realm of competitive advantage.<sup>107</sup> These economic arguments, however, have been vehemently contested by

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<sup>106</sup> See, for example, Conference Board of Canada, “Women on Boards: Not Just the Right Thing...But the Bright Thing” (2002) at 13 (“[t]he business case for women on boards is significantly bolstered by this conclusion: the factors that appear to be influenced by more women on boards are precisely those that have the most impact on corporate results”) [Conference Board of Canada, “Women on Boards”] and Carol Stephenson, “Leveraging Diversity to Maximum Advantage: the Business Case for Appointing More Women to Boards” (2004) 69 *Ivey Bus. J.* 1. at 5 (“[t]here is a powerful business case for why corporate boards should bring more women around the board table...companies with female board members can expect significantly higher returns and better overall financial performance”). With respect to senior management/executives etc., see Conference Board of Canada, “Creating High-Performance Organizations: Leveraging Women’s Leadership” (2000) at 24 (“[f]or those organizations that foster gender diversity at all levels of the organization, the rewards are great – bottom-line results, lower turnover and employment branding”) and Catalyst, “Survey Findings”, *supra* note X at 4 (“[b]y pursuing a set of key “action steps,” companies and firms can proactively tap into the competitive advantage offered by Canada’s changing labour force – key to a productive, profitable, and sustainable organization”) [emphasis added].

<sup>107</sup> Wendy Cukier/The Diversity Institute, “Diversity – The Competitive Edge: Implications for the ICT Labour Market” (March 2007) at 4 (“[L]everaging diversity can offer a competitive edge...the payoff can be significant. Effectively addressing diversity is no longer just a matter of human rights or equity, it is a competitive necessity”) (in the context of the ICT labour market; dealing with organizational diversity generally, rather than the board in particular).

corporate law scholars such as Douglas Branson, who insists that no positive correlation exists.<sup>108</sup> What then is the empirical reality?

#### A. EXAMINING THE EMPIRICAL LITERATURE

At a conceptual level, key aspects of the market-based rationale for enhanced board heterogeneity can be rooted in the organizational behaviour and economic theories of agency, transaction costs and resource dependence and have been summarized as follows:

(1) diversity improves the ability of the board to monitor managers due to increased independence, (2) diversity improves the decision making of the board due to unique new perspectives, increased creativity, and nontraditional innovative approaches, (3) diversity improves the information provided by the board to managers due to the unique information held by diverse directors, (4) diverse directors provide access to important constituencies and resources in the external environment, (5) board diversity sends important positive signals to the labor market, product market, and financial market, and (6) board diversity provides legitimacy to the corporation with both external and internal constituencies.<sup>109</sup>

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<sup>108</sup> Douglas M. Branson, *No Seat at the Table: How Corporate Governance and Law Keep Women Out of the Boardroom* (New York: New York University Press, 2007) at 176 (“[m]ost knowledgeable scholars, those who do business and corporate finance rather than race and gender subjects, deny...that any correlation exists...empirical work on the subject conclusively finds that no correlation can be found”) (citation omitted). It should be noted that Branson further contends that this discussion is misleading since the board’s most important function is monitoring, not wealth generation. *Ibid.* For various critiques of Professor Branson’s text, see Sarah White & Joan MacLeod Heminway, “WANTED: Female Corporate Directors (A Review of Professor Douglas M. Branson’s No Seat at the Table)” forthcoming in (2008) *Pace L. Rev.*, online: SSRN

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1295366](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295366)>.

<sup>109</sup> David A. Carter *et al.*, “The Diversity of Corporate Board Committees and Firm Financial Performance” (15 March 2007) at 7, online: SSRN <<http://ssrn.com/abstract=972763>> [Carter, “The Diversity of Corporate Board Committees”].

By way of practical illustration, the literature indicates not only that the board meeting attendance records of women are higher than their male counterparts,<sup>110</sup> but also that a more gender diverse board actually increases the attendance of male directors.<sup>111</sup> Given that meetings are one of the primary avenues through which directors fulfil their responsibilities, it is believed that boards with higher attendance levels are better governed.<sup>112</sup>

But do the elements of good governance that accompany heterogeneity inform the goal of value generation? Empirical studies have explored this question and established a positive relationship between board diversity and firm financial performance. For example, with respect to gender, examinations of Fortune 500 companies have concluded that: (1) corporations with higher share return volatility tend to consist of fewer female directors;<sup>113</sup> (2) higher levels of gender representation on boards translates into a consequential positive correlation with Tobin's Q;<sup>114</sup> and (3) higher levels of gender representation in top management teams are positively correlated with share appraisal and corporate performance.<sup>115</sup>

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<sup>110</sup> Renee B. Adams & Daniel Ferreira, "Gender Diversity in the Boardroom" (March 2007) at 18, online: SSRN <<http://ssrn.com/abstract=594506>> [Adams, "Gender Diversity"].

<sup>111</sup> Renee B. Adams & Daniel Ferreira, "Women in the Boardroom and Their Impact on Governance and Performance" (May 2008) at 14, online: SSRN <http://ssrn.com/abstract=1107721> [Adams, "Women in the Boardroom"].

<sup>112</sup> *Ibid.* at 10.

<sup>113</sup> Adams, "Gender Diversity", *supra* note X at 2.

<sup>114</sup> *Ibid.* at 10. Tobin's Q is a measure of financial performance commonly used in corporate governance research that "compares the market value of a firm to the replacement cost of the firm's assets." See Christopher C. Nicholls, *Corporate Finance and Canadian Law* (Scarborough: Carswell, 2000) at 88. In other words, if a business's value exceeds the costs that would be required to reconstruct it, then surplus profits are being generated.

<sup>115</sup> Anthony F. Jurkus, Jung Chul Park & Lorraine S. Woodard, "Gender Diversity, Firm Performance, and Environment" (28 February 2008), online: SSRN <<http://ssrn.com/abstract=1085109>> (finding, however, that "the positive impact of gender diversity is only pronounced for women-exclusive environments where the benefits of diversity may be more in demand"). See *ibid.* at 2.



With respect to race, a recent study of particular Fortune 1,000 firms, coupled with some of the U.S.'s largest private companies, found that higher degrees of racial diversity amongst corporate leaders were "significantly related to revenues, net income, and book-to-market equity".<sup>116</sup> In particular, the authors concluded that an inverse relationship exists between financial realization and enhanced racial diversity at the highest ranks of management up to a certain level. Beyond this, however, the two become positively correlated. These results suggest that firms which pursue racialized leaders only at a level of tokenism will not yield pecuniary gain. The value added by these individuals is not realized until a critical mass is reached.<sup>117</sup> At this stage, their unique views/abilities may become more entrenched in the organization's deliberative processes – for example, as the individuals become more socially integrated and are thus increasingly relied upon.<sup>118</sup> In addition to gaining access to a more extended set of networks/stakeholders, the firm may then benefit from the wider array of outlooks and experiences that these individuals bring to the table, which can "enhance strategic problem-solving and decision-making capabilities."<sup>119</sup>

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<sup>116</sup> Quientta M. Robertson & Hyeon Jeong Park, "Examining the Link Between Diversity and Firm Performance: The Effects of Diversity Reputation and Leader Racial Diversity" (2007) 32:5 *Group & Organization Management* 548 at 560 [Robertson, "Examining the Link"].

<sup>117</sup> The necessity of establishing a critical mass of diverse directors in order to reap the benefits of their diversity is a consistent theme in the literature. See, for example, Lynne L. Dallas, "The New Managerialism and Diversity on Corporate Boards of Directors" (2002) 76 *Tul. L. Rev.* 1363 at 1394 (citations omitted) [Dallas, "The New Managerialism"]; Vicki W. Kramer, Alison M. Konrad & Sumru Erkut, "Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance" (Wellesley Centers for Women, Report No. WCW 11, 2006) at v ("The magic seems to occur when three or more women serve on a board together") [Kramer, "Critical Mass"] and Monique Lortie-Lussier & Natalie Rinfret, "The Proportion of Women Managers: Where Is the Critical Mass?" (2002) 32:2 *Journal of Applied Social Psychology* 1974.

<sup>118</sup> Robertson, "Examining the Link", *supra* note X at 563 – 564.

<sup>119</sup> *Ibid.* at 564. See also Dallas, "The New Managerialism", *supra* note X at 1391 (surveying upper-echelon theory and related literature; observing that "group studies find that heterogeneous groups tend to make higher quality decisions in matters involving creative and judgmental decision making...heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences") (citations omitted).

Thus, establishing a level of “cognitive diversity”<sup>120</sup> in the boardroom is a key strategic asset, which serves to assist the firm in averting the perils/docile conduct associated with groupthink.<sup>121</sup> In Professors Leblanc and Gillies’ classification scheme of director types, individuals exhibiting this characteristic are known as “challengers”. They are viewed as “functional” directors who are inquisitive and cause others to reconsider determinations. They are to be contrasted with “conformists” – equilibrium preservers who do not seriously engage with issues and are viewed as “dysfunctional” directors.<sup>122</sup> The following observations from a study of Fortune 1,000 firms are instructive:

Thirty-one of the 37 women directors interviewed...noted, without prompting, that women raise tough issues in the boardroom...A male CEO claimed the *men* “felt a gender obligation to behave as though they understood everything.” As a woman director said, “Women are not afraid that they will look dumb if they ask a question,” and their “willingness to ask the question helps the board process. If people are afraid to raise a question, a matter does not get resolved.”<sup>123</sup>

It should be noted that cognitive diversity, and the accompanying element of constructive dissent which questions the dominant logic, are key to making the case that board diversity correlates to increased independence, which may then foster value enhancement. Indeed, board independence in and of itself (i.e. simply having non-officers/employees without the plurality of perspectives associated with gender and racial variety) is

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<sup>120</sup> Robertson, “Examining the Link”, *ibid.* at 553.

<sup>121</sup> Nanette Fondas & Susan Sassalos, “A Different Voice in the Boardroom: How the Presence of Women Directors Affects Board Influence Over Management” (2000) 12 *Global Focus* 13 at 20; Steven A. Ramirez, “A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?” (2003) 77 *St. John’s L. Rev.* 837 at 839ff.

<sup>122</sup> Richard Leblanc & James Gillies, *Inside the Boardroom: How Boards Really Work and the Coming Revolution in Corporate Governance* (Mississauga: Wiley, 2005) at X.

<sup>123</sup> Kramer, “Critical Mass”, *supra* note X at 14.

arguably insufficient to enhance firm performance<sup>124</sup> and to provide effective monitoring.<sup>125</sup>

While various other studies have established a correlation between board diversity and profitability,<sup>126</sup> authors have often conceded that this

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<sup>124</sup> See Sanjai Bhagat & Bernard Black, “The Non-Correlation Between Board Independence and Long-Term Firm Performance” (2002) 27 *J. Corp. L.* 231 at 248 (“[t]he results...offer no evidence that firms with more independent boards perform better. They provide evidence instead that firms with more independent boards do *not* perform better, and hints that these firms suffer worse performance than other firms”) and Edward Waitzer, “Real Independence” *Financial Post* (28 February 2008), online: *Financial Post Comment* <<http://www.financialpost.com/story.html?id=339212%20>> (“there is substantial empirical research questioning the correlation between independence and corporate performance”).

<sup>125</sup> Erica Beecher-Monas, “Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?” (2007) 86 *Oregon L. Rev.* 373 at 376 (“[i]ndependence defined as an absence of conflicting interests does not go far enough. Because directors function as a small social network, the dynamics of group decision making mean that boards need independent thought. Nourishing a culture of dissent will go farther in promoting the kind of monitoring that corporate governance is supposed to achieve”) [Beecher-Monas, “Marrying Diversity”].

<sup>126</sup> For a sample of additional U.S. literature, see: David A Carter, Betty Simkins & W. Gary Simpson, “Corporate Governance, Board Diversity, and Firm Value” (2003) 38 *Financial Review* 33 at 51 (“After controlling for size, industry, and other corporate governance measures, we find statistically significant relationships between the presence of women or minorities on the board and firm value, as measured by Tobin’s Q”) [Carter, “Corporate Governance”]; Niclas L. Erhardt, James D. Werbel & Charles B. Shrader, “Board of Director Diversity and Firm Financial Performance” (2003) 11 *Corporate Governance: An International Review* 102 at 107 (“The results of this study supported the original hypothesis stating that relatively higher levels of board diversity would lead to higher organisational performance” (using return on equity and return on assets as performance measures); Catalyst, “The Bottom Line: Corporate Performance and Women’s Representation on Boards” (2007) (using return on equity, return on sales and return on invested capital as performance measures); Roy D. Adler, “Women in the Executive Suite Correlate to High Profits” (2001), online: [Glass Ceiling Research Center](http://glassceiling.org/InTheNewsFolder/HBRArticlePrintablePage.html) <http://glassceiling.org/InTheNewsFolder/HBRArticlePrintablePage.html>; Stanely Slater, Robert Weigand & Thomas Zirlein, “The Business Case for Commitment to Diversity” (2008) 51 *Business Horizons* 201 at 203 (citing C. Dalton & D. Dalton, “In Defense of the Individual: The CEO As Board Chairperson” (2005) 26:6 *Journal of Business Strategy* 8). For the U.K. experience, see for example, Val Singh, “Ethnic Diversity on Top Corporate Boards: A Resource Dependency Perspective” (2007) 18:12 *The International Journal of Human Resource Management* 2128 at 2128 (“The 20 [FTSE

does not necessarily imply causation.<sup>127</sup> So then, although one interpretation of the data is that corporate leadership diversity is value-enhancing, is it not equally possible that firms which are profitable for other, independent reasons simply possess the resources that allow them to pursue diversity-related initiatives?<sup>128</sup>

While the literature is still in its infancy, recent explorations of this question using Tobin's Q as a performance measure suggest that causation can, in fact, be empirically established.<sup>129</sup> While at first instance this may be cause for celebration amongst diversity advocates, the reality is not quite so simple and is context dependent. For example, a deeper unpacking of the data suggests that particular board functions/committee work appear to be enriched by diversity while others are not. Further, while racial and gender variance seem to exhibit the same positive influence on financial outcomes, this is not uniformly so.<sup>130</sup> Certain literature also suggests that the effects of diversity on financial realization

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100] companies with [ethnic minority] directors are significantly more likely than other boards to have higher market capitalization”).

<sup>127</sup> See, for example, “Women and Profits” *Harvard Business Review* 79:10 (November 2001) at 30 (“[The study] found a strong correlation between a company’s profits and the number of female senior executives in its ranks...[w]hile...correlation does not prove causality...business leaders would be wise to keep these findings in mind...”); Conference Board of Canada, “Women on Boards”, *supra* note X at 12 (“These correlations do not necessarily show causality...Clearly, more research is needed in the area of cause and effect, particularly in gauging how women affect organizational outcomes and results”); Catalyst, *ibid.* at n. 2 (“[c]orrelation does not prove or imply causation”); Adler, *ibid.* at 2 (“[i]t is important to note that the correlation does not prove causality”).

<sup>128</sup> Carter, “The Diversity of Corporate Board Committees”, *supra* note X at 5. With respect to racialized directors, this issue is further complicated by the fact that the lack of these individuals necessarily means fewer data samples. *Ibid.* at 5 – 6.

<sup>129</sup> *Ibid.* at 26 (“Our data also indicate that the direction of causation goes from board diversity to firm financial performance which supports the economic case for board diversity. When we consider the percentage of women and ethnic minority directors on the board, the diversity of board composition appears to create value for shareholders.”) This study involved a survey of the Fortune 500 over a 5 year period.

<sup>130</sup> *Ibid.*

may, in fact, be neutral<sup>131</sup> or that any added value is a function of establishing the right diversity mix/balance (as opposed to merely ensuring the presence of diverse individuals).<sup>132</sup> Additionally, studies indicate that the relationship between diversity and pecuniary advantage may be linked to a firm's overall investor culture. Consonant with the apprehension that overmonitoring may have the effect of value minimization, companies with insubstantial shareholder voice (i.e. requiring further monitoring) appear to derive benefit, while those with stronger voice sustain adverse repercussions.<sup>133</sup> Finally, proper diversity management appears to be a key determinant of whether diversity-related financial value will be adequately harnessed by firms.<sup>134</sup>

In considering the literature referenced above, I would disagree with Professor Branson's overly austere characterization of the evidence. There is certainly potential to ground a case for leadership diversity in economic rationales. However, this line of argument is certainly quite nuanced. It carries with it various complications and is by no means infallible.

At this stage, it is important to consider the issue in light of the identity narratives explored in part II above. To the extent that the economic argument for diversity can be substantiated, it appears that critical mass, combined with the unique views/abilities/ cognitive diversity brought to the boardroom by diverse corporate leaders, are essential components. How does this resonate with the lived experiences of

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<sup>131</sup> Kathleen A. Farrell & Philip L. Hersch, "Additions to Corporate Boards: the Effect of Gender" (2005) 11 J. of Corp. Finance 85 at 86 ("[i]n general, our results tend to suggest that adding women to the board does not result in value creation (or destruction)").

<sup>132</sup> Kevin Campbell & Antonio Minguez-Vera, "Gender Diversity in the Boardroom and Firm Financial Performance" (2008) 83 J. of Business Ethics 435 at 447.

<sup>133</sup> Adams, "Women in the Boardroom", *supra* note X at 5 (using Tobin's Q and return on assets as performance measures).

<sup>134</sup> Orlando C. Richard, "Racial Diversity, Business Strategy, and Firm Performance: A Resource-Based View" (2000) 43:2 The Academy of Management Journal 164 at 174; Steven A. Ramirez, "Diversity and the Boardroom" (2000) 6 Stan. J.L. Bus. & Fin. 85 at 109; Jeffrey Gandz, "A Business Case for Diversity" (Queen's Printer of Ontario, 2001) at 16 ("[a]chieving diversity does nothing for an organization unless that diversity is managed effectively").

Canadian firm members? In considering the anecdotal evidence of the inability of these individuals to establish an adequate workplace fit because of their racial/gender minority status, their pressure to conform to the dominant group's conception of "Canadian identity", their social isolation and the silencing of their dissent etc., it is certainly arguable that Canadian firms are cultivating corporate environments that actively stifle the factors which might otherwise enable them to successfully leverage diversity. As posited by Professor Beecher-Monas, "[n]either race nor gender are necessarily a proxy for diversity of viewpoint. Having women and minorities on the board who mimic white male traits and attitudes will do little to achieve diversity."<sup>135</sup>

## B. A NOTE OF CAUTION

The economic argument is certainly attractive insofar as it carries persuasive currency as a political strategy. It is not outlandish to say that corporate Canada, to date, has been unmoved by concerns of gender and racial equality and that appeals predicated on value enhancement may hold more sway.<sup>136</sup> With respect to race, this approach can be seen as standing in harmony with "interest convergence theory", which posits that meaningful reform will only occur "when the interests of the racially oppressed align with the interests of the people who have the power to

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<sup>135</sup> Beecher-Monas, "Marrying Diversity", *supra* note X at 405.

<sup>136</sup> In the U.S. context, see Carter, "The Diversity of Corporate Board Committees", *supra* note X at 5 ("The validity of the normative case for board diversity is not dependent on the economic case but certainly it would be very attractive from various perspectives if including qualified women and minorities on the board because it is the right thing to do resulted in value creation for shareholders"). See also Carter, "Corporate Governance", *supra* note X at 34 ("participants at a forum sponsored by the Conference Board "immediately rejected the notion that board diversity for its own sake, without a business case, was sufficient reason to act") (citation omitted) and Leonard M. Baynes, "Foreword: The Intersection of Race, Corporate Law, and Economic Development" (2003) 77 St. John's L. Rev. 701 at 708 (noting that strategies predicated on business law tools and economic development "may in fact be more efficacious than the traditional civil rights remedies") (citation omitted).

bring about reform.”<sup>137</sup> In the context of corporate governance, Professor Ramirez argues that those seeking race-based reform must embrace the favourable openings that exist in political capitalism and coordinate their agendas with the agendas of those that exercise commercial/political dominion.<sup>138</sup>

That being said, I must also register a degree of hesitation. One must tread carefully and remain mindful of the critiques of this approach. In the context of feminist theory, Professor Testy invokes Audre Lorde’s oft-quoted piece “The Master’s Tools Will Never Dismantle the Master’s House” in cautioning against a reconstructive project that ends up devitalized and impoverished on account of internalizing the tenants and objectives of the dominant paradigms that are being impugned.<sup>139</sup>

Elaborating on this in the context of race, Professor Joo cautions that linking diversity with shareholder wealth serves to make what are fundamentally arguments of racial justice more palatable, more justifiable, more “race-neutral”. The inherent import of racial equality may become stunted in its development if it is allowed to be appropriated – to be subject to acquisition, if you will – by the predominant discourse of profit maximization.<sup>140</sup> While we are able to sidestep a potentially controversial unpacking of corporate racism and structural inequality, “there is danger in founding a racial agenda on nonracial values”.<sup>141</sup> The fact that racial justice is a desirable, independent goal has the potential to become lost in the mix as we debate the nexus between equal representation and profit.

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<sup>137</sup> Steven A. Ramirez, “Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What to Do About It” (2004) 61 Wash. & Lee L. Rev. 1583 at 1585 (citations omitted).

<sup>138</sup> *Ibid.* at 1606 (citations omitted). Professor Ramirez writes: “[w]hile one may bemoan the current distribution of political and economic power, there is little to be gained from dwelling on this point...A more effective approach is to take the current distribution of economic and political power as a given and find a way to operate within those constraints.” *Ibid.*

<sup>139</sup> Kellye Y. Testy, “Linking Progressive Corporate Law with Progressive Social Movements” (2002) 76 Tul. L. Rev. 1227 at 1229 – 1230.

<sup>140</sup> Thomas W. Joo, “Race, Corporate Law, and Shareholder Value” (2004) 54 J. Legal Educ. 351 at 352 [Joo, “Race, Corporate Law”].

<sup>141</sup> *Ibid.* at 363.

There is an important moral imperative at play – certain values are fundamental in and of themselves and should not be abrogated.<sup>142</sup> But by validating diversification initiatives with reference to wealth aggregation, the implication is that the worth of these efforts is contingent on stock value.<sup>143</sup> As poignantly asked by Professor Wilkins, writing in the context of equal representation in corporate law firms: “what caused the rhetoric of the black equality struggle to shift from one grounded on moral claims about integration being “the right thing to do” to economic arguments premised on the claim that “diversity is good for business”?”<sup>144</sup> Further, implicit in economic optimization arguments is an acceptance of morally questionable racial commodification, where an individual’s racialized status is cast as a “commodity to be bought and sold in the marketplace”.<sup>145</sup>

Beyond the philosophical difficulties associated with purely instrumental rationales, there are also more tangible social and personal repercussions that require consideration by Canadian diversity advocates as they further refine their strategies. Consider, for example, the argument that the appointment of diverse directors will assist the corporation in connecting with a more extended and diverse circle of constituencies/clients and thus augment earnings.<sup>146</sup> As noted by

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<sup>142</sup> See Lisa M. Fairfax, “Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancements” (2006) 65 Md. L. Rev. 579 at 595 (“ensuring a more representative number of women directors in the boardroom has an important moral significance. At base, having a boardroom that better reflects women’s participation in the workforce is the right thing to do”).

<sup>143</sup> Thomas W. Joo, “Corporate Hierarchy and Racial Justice” (2005) 79 St. John’s L. Rev. 955 at 970 (citation omitted) [Joo, “Corporate Hierarchy”].

<sup>144</sup> David B. Wilkins, “From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar” (2004) 117 Harvard L. Rev. 1548 at 1553 [Wilkins, “Separate is Inherently Unequal”].

<sup>145</sup> Lisa M. Fairfax, “The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards” (2005) Wis. L. Rev. 795 at 847 (citation omitted) [Fairfax, “The Bottom Line”].

<sup>146</sup> See, for example, Catalyst, “Advancing African-American Women in the Workplace: What Managers Need to Know” (2004) at 2 (noting significant increases in Black buying power in the U.S.) (citation omitted) and Steven A. Ramirez, “Diversity and the Boardroom” (2000) 6 Stan. J. L. Bus. & Fin. 85 at 100 – 101 (“[o]ne area where this



Professor Fairfax, to the extent this assertion relies on the idea that racialized directors are better able to identify with/understand the needs of racialized external stakeholders (e.g. consumers), it may be fallacious when considering possible class differentials between these groups.<sup>147</sup> Further, the corollary of the argument is the firm should actively employ the skills of racialized directors in developing consumer/client-bases that are from the directors' own ethno-cultural group. This may lead to the "pigeon-holing" of diverse directors, which would prevent them from being active participants in matters of wider concern to the board and from contributing the breadth of their skills/abilities. This would effectively serve to further disempower and marginalize the director<sup>148</sup> – an unfortunate reality that has been reported in corporate law firms.<sup>149</sup> Finally, at a general level, an over-reliance on economic rationales as a means of addressing complexities in business culture may have problematic consequences for the practice of theorizing the firm, forcing a sort of conceptual stagnation that does not allow for growth and development.<sup>150</sup>

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value is unleashed is the ability to exploit diversity to achieve greater market penetration...the insights and sensitivities brought by people from varying ethnic backgrounds help companies reach a wider variety of markets") (citations omitted). For a discussion of board diversity in the context of corporate relations with consumers, and through the lens of signalling theory, see Lissa Lamkin Broome & Kimberly D. Krawiec, "Signaling Through Board Diversity: Is Anyone Listening?" forthcoming in (2008) 76 U. Cinn. L. Rev., online: SSRN <<http://ssrn.com/abstract=1132884>> at 28 – 29.

<sup>147</sup> Fairfax, "The Bottom Line", *supra* note X at 842.

<sup>148</sup> *Ibid.* at 844 – 845.

<sup>149</sup> See Wilkins, "Separate is Inherently Unequal", *supra* note X at 1595 – 1597 (discussing the experiences of Puerto Rican, Japanese-American and Black lawyers; noting that being racially pigeon-holed leaves the individual feeling "devalued and exploited").

<sup>150</sup> See Joshua D. Margolis & James P. Walsh, "Misery Loves Companies: Rethinking Social Initiatives by Business" (2003) 48 Administrative Science Quarterly 268 at 280:

A preoccupation with instrumental consequences renders a theory that accommodates economic premises yet sidesteps the underlying tensions between the social and economic imperatives that confront organizations. Such a theory risks omitting the pressing descriptive and normative questions raised by these tensions, which, when explored, might hold great promise for new theory, and even for addressing practical management challenges. How do firms navigate their way

In light of these considerations, diversity proponents should proceed with caution and resist the temptation to let market-based rationales become the entire focus of their advocacy.

#### IV. MECHANISMS FOR REFORM

It has been observed that according to traditional economic theory, the market will eventually eradicate employment bias<sup>151</sup> given its inherent lack of efficiency and rationality.<sup>152</sup> Thus far, this proposition has not borne fruit at the highest levels of the Canadian corporation. Correspondingly, this section considers mechanisms for reform at both the extra-legal and legal levels.

##### A. EXTRA-LEGAL

Steps towards ameliorating the issues raised in this paper will undoubtedly involve implementing changes in organizational culture. There are myriad ways to move forward on this front including, for example, establishing “apprenticeship or understudy programs”,<sup>153</sup> creating board committees specifically designed to address gender and

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through these tensions? How ought they to do so? Organizational inquiry must go beyond efforts to reconcile corporate responses to social misery with the neoclassical model of the firm. Rather, this social and economic tension should serve as a starting point for new theory and research.

<sup>151</sup> Charles D. Watts, Jr., “In Critique of a Reductivist Conception and Examination of “The Just Organization”” (1993) 50 Wash. & Lee L. Rev. 1515 at 1519 (citation omitted).

<sup>152</sup> Katherine V.W. Stone, “The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law” (2001) 48 UCLA L. Rev. 519 at 599.

<sup>153</sup> Sarra, “Class Act”, *supra* note X at 1136.

race issues<sup>154</sup> and establishing liaisons with organizations that can provide a roster of qualified diverse candidates.<sup>155</sup>

Two of the most salient extra-legal avenues for reform include enhanced networking and mentoring opportunities. With respect to the former, a survey of women sitting on Canadian boards indicates that the most important aspect of attaining a directorship is “being visible to male CEOs, male board chairmen and male board members”<sup>156</sup> given that the “old boy’s network” is still alive and well.<sup>157</sup> These perceptions fit into the overall context of Financial Post 500 corporations consistently selecting directors from restricted pools – such as candidates who already have one or more directorships with other Financial Post 500 firms.<sup>158</sup> Correspondingly, while executive search agencies are increasingly employed for director recruitment, for the most part these processes continue to be conducted informally – especially given that recruitment firms tend to make use of internal networks in determining suitable applicants.<sup>159</sup> This is problematic from a diversity perspective, as access to integral professional and social networks is significantly thwarted by

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<sup>154</sup> *Ibid.*

<sup>155</sup> An example in the U.S. is the Director Diversity Initiative, run by the University of North Carolina’s law faculty. See “Director Diversity Initiative”, online: UNC School of Law

<<https://ddi.law.unc.edu/default.aspx>> (“[t]he Initiative also maintains a computerized database of potential diverse directors”). In Canada, Maytree’s DiverseCity onBoard program connects qualified racialized candidates with non-profit/public boards. See “DiverseCity onboard”, online:

<<http://www.diversecitytoronto.ca/diversecity-onboard/>>. Also, the publication “Women in the Lead” is a “directory of more than 600 women whose professional expertise and experience recommend them as candidates for corporate board appointment.” See “The Directory”, online: Women in the Lead <<http://www.womeninthelead.ca/directory.htm>>.

<sup>156</sup> Ronald J. Burke, “Women Directors: Selection, Acceptance and Benefits of Board Membership” (1997) 5:3 Corporate Governance: An International Review 118 at 123.

<sup>157</sup> *Ibid.* at 124.

<sup>158</sup> Catalyst, “2007 Catalyst Census”, *supra* note X at 3.

<sup>159</sup> *Ibid.* at 24. As one female director put it: “Now all of the search committees, the governance committees, they go through the exercise of hiring firms...[However,] the lion’s share of directors still come through the internal networks of the people involved.” *Ibid.*

gendered barriers. Indeed, existing Canadian female directors have indicated that the networks they were able to utilize “are rarely available to women” and that “many qualified women may not even be aware that such entry portals exist”.<sup>160</sup> In that regard, Catalyst urges firms to critically consider the possible exclusionary effects of informal networking practices and to establish formal networking structures that, by design, focus on inclusion.<sup>161</sup>

With respect to the latter, establishing a professional culture of mentoring is essential. The research indicates that racialized persons who progress to the highest ranks of the corporate hierarchy, without exception, enjoy the benefits of mentoring relationships.<sup>162</sup> This, however, is not an easy task as the lack of representation at the top makes it very difficult to establish the *specific types* of mentoring relationships that are necessary.<sup>163</sup> In other words, studies establish that cross-race and cross-gender mentoring relationships suffer key shortcomings from the perspective of the mentee.<sup>164</sup> On this issue, Catalyst recommends establishing formal

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<sup>160</sup> *Ibid.* at 26. The observations of female directors surveyed on this point include the following: “[t]he biggest impediment to women being on boards is that they are not part of the network, and the network, what used to be called the “old boys’ club,” is there. It’s alive, it’s well, and it is fully functioning”, “[o]ften board directorships come through networking, and women are often less well exposed within the network... There are fewer women within the network and... the networks aren’t as wide or as pervasive.” *Ibid.*

<sup>161</sup> Catalyst, “Career Advancement in Corporate Canada: A Focus on Visible Minorities – Critical Relationships” (2007) at 26 – 27 [Catalyst, “Critical Relationships”].

<sup>162</sup> David A. Thomas, “The Truth About Mentoring Minorities: Race Matters” (2001) 79 *Harvard Business Review* 98 at 99 [Thomas, “The Truth”]. For further discussion of the value of mentoring relationships in attaining corporate directorships, see Susan Vinnicombe & Val Singh, “Locks and Keys to the Boardroom” (2003) 18:6 *Women in Management Review* 325 at 332.

<sup>163</sup> See Keith L. Alexander, “Minority Women Feel Racism, Sexism are Blocking the Path to Management” *Wall Street Journal* (25 July 2007) at B1 (“The dearth of top black managers – let alone female black managers – makes it nearly impossible to find a savvy ally who has both faced the same difficulties and blazed a trail.”)

<sup>164</sup> See, for example, David A. Thomas, “The Impact of Race on Managers’ Experiences of Developmental Relationships (Mentoring and Sponsorship): An Intra-Organizational Study” (1990) 11 *Journal of Organizational Behaviour* 479 at 487 (“[i]t was found that same-race relationships do provide more psychosocial support than do cross-race relationships... [and] [s]ame-sex relationships provide more psychosocial [and career] support than do cross-sex relationships”) and Thomas, “The Truth”, *supra* note X at 105

mentoring structures, enhancing “strategic mentoring” capacities and prioritizing mentee exposure to the diverse colleagues that do exist at more senior levels.<sup>165</sup>

## B. LEGAL CULTURE AND PRACTICE

It is arguable that the legal culture and practice that shape corporate activity may ultimately serve to facilitate board homogeneity and to undermine future diversification efforts. This is most pronounced when considering the director nomination process,<sup>166</sup> shareholder proposals and existing corporate governance principles.

### 1. DIRECTOR ELECTIONS

In theory, shareholders’ power to elect corporate directors is one of the most important rights associated with equity investment. In practice, however, this power is largely illusory.<sup>167</sup> In Canada, as with the U.S., the process of electing public company directors does not afford shareholders an opportunity to select from rival candidates. Rather, in advance of a meeting, shareholders are provided with a proxy circular that contains a “management slate” – a list of possible directors approved of and put forth by the current directors of the corporation (i.e. via the nomination or board

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(“when the mentoring relationship is across race, the mentor will often have certain limitations as a role model...In my study, an African- American participant recounted how his white mentor encouraged him to adopt the mentor’s more aggressive style. But when the protégé did so, others labeled him an “angry black man”).

<sup>165</sup> Catalyst, “Critical Relationships”, *supra* note X at 28 – 29.

<sup>166</sup> Burke, “Women on Corporate Boards”, *supra* note X at 4 (“[t]he director selection and nomination process has been identified as one barrier to the appointment of women to corporate boards”).

<sup>167</sup> “[S]hareholders in public corporations do not in any realistic sense elect boards. Rather, *boards elect themselves.*” M. Blair & L. Stout, “A Team Production Theory of Corporate Law” (1999) 85. Va . L. Rev. 247 at 311 [emphasis in original]. For a discussion of shareholder impotence in terms of the right to appoint the firm’s auditor, see Anita Indira Anand, “Shareholder Isolation and the Regulation of Auditors” (2004) 54 U. Toronto L.J. 1.

selection committee). Under the traditional voting standard of plurality, shareholders are asked either to support these individuals or to withhold support – not to vote against.<sup>168</sup> Correspondingly, a candidate will be elected if he/she secures a plurality of votes, irrespective of the number of votes that withhold support and even if the plurality does not reflect a majority of votes submitted.<sup>169</sup> The result has been characterized as “‘Soviet-style’ elections” and “a ceremony that masks the self-perpetuating and insular nature of many boards”.<sup>170</sup>

After considerable debate in the U.S., the Canadian Coalition for Good Governance (“CCGG”) recently began a campaign to shift from a plurality system to a majority system. Under it, boards establish internal policies stipulating that candidates in respect of whom a majority of votes are withheld must submit their resignation to the company (under the principle that votes withheld are to be construed as votes against).<sup>171</sup> I see this as a significant step in the right direction and it should be noted that as of December 2008 at least 99 Canadian trusts and corporations have implemented majority voting procedures.<sup>172</sup>

That being said, the CCGG initiative is by no means a panacea. It contemplates the board retaining discretion as to whether or not to actually accept the unsuccessful candidate’s resignation. The board is not required to do so.<sup>173</sup> Further, majority voting is “much less threatening to corporate

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<sup>168</sup> Christopher C. Nicholls, *Corporate Law* (Toronto: Emond Montgomery, 2005) at 234 – 235 [Nicholls, “Corporate Law”]; Carol Hansell, *What Directors Need To Know: Corporate Governance* (Toronto: Carswell, 2003) at 38 – 39.

<sup>169</sup> Lisa M. Fairfax, “Shareholder Democracy on Trial: Some International Perspective on the Effectiveness of Increased Shareholder Power” (2008) 3 Va. L. & Bus. Rev. 1 at 5.

<sup>170</sup> J. Cook, “Director Elections: Impact of Regulatory Changes and Shareholder Activism on the Market for Corporate Leadership” (Presentation at the Workshop of the Chair in Business Law and International Trade, University of Montreal, 21 September 2006) at 3, online: <http://www.droitdesaffaires.org/pdf/jcook.pdf> [Cook, “Director Elections”].

<sup>171</sup> CCGG, “Guidelines: Majority Voting”, online CCGG: <http://www.ccg.ca/guidelines/majority-voting/>.

<sup>172</sup> CCGG, “Majority Voting Adoptees”, online CCGG: <http://www.ccg.ca/guidelines/majority-voting/majority-voting-adoptees/>.

<sup>173</sup> Various players in the Canadian investment community have criticized this style of approach. See, for example, Shareholder Association for Research and Education, “How

boards than contested elections”<sup>174</sup> and it is quite arduous for shareholders to recommend their own competing candidates.<sup>175</sup> While it is true that the shareholder proposal mechanism under Canadian corporate law expressly permits shareholder-driven director nominations,<sup>176</sup> as will be discussed below, this mechanism is fraught with difficulties that thwart investor voice. In effect, equity holders must be willing to take on the role of “dissident shareholder” and to finance a very costly and time-consuming proxy contest, wherein they would circulate a dissident circular and attempt to convince other shareholders to support their dissent slate (as opposed to the management slate). As a result, shareholder-led director-replacement initiatives are “extremely rare”<sup>177</sup> and “rarely a feasible option for small shareholders.”<sup>178</sup>

These problems are compounded by other defects in the shareholder voting structure. Former Ontario Securities Commission Chair Edward Waitzer recently commented on an unintended effect of National Instrument 54-101, which addresses a corporation’s communications with beneficial owners.<sup>179</sup> He notes the instrument does

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the Votes Added up at Canada’s Big Banks”, online: SHARE  
 <<http://www.share.ca/en/node/1435&print>> (“Why should a director who does not enjoy the confidence of shareholders continue to serve? We cannot think of a compelling reason”).

<sup>174</sup> Cook, “Director Elections”, *supra* note X at 9.

<sup>175</sup> Nicholls, “Corporate Law”, *supra* note X at 235.

<sup>176</sup> *CBCA*, *supra* note X, ss. 137(4).

<sup>177</sup> RiskMetrics Group, “Ethical Funds (Canada)”, online:

<[www.riskmetrics.com/policy\\_exchange/policy\\_detail?param1=ef&param2=board&param3=proxy\\_access](http://www.riskmetrics.com/policy_exchange/policy_detail?param1=ef&param2=board&param3=proxy_access)> [“RiskMetrics”].

<sup>178</sup> Christopher C. Nicholls, *Mergers, Acquisitions and other Changes of Corporate Control* (Toronto: Irwin, 2007) at 266.

<sup>179</sup> National Instruments are developed by provincial securities administrations in collaboration and are put forth by the Canadian Securities Administrators (“CSA”), the umbrella organization of all provincial regulators. The fact that an instrument has been termed “national”, as opposed to “multilateral”, reflects its adoption by the regulator of each province. See Mark R. Gillen, *Securities Regulation in Canada*, 3d ed., (Toronto: Thomson, 2007) at 101 and Jeffrey G. MacIntosh & Christopher C. Nicholls, *Securities Law* (Toronto: Irwin Law, 2002) at 83 – 84.

not explicitly speak to what party should sustain the costs of sending proxy materials to beneficial owners that are unwilling to disclose their identity to the reporting issuer. Leveraging the instrument's silence, issuers are progressively declining to pay. It is argued that regulatory attention to this defect may make it "easier for shareholders to veto the election of directors standing unopposed".<sup>180</sup>

In addition, the CSA has not advocated other U.S.-style actions that could produce the same result; for example, recent electronic proxy provisions which allow the utilization of internet-posted proxy materials.<sup>181</sup> This initiative has the potential to markedly decrease the significant expenses associated with initiating a proxy contest.<sup>182</sup> Similarly, effective February 25, 2008 the U.S. Securities and Exchange Commission ("SEC") took a bold step forward in facilitating internet-based investor communication in the form of electronic shareholder forums. The SEC's amendments to its proxy rules eliminate any concerns that partaking in such a form will trigger solicitation requirements (provided certain conditions are met) and make it clear that the operation of these forums will not leave a firm or shareholder (or a third party acting on behalf of either) liable for statements made by other participants.<sup>183</sup> Through the utilization of technology, these innovative amendments remove substantial legal and financial barriers to shareholder engagement and expressly contemplate bolstering investor participation in the director nomination process.<sup>184</sup>

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<sup>180</sup> Ed Waitzer, "Let Investors Do It" *Financial Post* (24 April 2008), online: Financial Post Comment

<<http://network.nationalpost.com/np/blogs/fpcomment/archive/2008/04/24/let-investors-do-it.aspx>>.

<sup>181</sup> *Ibid.*

<sup>182</sup> Cook, "Director Elections", *supra* note X at 5.

<sup>183</sup> "Electronic Shareholder Forums", 17 C.F.R. Part 240 (25 February 2008) at 1, online: SEC

<<http://sec.gov/rules/final/2008/34-57172.pdf>>.

<sup>184</sup> *Ibid.* at 27 ("we hope to tap the potential of technology to better vindicate shareholders' state law rights, including their rights to elect directors, in ways that are potentially both more effective and less expensive").



These sorts of proactive movements would be important first steps in reconfiguring the Canadian landscape and should be seriously examined by regulators.<sup>185</sup> In the interim, we are left with a troubling predicament. As discussed earlier in this paper, studies reveal that corporate leaders demonstrate an unconscious bias towards in-group favouritism. Implicit social cognitions and lack of exposure to qualified female and racialized candidates may lead White, male directors to reproduce predominantly White, male boards. And yet there is little opportunity to inject a plurality of opinion into the director-nomination process – for example, by allowing shareholders to challenge the corporation’s choice of directors. As a result, there is a continuing inertia towards self-perpetuation and a decreased probability of challenging the “behavioral bias toward homogeneity”.<sup>186</sup>

Firms, *inter alia*, are apprehensive about such interventions for fear that their desired candidates would not gravitate to elections where they risk defeat.<sup>187</sup> But in some ways this is actually the point – i.e. to cause the corporation to rethink traditional modes of director selection, and to extend beyond typical pools of senior managers/executives and business/social contacts, in order to recognize the potential contributions of racialized and female candidates that are currently being overlooked.<sup>188</sup>

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<sup>185</sup> Claude Lamoureux & Edward Waitzer, “Shareholders Face Communications Breakdown” *Financial Post* (27 August 2008), online: Financial Post Comment

<<http://network.nationalpost.com/np/blogs/fpcomment/archive/2008/08/27/shareholders-face-communications-breakdown.aspx>> (“The...need for leadership in Canada is immediate and imperative. The CSA should be proactive with initiatives to facilitate an increase in shareholder participation by taking advantage of technology to reduce the costs and other barriers to shareholder communications and ensure the integrity of the voting process. Failure to act will only serve to diminish public confidence in their ability...”).

<sup>186</sup> Joo, “A Trip”, *supra* note X at 736. Professor Ray approaches the general issue from the perspective of democratic theory. See Dennis M. Ray, “Corporate Boards and Corporate Democracy” (2005) 20 *J. of Corporate Citizenship* 93 at 97 (“[s]elf-perpetuating and self-serving corporate oligarchy...violates a basic premise of democratic theory with regard to participation and representation”).

<sup>187</sup> Cook, “Director Elections”, *supra* note X at 9.

<sup>188</sup> As I have stated earlier, the statistics do not support businesses’ perception of a pool problem. In other words, diverse candidates with “traditional” qualifications exist (e.g. business expertise etc.). While the primary claim being made is that Canadian firms

This, of course, assumes that board homogeneity would be of concern to shareholders. It is arguable that this issue is progressively starting to appear on the shareholder radar. My analysis of data compiled by the Shareholder Association for Research and Education reveals that in the 2008 proxy season shareholders submitted approximately 12 proposals to Canadian corporations/financial institutions seeking greater board representation; in particular, with respect to gender. One such proposal even garnered 11 percent of the votes cast, a significant result for a proposal that would traditionally be viewed as social policy-related in nature.<sup>189</sup>

As shareholder consciousness of the links between board diversity and enhanced corporate governance and firm value increases, there is every reason to believe that these trends will continue and expand in their scope<sup>190</sup> and it is hoped that institutional investors will take a proactive

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should reach out to these individuals, I also support the argument that boards should seek candidates with “non-traditional” qualifications. See Curtis J. Crawford, “Be Strategic about Board Composition” (2008) 1 Board Composition 33 at 34 (“[g]reat directors are to be found not only in corporate settings, but also in government and in not-for-profit cultural and academic settings...boards should develop strategies for tapping into the eclectic pool of highly qualified candidates working in nontraditional settings”).

<sup>189</sup> Shareholder Association for Research and Education, “Shareholder Resolution Database”, online: SHARE

<<http://share.ca/en/node/1341>> (proposal to Power Corporation of Canada by Mouvement d’Education et de Défense des Actionnaires ).

<sup>190</sup> Consider, for example, the following position of the Ethical Funds Company:

The Ethical Funds Company supports proposals to report on diversity in the workforce, and to adopt plans to improve diversity and equity in the workplace...[it] supports proposals to create and implement employment equity policies...The term “glass ceiling” refers to the barrier to the advancement of women and minorities into corporate management positions...among the 535 most senior and highest paid positions in Canadian companies, just 4.8% are held by women. The percentage of women on corporate boards in Canada is also similar to the situation in the United States, ranging from 9-12%...depending on the index analyzed. Management studies indicate that companies with high ratings for equal employment opportunity have performed better in the stock market than companies with poor performance in areas related to hiring and advancing women and minorities. The Ethical Funds Company supports proposals to report on steps taken to adopt

role in leading this charge<sup>191</sup> as seen in the U.S.<sup>192</sup> And yet, there are notable limits to shareholders' ability to submit proposals to management<sup>193</sup> and thus to proactively engage diversity-related issues. In general, the proposal mechanism affords shareholders the right to compel a vote on issues the proponent considers significant. The corporation is obligated to include a proposal in the management proxy circular.<sup>194</sup> Shareholders then consider the proposal before voting on it at an annual meeting. The corporation, however, is excused from the duty to distribute a proposal if certain procedural requirements are not met or if a substantive basis for exclusion exists.<sup>195</sup> This leads to the factors that quell investor voice alluded to above, four of which I will mention now.

## 2. SHAREHOLDER PROPOSALS – LIMITATIONS

First, in order to submit a proposal under the *CBCA*, shareholders must either own (or have the support of others who own) 1 percent of total outstanding voting shares on the date of submission or own shares that have a fair market value of at least \$2,000 at the close of business on the

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policies addressing leadership development, employee mentoring, workforce diversity initiatives, and family-friendly programs.

See RiskMetrics, *supra* note X at online:

[http://www.riskmetrics.com/policy\\_exchange/policy\\_detail?param1=ef&param2=esg&param3=equal](http://www.riskmetrics.com/policy_exchange/policy_detail?param1=ef&param2=esg&param3=equal).

<sup>191</sup> Consistent with the view that these investors are/should be more concerned with long-term value creation.

<sup>192</sup> For example, the Teachers Insurance and Annuity Association – College Retirement Equities Fund, one of the largest financial services firms in the U.S., has adopted a governance policy position which insists that boards “should be composed of “qualified individuals who reflect diversity of experience, gender, race, and age.”” See Carter, “Corporate Governance”, *supra* note X at 34 (citation omitted).

<sup>193</sup> See generally Aaron A. Dhir, “Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability” (2006) 43:2 Am. Bus. L. J. 365 [Dhir, “Realigning”].

<sup>194</sup> *CBCA*, *supra* note X, ss. 137(2).

<sup>195</sup> Dhir, “Realigning”, *supra* note X at 385 – 390.

day before submission.<sup>196</sup> Of primary importance is the fact that this threshold requirement is raised in situations where the subject matter of the proposal is a director nomination. These proposals must be supported by an aggregate shareholding of, at minimum, 5 percent of shares or of shares of a class entitled to vote at the relevant meeting.<sup>197</sup> This is a key restriction and the rationales underlying it need to be reconsidered. Canadian equity holders have by no means demonstrated a history of abusing the proposal provision and it is difficult to see the necessity for these threshold requirements, which, by design, have the effect of excluding smaller investors.<sup>198</sup>

Second, the *CBCA* allows a proposal length of 500 words.<sup>199</sup> Before the statute was amended in 2001, there was a 200-word limit; however, it applied only to the optional supporting statement that may be included with the proposal.<sup>200</sup> Under the amended *CBCA*, the 500-word ceiling applies to *both* the proposal and any supporting statement together. It has been argued that “[a]s a result, the total effect of the amendments may have been to increase the restrictions on the ability of shareholders to communicate both their proposals and a coherent rationale.”<sup>201</sup> This is especially of concern in light of the asymmetrical approach reflected in the Act. Specifically, no express word limit is imposed on the written statement of reasons that management is required to provide if it refuses to include a proposal in the proxy circular.<sup>202</sup>

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<sup>196</sup> *CBCA*, *supra* note X, ss. 137(1.1) and *Canada Business Corporations Regulations, 2001*, SOR/2001-512, ss. 46 [*Regulations*].

<sup>197</sup> *CBCA*, *ibid.*, ss. 137(4).

<sup>198</sup> This, in turn, may have a gendered effect. See Sarra, “The Gender Implications”, *supra* note X at 467 (noting that women are more likely to be small investors).

<sup>199</sup> *CBCA*, *supra* note X, ss. 137(3); *Regulations, ibid.*, s. 48.

<sup>200</sup> *CBCA, ibid.* (prior to the 2001 amendments).

<sup>201</sup> Janis Sarra, “Shareholders as Winners and Losers under the Amended Canada Business Corporations Act” (2003) 39 *Can. Bus. L.J.* 52 at 68 [Sarra, “Shareholders as Winners”].

<sup>202</sup> *CBCA, supra* note X, ss. 137(7).

Third, the *CBCA* permits management to exclude a proposal if “substantially the same proposal” was submitted to a shareholder meeting in the preceding 5 years and it attracted less than 3 percent of the vote when initially submitted, 6 percent when next submitted and 10 percent when submitted for the third (and subsequent) time/s.<sup>203</sup> This was modeled after a similar provision in the U.S. known as the “resubmission rule”. Notwithstanding the proposal to the Power Corporation of Canada referenced above, it is reasonable to assume that diversity-related proposals, at the outset, may not receive substantial support. Part of the value of the proposal mechanism, however, is its communication function. By generating debate and raising the level of discourse within the corporation, it progressively plays an educative role and can cause otherwise passive shareholders to rethink their sometimes uncritical support of management. In attempting to subsequently reintroduce such proposals, with the hopes of galvanizing heightened levels of support, the proposing shareholder is thwarted by the Canadian equivalent of the resubmission rule. The provision, as it stands, perpetuates the misconception that socially conscious shareholders are “gadflies” who seek to abuse management through the proposal mechanism.

Fourth, if the corporation wishes to exclude a proposal, it must provide the proposing shareholder with written notice and a set of reasons for the exclusion.<sup>204</sup> However, an exclusion does not engage any regulatory oversight. Rather, if a shareholder wants to dispute a decision to exclude, its only recourse is to seek a court’s review.<sup>205</sup> This stands in contrast to the U.S. where, if there is disagreement regarding whether a ground for exclusion is met, the onus lies with the corporation to satisfy the SEC that it acted lawfully. In Canada, both the legal and financial onus lie with the shareholder. As argued by the Social Investment Organization, “[m]any shareholders – such as foundations, private trusts and small mutual or pension funds – lack the legal and financial resources to mount a court battle. The effect of this will be to give management an arbitrary veto over shareholder proposals with no practical way for

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<sup>203</sup> *Ibid.*, ss. 137(5)(d); *Regulations*, *supra* note X, s. 51.

<sup>204</sup> *CBCA*, *ibid.*, ss. 137(7).

<sup>205</sup> *Ibid.*, ss. 137(8).

shareholders to appeal the exclusion.”<sup>206</sup> Having to seek approval before resorting to exclusion would help ensure that the firm gives thorough consideration to whether a proposal can legitimately be excluded, rather than merely rejecting the proposal as a matter of form and forcing the shareholder to seek a court’s review.

I should note that some U.S. academics are skeptical of the argument that rectifying legal impediments to the expression of shareholder voice will advance issues of racial justice in the corporation given, for example, that shareholder proposals are generally not binding on management.<sup>207</sup> While I sympathize with this argument, there is certainly increasing evidence in Canada “suggest[ing] that today’s proposals may become tomorrow’s corporate policy”.<sup>208</sup> In other words, through the proposal submission process, and resulting dialogue between proposing shareholders and management, the formulation of corporate policy with respect to social issues has been fundamentally influenced. In particular cases, shareholders have withdrawn their proposals after concluding successful negotiations with management.<sup>209</sup>

### 3. CORPORATE GOVERNANCE PRINCIPLES

In December 2008, the CSA released a proposed set of 9 broad corporate governance principles that would apply to Canadian issuers.<sup>210</sup>

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<sup>206</sup> Social Investment Organization, “Submission By the Social Investment Organization to the Senate Banking, Trade and Commerce Committee on Bill S-19, An Act to Amend the Canada Business Corporations Act (May 3, 2000), online: <<http://www.socialinvestment.ca/News&Archives/news-700-Senate-submission.htm>>.

<sup>207</sup> See Joo, “Corporate Hierarchy”, *supra* note X at 961 – 962.

<sup>208</sup> Sarra, “Shareholders as Winners”, *supra* note X at 74 – 75.

<sup>209</sup> I have previously canvassed several examples of this trend. See Dhir, “Realigning”, *supra* note X at 405 – 407 and Aaron A. Dhir, “The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice and Human Rights” forthcoming in (2009) 47 *Osgoode Hall L.J.* at 29 – 31 of unpublished version (on file with author) [Dhir, “The Politics”].

<sup>210</sup> “Request for Comment – Proposed Repeal and Replacement of NP 58-201 *Corporate Governance Guidelines*, NI 58-101 *Disclosure of Corporate Governance Practices*, and

Documents such as these are performing an increasingly important function. Given the constraints of traditional regulatory models and conventional legal approaches, they reflect a movement towards a “new governance” framework. The new governance project seeks, in part, to transcend traditional punitive/deterrence-based measures<sup>211</sup> and to focus instead on norm generation and the enhancement of “internal self-regulatory capacities”.<sup>212</sup>

The new policy document has been both lauded and critiqued for moving towards a more flexible principles-based approach, rather than consisting of prescribed practices/threshold requirements (as do the current CSA guidelines).<sup>213</sup> The principles are accompanied by explanatory information and examples of practices that would achieve their objectives. Unfortunately, while mention is made of board “composition”, “skills”, “competencies”, “integrity”, “independent judgment”, the fact that “[n]o individual...should dominate the board’s decision-making”, “evaluating the necessary and desirable competencies and other attributes of directors” and “identifying any gaps that exist on the board”, the issue of heterogeneity is nowhere to be found.<sup>214</sup> Rather, when issuers consult the document in an effort to improve their

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NI 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit Committees*”, (2008) 31 OSCB 12158 [“Request for Comment”].

<sup>211</sup> David Hess, “Social Reporting and New Governance Regulation: The Prospects of Achieving Stakeholder Accountability through Transparency” (2007) 17:3 *Business Ethics Quarterly* 453 at 453.

<sup>212</sup> Orly Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” (2004) 89 *Minn. L. Rev.* 342 at 365. See also Bradley C. Karkkainen, ““New Governance” In Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping” (2004) 89 *Minn. L. Rev.* 471 at 473 (“This scholarship endeavors simultaneously to chronicle, interpret, analyze, theorize, and advocate a seismic reorientation in both the public policymaking process and the tools employed in policy implementation. The valence of this reorientation...is generally away from the familiar model of command-style, fixed-rule regulation by administrative fiat, and toward a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance.”).

<sup>213</sup> Barbara Shecter, “CSA Implements Broad Directives for Good Corporate Governance” *Financial Post* (21 December 2008), online: <<http://www.financialpost.com/story.html?id=1102205>>.

<sup>214</sup> “Request for Comment”, *supra* note X at 12173 – 12175.

governance practices they will find a set of principles and related text that stick to the standard refrains and fail to provide even a measure of diversity-related normative content.

This is particularly discouraging given that earlier attempts to articulate effective organizing principles for Canadian corporate governance planted the seeds of such content. For example, the 1994 Dey Report supported “the constitution of boards...with a variety of backgrounds” and stated that “diversity has many advantages in the board decision-making process.”<sup>215</sup> A subsequent 5-year review of the Dey Report’s recommendations makes more explicit reference to “[d]iversity of the board with respect to gender and race.”<sup>216</sup> And in 2001, the Saucier Report recommended that boards “should actively look beyond traditional sources in seeking” directors and that “[d]iversity of background and experience can add value to boardroom deliberations.”<sup>217</sup>

Canadian regulators should also be mindful of governance principles and recommendations made in other jurisdictions. For example, in the U.K., the Secretary of State for Trade and Industry and the Chancellor of the Exchequer commissioned an independent inquiry into the purpose and efficacy of non-executive directors. The resulting 2003 Higgs Report makes specific recommendations aimed at widening the scope of candidates for board positions, which is partially aimed at addressing low levels of gender diversity.<sup>218</sup> Also, the Swedish Code of Corporate Governance advises that the board “is to have an appropriate

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<sup>215</sup> Report of the Toronto Stock Exchange Committee on Corporate Governance in Canada, “Where were the Directors?: Guidelines for Improved Governance in Canada” (December 1994) at 30.

<sup>216</sup> Institute of Corporate Directors & Toronto Stock Exchange, “Report on Corporate Governance, 1999: Five Years to the *Dey*” (1999) at 6.

<sup>217</sup> Joint Committee on Corporate Governance, “Beyond Compliance: Building a Governance Culture” (November 2001) at 15. See also A Statement of the Canadian Council of Chief Executives, “Governance, Values and Competitiveness: A Commitment to Leadership” (September 2002) at 18 (“each board should...[e]nsure...it takes into account... factors including candidates’...personal qualities, and the benefits of diversity”).

<sup>218</sup> Derek Higgs, “Review of the Role and Effectiveness of Non-Executive Directors” (January 2003) at paragraphs 10.25 to 10.31.



composition, exhibiting diversity and breadth in the directors' qualifications, experience and background" and that "[a]n equal gender distribution on the board is to be an aim."<sup>219</sup>

It should be noted that one of the consequences of regulators and firms choosing to ignore board diversity issues is the possibility of direct intervention by the state. The most striking example of this sort of traditional, command-and-control style of regulation is seen in Norway. Recent revisions to Norwegian corporate law require public limited liability companies to comply with varying degrees of gender representation, depending on the size of the board. For example, if a board has 9 members, at least 4 must be women. If the number exceeds 9, at least 40 percent must be women.<sup>220</sup> Facing possible court-enforced involuntary dissolution,<sup>221</sup> it appears that all Norwegian issuers complied with the provisions by April 2008.<sup>222</sup> Similar initiatives are currently underway in jurisdictions such as Switzerland, where a Bill proposing a 30 percent gender quota is scheduled to be debated in the Swiss federal parliament in the Spring of 2009.<sup>223</sup> In Spain, while not mandatory, legislation expressly recommends that reporting issuers "endeavour to include a sufficient number of women on their boards to reach a balanced presence of women and men".<sup>224</sup> While these jurisdictions may not be identical to Canada, Canadian issuers should be cognizant of their experiences. Indeed, the idea of corporate diversity quotas is not

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<sup>219</sup> "Swedish Code of Corporate Governance" (Stockholm 2005) at para. 3.2.1.

<sup>220</sup> *Norwegian Public Limited Liability Companies Act*, 1997, Del K:1, ss. 6-11a.

<sup>221</sup> *Ibid.* at ss. 6-15.

<sup>222</sup> "Representation of Both Sexes on Company Boards", online: Norwegian Ministry of Children and Equality

<http://www.regjeringen.no/en/dep/bld/Topics/Equality/rules-on-gender-representation-on-compan.html?id=416864>.

<sup>223</sup> "Accroître Le Pourcentage Des Femmes Dans Les Conseils D'administration Des Entreprises Dont L'état Est Actionnaire", online: The Federal Assembly - The Swiss Parliament

[http://www.parlament.ch/E/Suche/Pages/geschaeft.aspx?gesch\\_id=20030440](http://www.parlament.ch/E/Suche/Pages/geschaeft.aspx?gesch_id=20030440) (in French only).

<sup>224</sup> Constitutional Act 3/2007 of 22 March for Effective Equality between Women and Men, 2007, Article 75.

completely foreign to Canadian discourse, having been recently suggested by participants in a Government of Canada initiative on discrimination in the workplace.<sup>225</sup>

## V. AVENUES FOR FUTURE INQUIRY AND CONCLUDING REMARKS

### A. AVENUES FOR FUTURE INQUIRY

Moving forward, various issues surrounding corporate board composition, law and diversity remain underexplored and merit future research. I will mention 4 now. First, in continuing to develop new governance-style mechanisms to achieve heterogeneity, is there a role to be played by enhancing corporate disclosure? Would requiring the submission of diversity-related information to investors be useful not only in terms of galvanizing shareholder advocacy, but also in terms of having a positive impact on how firms are managed? Put another way, rather than following the lead of jurisdictions such as Norway, would requiring firms to disclose the lack of representation on their boards (both the actual reporting and the process of information gathering) lead to managerial self-reflection and accompanying behavioural modification?<sup>226</sup>

<sup>225</sup> See John Samuel and Associates Inc., “Summary Report on Engagement Sessions for a Racism-Free Workplace” (prepared for the Labour Program of Human Resources and Social Development Canada) (March 2006), online:

[http://www.hrsdc.gc.ca/eng/lp/lo/lsw/we/special\\_projects/RacismFreeInitiative/consultation-2005/FocusGroup.shtml](http://www.hrsdc.gc.ca/eng/lp/lo/lsw/we/special_projects/RacismFreeInitiative/consultation-2005/FocusGroup.shtml) (“Some suggested that there should be a requirement to include members of visible minorities on the boards of directors of major corporations. An example was provided from South Africa’s successful Black Business Empowerment program, under which every company must have at least one Black person on the board of directors”).

<sup>226</sup> See Richard A. Bernardi, David F. Bean & Kristen M. Weippert, “Minority Membership on Boards of Directors: The Case for Requiring Pictures of Boards in Annual Reports” (2005) 16 *Critical Perspectives on Accounting* 1019 at 1019 (“[e]mpirical evidence is presented that shows a significant increase in the presence of ethnic minorities and females when pictures of board members are included in annual reports. We suggest that requiring pictures of board members in annual reports and regulatory filings would result in a larger presence for gender and race diversity on boards of directors”).

Second, turning to the transnational level, can it be argued that a state's corporate law policies should be analyzed through an international human rights lens? For example, Canada – like New Zealand – has ratified the *Convention on the Elimination of All Forms of Discrimination against Women* (“CEDAW”).<sup>227</sup> In reviewing the latter state party's compliance with CEDAW, the United Nations Committee on the Elimination of Discrimination against Women has expressed concern about private sector gender inequality and urged New Zealand to “strengthen its policies in supporting the private sector's efforts towards the promotion of women *in decision-making positions*”.<sup>228</sup>

Third, in running the affairs of the corporation, Canadian directors (and officers) must “act honestly and in good faith with a view to the best interests of the corporation”.<sup>229</sup> Recently developments in corporate law jurisprudence suggest that in discharging this fiduciary obligation, directors are permitted to consider the interests of non-shareholder stakeholders such as creditors, employees, consumers, suppliers, the environment, the broader community etc.<sup>230</sup> As I have discussed elsewhere, there are numerous practical and conceptual difficulties that accompany this development.<sup>231</sup> However, setting these aside, the reality is that while directors are not under a legal obligation to act in this manner, doing so will not result in a violation of the fiduciary duty. This represents a shift in the way fiduciary obligations have been conceptualized under Canadian corporate law given prior jurisprudence that interpreted the

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<sup>227</sup> December 18, 1979, 1249 U.N.T.S. 13.

<sup>228</sup> United Nations Committee on the Elimination of Discrimination against Women, “Fifth Periodic Report, New Zealand, Concluding Observations: 29th Session” (2003) at para. 407 – 408, online: Office of the High Commissioner for Human Rights

<<http://www2.ohchr.org/english/bodies/cedaw/docs/co/NewZealandCO29.pdf>> [emphasis added].

<sup>229</sup> *BCA*, *supra* note X, ss. 122(1)(a). Parallel provisions exist in provincial corporate law statutes. See, for example, *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 134(1)(a).

<sup>230</sup> *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461 at para. 42; *BCE Inc.*, *supra* note X at paras. 39 – 40.

<sup>231</sup> Dhir, “The Politics”, *supra* note X at 35 – 36.

phrase “best interests of the corporation” as being synonymous with maximizing shareholder return.<sup>232</sup>

This, I think, should be of interest to human rights advocates.<sup>233</sup> The overseas operations of Canadian corporations are continually impugned for their human rights-related impacts.<sup>234</sup> These concerns have focused primarily on the Canadian extractive industry. Canada has listed on its stock exchanges more mining firms than any other state.<sup>235</sup> Globally, these exchanges represent “the world’s largest source of equity capital for mining exploration and production both in Canada and abroad.”<sup>236</sup> Interestingly, when one disaggregates board composition statistics by industry, extractive companies are among the worst in terms of gender representation.<sup>237</sup> This is particularly noteworthy given studies suggesting that boards with a critical mass of female directors are more likely to be attuned to non-shareholder interests.<sup>238</sup>

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<sup>232</sup> Sarra, “Class Act”, *supra* note X at n. 98 (citing various Ontario and Saskatchewan decisions).

<sup>233</sup> Similarly, see Lawrence E. Mitchell, “The Board As A Path Toward Corporate Social Responsibility” in D. McBarnet, A. Voiculescu & T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007) at 280 (arguing that “the most likely way for proponents of CSR to achieve their goals is to recast their issues as issues of corporate governance”).

<sup>234</sup> For a review of the criticisms see Dhir, “The Politics”, *supra* note X at 5 – 7.

<sup>235</sup> National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries, “Advisory Group Report” (29 March 2007), online: Foreign Affairs and International Trade Canada

<<http://geo.international.gc.ca/cip-pic/library/Advisory%20Group%20Report%20-%20March%202007.pdf>> at 3 (citation omitted).

<sup>236</sup> *Ibid.*

<sup>237</sup> Catalyst, “2007 Catalyst Census”, *supra* note X at 11.

<sup>238</sup> See for example, Kramer, “Critical Mass”, *supra* note X at 10 (“Women directors are also more likely to broaden the content of boardroom discussions to consider the perspectives of multiple stakeholders who have an impact on and are impacted by the company’s performance... Though these may be considered “softer” issues by some, the women directors and CEOs we interviewed saw them as business matters”).

Fourth, and related to number 3, given the presence of Canadian corporations in a globalized market – and the associated allegations of complicity in developing world human rights deprivations – should consideration be given to internationalizing the boards of multinational firms? From a business perspective, some have argued that boards consisting of members from a range of states and areas are becoming integral to successful operations.<sup>239</sup> From a rights-based perspective, the contemporary multinational enterprise is viewed by some as an agent of neocolonialism and part of the “recolonization” of the apparently decolonized by the imperial centre of the global capitalist project.<sup>240</sup> If there is merit to this claim, query as to whether addressing board composition may play at least some role in addressing these concerns:

A corporation cannot be truly global until its board reflects the countries and regions in which it operates...this requires eliminating colonial thinking from boardrooms, which are invariably dominated by people from the home country. If innovation is global and can change how companies are managed, and if skills are a key part of the new enterprise, then it should start with boards...corporate boards exhibit nationalism, xenophobia and anti-modernism...Their lack of exposure to and ability to communicate with different cultures and attitudes hamstringing them: colonialists sought to manage the world without the worldly experience – and to protect national interests – and everyone else had to fit in.<sup>241</sup>

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<sup>239</sup> Alex Mandl, “Risky but Rewarding: Globalizing the Board” (2004) 9:2 Global Governance 13 at 13.

<sup>240</sup> John S. Saul, *Decolonization and Empire* (Monmouth: Merlin Press, 2008) at 49.

<sup>241</sup> Chandran Nair, “Multinationals and Responsibility – Cracking the Colonial Corporate Culture” (31 August 2006), online: Ethical Corporation <<http://www.ethicalcorp.com/content.asp?ContentID=4483>>.

## B. CONCLUDING REMARKS

In terms of diversity, the corporate governance landscape in Canada is grim. The statistics on board composition reveal a culture of widespread gender and racial homogeneity. The evidence does not support businesses' perception of a pool problem; rather, it appears that a more fruitful explanation can be rooted in the cognitive processes and structures that inform corporate decision-making. Attempts by Canadian civil society organizations and others to cast board diversification in terms of organizational performance can be grounded in the empirical literature to date. However, it appears that Canadian firms may be perpetuating environments that actively stifle factors which might otherwise enable them to successfully leverage diversity. Further, the market-based approach is not without complication. And while it is certainly attractive in terms of carrying currency as a political strategy, it should be advanced with great care. In considering avenues for reform, particular aspects of the legal culture and practice that shape the director nomination process, shareholder proposals and existing governance principles require reconsideration. As currently formulated, they may ultimately serve to facilitate board homogeneity and to undermine future diversification efforts. It is hoped that progress on these fronts will be the first step towards a more inclusive and equitable corporate governance edifice.